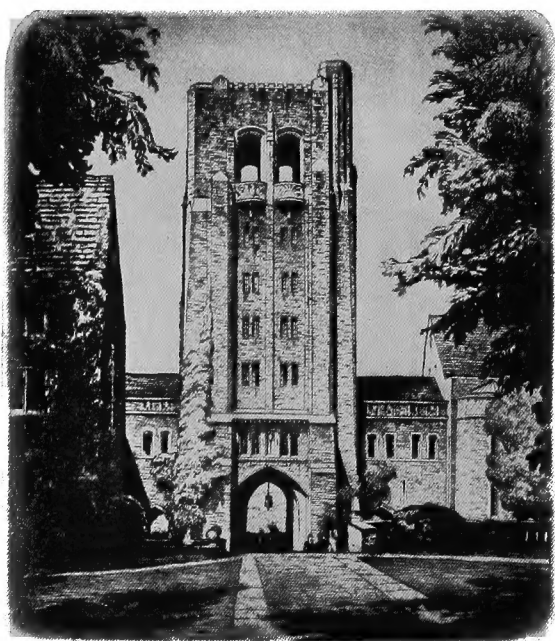


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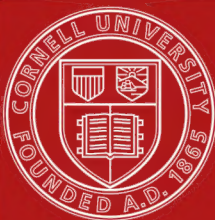
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A CODE

OF

FEDERAL PROCEDURE.

(SUPERSEDING DESTY'S FEDERAL PROCEDURE.)

EMBODYING ENACTMENTS OF CONGRESS, CONSTITUTIONAL PROVISIONS
ESTABLISHED PRINCIPLES, AND COURT RULES, IN FORCE
DECEMBER 1, 1906, AND THE BANKRUPTCY ACT OF
1898, WITH AMENDMENTS AND ORDERS,
TOGETHER WITH A COLLECTION
OF FORMS AND PRECEDENTS.

BY

WALTER MALINS ROSE,
Author of "Notes on United States Reports."

IN THREE VOLUMES.
VOL. I.

SAN FRANCISCO.
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS,
1907.

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BY

WALTER MALINS ROSE.

TO THE MEMORY OF

Robert H. Hayne

LATE OF THE SAN FRANCISCO BAR

The inspiration of whose unremitting and splendid toil
as author, advocate and judge, lives after him.

PREFACE.

This Code is an outgrowth of Desty's Federal Procedure, so well known to the profession, and an attempt to amplify and develop the features of that work upon which its long continued popularity has rested. Through the kindness of the publishers all the matter contained in the last edition of Desty was placed at the disposal of the writer for use in this undertaking.

Since Mr. Desty's book first appeared, codification of the law of procedure has become almost universal in the various States, and it seemed advisable to depart from the classification scheme of the Revised Statutes, followed by Mr. Desty and his subsequent editors, and attempt a Federal Code along more modern and satisfactory lines.

Certain departures from the usual rules of codification were rendered necessary by the fact that the governing rules and precedents of Federal procedure are not based exclusively upon statutory provisions. Many of them, especially in equity and admiralty practice, consist of rules promulgated by the Supreme Court, but having all the force of law. Others of them are founded upon provisions of the United States Constitution; and others no less immutable and established, grow out of, and necessarily result from, the peculiar scope, nature and limits of the Federal judicial power.

The Code sections herein are therefore derived from four sources, viz : constitutional provisions, statutory provisions, court rules, and decided cases or established principles. These it seemed advisable to arrange and intermingle quite without reference to their derivation, in an effort to obtain a logical and symmetrical classification.

At the end of each code section its nature is indicated by a reference to the particular section or paragraph or clause of statute, court rule, or constitutional provision there reproduced, or

the words "author's section" are appended if the code section is an attempt to complete the treatment of a topic by a statement of some established principle. Authorities pertinent to the rule or principle stated in each code section are discussed in the annotation appended thereto.

It was deemed inadvisable to attempt any extended treatment of such matters as bankruptcy, which of itself has been made the subject of separate treatises, or the practice and jurisdiction of the Court of Claims, or other topics of interest exclusively to practitioners in the District of Columbia.

The writer does not dare to hope that the work is free from error and omissions, and realizes that in many instances the topics considered are not explored with the thoroughness which a greater abundance of time might have rendered possible.

Acknowledgments are due to Mr. Andrew Henry Rose for valuable assistance rendered during the past year in the annotation of chapters five to nineteen of Part One, and chapters thirty-five to sixty-nine of Part Two.

The other portions of the Code were prepared during a sojourn of a year and a half in Arizona. The writer is under many obligations to friends in Prescott and Tucson for the use of excellent libraries whose facilities were freely and generously extended during that time. To Colonel William Herring of Tucson, and to Sarah H. Sorin, his daughter, a most excellent lawyer, to Messrs. Hawkins, Ross and Anderson, and to Hon. Robert E. Morrison, of Prescott, thanks are especially due and gratefully expressed.

WALTER MALINS ROSE.

Los Angeles, California.
January, 1907.

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NOTE:—These rules are also printed in full in appendix I. A.

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PARALLEL REFERENCES SHOWING THE EQUITY RULES AND THEIR PLACE

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NOTE:—These rules are also printed in full in appendix I. B.

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NOTE:—These rules are also printed in full in appendix I. C.

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PARALLEL REFERENCES TO CIRCUIT COURT OF APPEALS RULES.

NOTE:—The C. C. A. rules for each circuit are printed in full in appendix I. E., and at the end of each, as there printed, appears a reference to the Code section where it is reproduced or referred to.

	Code Section		Code Section
Rule 7	491	Rule 19	1899, 1900, 1901
Rule 8	1887	Rule 20	2110
Rule 9	839	Rule 28, Cl. 4	2127
Rule 11	1931	Rule 30	2127
Rule 12	2086	Rule 31	1843, 1844, 1846, 1983
Rule 13	2015, 2021		1984
Rule 14	1950, 1971, 2035	Rule 31, Cl. 3	1848
Rule 16	1978	Rule 31, Cl. 5	1852
Rule 17	2118	Rule 33	1686, 1687, 1688
Rule 18	1997	Rule 38 (9th circuit)	2406

COURT OF CLAIMS RULES.

NOTE:—These rules are printed in full in appendix I. D.

	Code Section
Rule 3	1908

PARALLEL REFERENCES TO THE ORDERS IN BANKRUPTCY

SHOWING WHERE REPRODUCED IN THIS CODE.

NOTE:—These orders are also printed in full in appendix II.

			Code Section				Code Section
Order in Bankr.	1.....		2216	Order in Bankr.	21, Cl. 4....		2307
Order in Bankr.	2.....		2217	Order in Bankr.	21, Cl. 5....		2308
Order in Bankr.	3.....		2218	Order in Bankr.	21, Cl. 6....		2309
Order in Bankr.	4.....		2219	Order in Bankr.	22.....		2350
Order in Bankr.	5.....		2270	Order in Bankr.	23.....		2342
Order in Bankr.	6.....		2283	Order in Bankr.	24.....		2310
Order in Bankr.	7.....		2282	Order in Bankr.	25.....		2312
Order in Bankr.	8.....		2294	Order in Bankr.	26.....		2243
Order in Bankr.	9.....		2291	Order in Bankr.	27.....		2343
Order in Bankr.	10.....		2220	Order in Bankr.	28.....		2318
Order in Bankr.	11.....		2272	Order in Bankr.	29.....		2319
Order in Bankr.	12, Cl. 1....		2338	Order in Bankr.	30.....		2320
Order in Bankr.	12, Cl. 2....		2339	Order in Bankr.	31.....		2325
Order in Bankr.	12, Cl. 3....		2340	Order in Bankr.	32.....		2326
Order in Bankr.	13.....		2246	Order in Bankr.	33.....		2323
Order in Bankr.	14.....		2254	Order in Bankr.	34.....		2292
Order in Bankr.	15.....		2255	Order in Bankr.	35.....		2215
Order in Bankr.	16.....		2256	Order in Bankr.	35, Cl. 2....		2242
Order in Bankr.	17.....		2250	Order in Bankr.	35, Cl. 3....		2253
Order in Bankr.	18.....		2317	Order in Bankr.	35, Cl. 4....		2221
Order in Bankr.	19.....		2223	Order in Bankr.	36, Cl. 1....		2364
Order in Bankr.	20.....		2341	Order in Bankr.	36, Cl. 2....		2365
Order in Bankr.	21, Cl. 1....		2304	Order in Bankr.	36, Cl. 3....		2366
Order in Bankr.	21, Cl. 2....		2305	Order in Bankr.	37.....		2207
Order in Bankr.	21, Cl. 3....		2306	Order in Bankr.	38.....		2208

PART I.
FEDERAL COURTS AND THEIR JURISDICTION.

CHAPTER 1.

FEDERAL JURISDICTION IN GENERAL.

- § 1. Nature of Federal Judicial power.
- § 2. Scope and extent.
- § 3. The ancillary jurisdiction of Federal courts.
- § 4. Federal Courts power to decide non-Federal questions and entire controversy.
- § 5. States may not impair or regulate Federal jurisdiction or procedure.
- § 6. Inherent limitations on Federal judicial power.
- § 7. Suits against a State prohibited.
- § 8. The Federal Courts.
- § 9. Federal jurisdiction is limited and must affirmatively appear.
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- § 11. —in admiralty criminal and bankruptcy cases and suits by States.
- § 12. —State laws as rules of decision.
- § 13. —is there a Federal common law?
- § 14. Federal Constitution treaties and laws supreme.
- § 15. When Federal jurisdiction is exclusive.
- § 16. Concurrent and conflicting jurisdiction—personal actions—plea of another action pending.
- § 17. —property in custody of the law, and garnishment cases.
- § 18. —persons in custody—habeas corpus.
- § 19. —power of State or Federal court to vacate or relieve against the others judgment or decree.
- § 20. —Federal injunction to stay proceedings in State courts.
- § 21. —State writ to restrain or control Federal proceedings.
- § 22. —comity between different Federal courts.
- § 23. Suits by assignees and colorable transfers to obtain or defeat Federal jurisdiction.
- § 24. Citizenship of national banks for jurisdictional purposes.
- § 25. Territorial limits and extent of Federal jurisdiction.
- § 26. —District of Columbia, government forts, docks and buildings.
- § 27. Federal jurisdiction over crimes on Great Lakes.
- § 28. Local law as to remedies for improvements, applies to Federal occupants.
- § 29. The law applied in civil rights cases.
Fed. Proc.—1.

§ 1. Nature of Federal judicial power.

The judicial power of the courts of the United States is not merely the cognate of the legislative power of Congress, but much broader. The Federal courts are called upon to declare and administer the law between litigants and respecting matters which may be the subject of judicial controversy in a very large class of cases as to which Congress is invested with no power whatever to provide the rules by which those controversies are to be determined.^[a] From this it results that the Federal courts derive many of the legal rules and principles which they apply from other sources than the enactments of Congress. They come in part from the State, through State constitutions, statutes and common law; in part from the national government, through the Federal Constitution and laws; and in part from no acknowledged law-making power at all, but from what is termed international law or the law of nations.^[b] While Congress is unable to declare the substantive rules of law applicable to all legal controversies of Federal cognizance, it has an important control over these substantive rules through its power to prescribe the procedure and regulate or declare the remedies that shall be applicable to suits in the Federal courts.^{[c]-[d]}

Author's section.

[a] Federal judicial power broader than legislative.

It has been said that the powers of the legislative, executive and judicial branches should be coextensive and that the judiciary should have power to construe every law which the legislative branch has power to enact.¹ Undoubtedly the Federal judiciary possesses this power of construction and exposition. This, however, serves but to emphasize a much wider and more important jurisdiction which it also possesses. There are, for instance, many constitutional prohibitions as to which Congress has no sort of power to legislate, that may nevertheless demand the intervention of Federal courts under what may be termed their restrictive powers. Thus, the familiar prohibition against a deprivation of property by a State without due process of law, does not authorize Congress to provide due process of law for the vindication of this right.² Yet the power of the courts to protect this and all other constitutional rights against infractions by Congress or the States is obvious and well settled. Again, Congress cannot legislate as to contracts or other transactions because arising between citizens of different States or citizens and aliens. Yet the Federal courts have been given a jurisdiction over controversies grow-

Osburn v. United States Bank, 9 Wheat, 818, 6 L. ed. 223.

²Civil Rights Cases, 109 U. S. 3, 27 L. ed. 840, 3 Sup. Ct. Rep. 22.

ing out of these matters by reason of the character of the parties involved, and quite outside either the legislative powers of Congress or the prohibitions of the Federal constitution. In the cases where the judicial power is but the correlative of the legislative—of which patent and bankruptcy matters are illustrations—the Federal judicial power is plenary and in its nature properly exclusive. In the class of cases where the judicial function is restrictive, Federal courts are concerned primarily with the protection of some Federal right, or rights, and do not extend their inquiries beyond. In the cases where the jurisdiction depends on the character of the parties, the national government is not necessarily otherwise concerned than as furnishing an impartial arbitrator between persons whose legal rights are or may be entirely governed by local or State laws. There is yet another class of controversies justiciable in the highest Federal court because of the parties involved, and quite outside of the law-making power of either State or nation; controversies, namely, between States of the Union.³ These give to the Supreme Court the dignity and importance of a quasi international tribunal.

It is of course not always true that a case falls within some one of these four classes of controversies to the entire exclusion of the others. A controversy between citizens of different States may involve one or more Federal questions, and a cause concerned primarily with the national patent law may involve some question of local jurisprudence. It is true, however, that causes going from a State court to the Supreme Court on writ of error, always present a case concerned only with what is above termed the restrictive power of the Federal courts;⁴ and that in such cases the Supreme Court refrains from a consideration of any questions of local law.⁵

[b] Federal courts administer local, national, and international law.

In these several classes of controversies which the Constitution has made of Federal cognizance, the Federal courts, are, or may be, called upon to administer rules and principles of State law, rules prescribed by Congress, rules and principles enunciated by the Supreme Court in the discharge of its important function of interpreting and expounding the Federal constitution, and rules and principles of international law. The question as to the authoritative and proper source whence the Federal courts shall derive the rules of substantive law applicable in these various classes of controversies is of the utmost importance, and is considered in subsequent sections of this code.⁶ The Federal courts have developed a very considerable body of learning in their exposition and application of the various rules and principles of local and national law, but as yet the Supreme Court has established but few precedents to indicate the foundation upon which its framework of quasi international jurisprudence is to be up-reared. This is largely due to the infrequency of legal disputes between States of the Union except over matters of boundary, and in part to the

³See post, § 2.

⁶Post, § 10 et seq.

⁴Post, § 38.

⁵Post, § 2084.

reluctance of the court to assume this function except in cases of absolute necessity.⁷ The admiralty jurisdiction of the Federal courts presents many features that would justify its separate classification. It is a sort of common law of the seas, not founded upon act of Congress;⁸ and the Federal courts resort to establish precedents and the writings of admiralty jurists for the principles that they expound and the rules that they apply in admiralty causes. Nevertheless the power of Congress to modify, amend, and add to the law maritime is established; and if rightfully so, then the Federal judicial power of expounding admiralty law is but the correlative of the power of Congress to enact it.

[c] Power of Congress over procedure, as affecting substantive law.

Keeping in mind the fact that Federal courts are called upon in innumerable cases to expound and apply rules of local or State law as to which Congress has no legislative power, and the further fact that Congress has the power to prescribe the forms of procedure and the remedial machinery in all such cases,⁹ it is plain that Congress has a most important power of influencing the administration of purely local law, through its control over Federal procedure. Furthermore, as the substantive law administered by the Federal courts in many controversies justiciable before them, has its source in one sovereignty and the law of procedure in another, it is also obvious that the Federal courts must distinguish sharply between substantive law and procedure, in order to determine the scope of the power of Congress to prescribe the law applicable in controversies before them; and to decide when fundamental principles underlying our system of dual sovereignties require them to accept the rules of substantive law which the law-making power of the State prescribes, without qualifications or additions of their own making. This matter is considered in detail in subsequent code sections.¹⁰ It so happens that Congress has always followed the policy of assimilating the Federal procedure in common-law cases to that of the State courts;¹¹ has adopted the State remedies of attachment, execution and the like;¹² the state law as to limitation of actions;¹³ and as to execution liens.¹⁴ Congress has also declared, in terms, that State law shall be the rule of decision in Federal courts except when in conflict with the Federal law.¹⁵ This legislation has prevented the distinctions above pointed out from becoming of practical moment in the great majority of cases. It has also, it is conceived, and perhaps unfortunately, prevented that examination and elucidation of basic principles which the Supreme Court might otherwise have made.

[d] Difficulty of the subject.

It is not surprising that Federal procedure presents many difficult and intricate questions demanding the most careful study. The Federal courts exercise four distinct jurisdictional functions. They administer State, Federal,

⁷Missouri v. Illinois, 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 713.

⁸Post, § 11.

⁹See post, § 799.

¹⁰Post, §§ 10 et seq; 799.

¹¹Post, § 900.

¹²Post, §§ 905, 925.

¹³See post, § 870.

¹⁴Post, § 1862.

¹⁵Post, § 12.

and international law, and the law of the seas. They are required to preserve the ancient distinction between common law and equity, often in the face of State laws planned to effect its abolition. And finally they must not only restrain unconstitutional action by other departments of government, State and Federal, but must themselves refrain from exceeding the jurisdiction conferred upon them, and from ignoring the source whence the substantive law they administer should be derived.

§ 2. Scope and extent.

The judicial power^[a] shall extend^[b] to all^[c] cases in law and equity^{[d]-[e]} arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;^{[f]-[g]} to all cases affecting Ambassadors, other public ministers, and consuls;^{[h]-[j]} to all cases^{[d]-[e]} of admiralty and maritime jurisdiction;^{[k]-[kk]} to controversies^{[d]-[e]} to which the United States shall be a party;^{[l]-[nn]} to controversies^{[d]-[e]} between two or more States;^{[n]-[p]} between a State and citizens of another State;^[o] between citizens of different States;^{[q]-[w]} between citizens of the same State claiming lands under grants of different States,^[x] and between a State,^[o] or the citizens thereof, and foreign States,^[z] citizens, or subjects.

U. S. Cons. Art. III § 2.

[a] Judicial power defined.

The judicial power or jurisdiction of courts, is the power to hear and determine a cause;¹ to hear and determine the subject matter in controversy between parties to a suit;² the power to declare the law.³ The exercise of judicial power over the parties to a suit is the exercise of jurisdiction.⁴ When it has once attached, a court may decide the entire cause⁵ and retains jurisdiction after judgment until complete relief is accorded within the scope of the subject matter involved.⁶ The repeal of a law conferring jurisdiction ousts jurisdiction in pending causes.⁷

¹United States v. Arredondo, 6 U. S. 220, 31 L. ed. 402, 8 Sup. Ct. Pet. 709, 8 L. ed 547; Overby v. Gordon, 177 U. S. 220, 221, 44 L. ed. 744, 20 Sup. Ct. Rep. 693.

²Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. ed. 1233, Grignon v. Astor, 2 How. 338, 11 L. ed. 283.

³Ex parte McCardle, 7 Wall. 514, 19 L. ed. 264.

⁴Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. ed. 1233.

⁵Elliott v. Peirsol, 1 Pet. 340, 7 L. ed. 164; Grignon v. Astor, 2 How. 343, 11 L. ed. 283; In re Sawyer, 124

U. S. 220, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

⁶Ward v. Todd, 103 U. S. 329, 26 L. ed. 339; Wayman v. Southard, 10 Wheat. 23, 6 L. ed. 253; Bank of United States v. Halstead, 10 Wheat. 64, 6 L. ed. 264.

⁷Insurance Co. v. Ritchie, 5 Wall. 544, 18 L. ed. 540; Assessor v. Osbornes, 9 Wall. 567, 19 L. ed. 748; Railroad Co. v. Grant, 98 U. S. 401, 25 L. ed. 231; Sherman v. Grinnell, 123 U. S. 680, 31 L. ed. 278, 8 Sup. Ct. Rep. 260; National Ex. Bk. v.

[b] Meaning of words "shall extend."

These words are used in an imperative sense and the entire section is mandatory, so that Congress could not, without violation of its duty, have refused to carry it into operation.⁸ It is the duty of Congress to vest all the judicial power either in appellate or original form.⁹ The enumeration of matters of Federal jurisdiction in this section, negatives the exercise of any jurisdiction not comprehended within it.¹⁰ Courts created by written law cannot transcend the jurisdiction conferred.¹¹ In other words, Federal courts are courts of limited jurisdiction which must affirmatively appear.¹²

[c] When jurisdiction extends to "all cases" and when not.

As to all cases arising under the constitution, laws and treaties, or involving the admiralty jurisdiction, foreign ministers and consuls, the constitution requires that Congress shall in every instance provide a Federal tribunal, though not necessarily of original cognizance. The words are satisfied by authorizing merely an appellate jurisdiction in the Federal courts, since the manner in which Congress shall extend the jurisdiction is within its discretion.¹³ Hence, the jurisdiction is not necessarily exclusive, although it has been said it may be made so.¹⁴ In vesting jurisdiction in the remaining cases included in the above section, the word "all" is omitted. But this omission is of no significance as respects civil cases where a State is party since the next clause of the Constitution expressly confers jurisdiction on the Supreme Court of "all" such cases.¹⁵ It is of significance, however, in controversies between citizens of different States, where land is claimed under grants for different States, and between citizens, foreign States, citizens or subjects. In such cases Congress need not vest jurisdiction over all cases and has in fact always restricted the jurisdiction to cases involving a substantial sum.¹⁶ The extension of jurisdiction to cases in which the United States is party, omitting the word "all," was also by design, saving the government from imperative provisions either in the matter of suing or of being sued, and leaving Congress free to make regulations from time to time.¹⁷

[d] Cases in law and equity, and controversies defined.

It is not every violation of the Constitution that is justiciable in the Federal courts, but only such as arise in some case in law or equity.¹⁸

Peters, 144 U. S. 572, 36 L. ed. 545, 12 Sup. Ct. Rep. 767.

⁸Martin v. Hunter, 1 Wheat. 328, 331, 4 L. ed. 103, 104.

⁹Martin v. Hunter, 1 Wheat. 328, 4 L. ed. 104.

¹⁰Marbury v. Madison, 1 Cranch, 173, 2 L. ed. 72; National Exch. Bank v. Peters, 144 U. S. 573, 36 L. ed. 545, 12 Sup. Ct. Rep. 767.

¹¹Ex parte Bollman, 4 Cranch, 93, 2 L. ed. 554.

¹²See post, § 9.

¹³Martin v. Hunter, 1 Wheat. 334, 4 L. ed. 104, 105; The Moses Taylor, 4 Wall. 411, 18 L. ed. 401; Mayor v. Cooper, 6 Wall. 247, 18 L. ed. 852.

¹⁴The Moses Taylor, 4 Wall. 411, 18 L. ed. 401. See post, § 15.

¹⁵Post, § 35.

¹⁶Martin v. Hunter, 1 Wheat. 335, 336, 4 L. ed. 105.

¹⁷Ibid.

¹⁸Cohens v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

"The judicial power only becomes capable of acting when the subject is submitted to it by a party who asserts his right in the form prescribed by law. It then becomes a case."¹⁹ A suit by the United States to determine the question of fraud in obtaining an award against Mexico, brought under act of 1892, has been held to be a "case" within this section.²⁰ A common-law cause is one in which legal rights are ascertained and determined; and an equity case is one in which relief is sought according to the principles and practice of equity jurisprudence as established in England.¹ A proceeding to obtain from the Federal district court, a license for ocean and coastwise vessels is not an action or suit, within the judicial power granted by this section of the Constitution.² Many administrative acts involving the exercise of judgment upon law and fact, such as the auditing of the accounts of a receiver of public moneys, may be made the subject of judicial controversy, but are nevertheless not strictly an exercise of judicial power.³ A proceeding before a territorial judge to obtain an award of damages pursuant to a treaty is not a case and the judge does not act judicially.⁴ But a claim for fugitive slaves has been held a judicial controversy.⁵ In a legal sense, action, suit, and cause are convertible terms, and an application for habeas corpus is a "cause" within the law permitting certification of questions where the circuit judges are divided in opinion.⁶ A proceeding by a creditor to have a debtor adjudged bankrupt has been held a case;⁷ also extradition proceedings against a fugitive from justice.⁸ This subject is further considered in determining what constitutes a case within the law defining the jurisdiction of the circuit court, both original and on removal.⁹

[e] Moot questions and absence of actual controversy.

Where there ceases to be any real controversy between parties to a pending cause it will be dismissed¹⁰ and it is the court's duty to investi-

¹⁹*Osborn v. Bank of United States*, 9 Wheat. 819, 6 L. ed. 212.

²⁰*La Abra etc. Co. v. United States*, 175 U. S. 453-457, 44 L. ed. 232, 20 Sup. Ct. Rep. 168.

¹*Irvine v. Marshall*, 20 How. 565, 15 L. ed. 994.

²*Pacific S. W. Co. v. United States*, 187 U. S. 447, 47 L. ed. 253, 23 Sup. Ct. Rep. 154.

³*Murray v. Hoboken L. Ins. Co.* 18 How. 272, 15 L. ed. 376.

⁴*United States v. Ferreira*, 13 How. 40, 46, 14 L. ed. 44.

⁵*Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060.

⁶*Ex parte Milligan*, 4 Wall. 121, 18 L. ed. 292, 293. A suit is the prosecution of some demand in a court of justice; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257. The term is comprehensive and a proceeding for writ of prohibition is a suit;

Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; so, also, is a petition for habeas corpus. *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579.

⁷*In re Oregon Bulletin Co.*, 3 Saw. 531, Fed. Cas. No. 10,560.

⁸*In re Metzger*, 17 Fed. Cas. No. 234.

⁹See post, § 129, et seq.

¹⁰*Cleveland v. Chamberlain*, 1 Black, 426, 17 L. ed. 93; *Wood Paper Co. v. Heft*, 8 Wall. 336, 19 L. ed. 379; *South etc. Min. Co. v. Amador etc. Min. Co.* 145 U. S. 301, 12 Sup. Ct. Rep. 921, 36 L. ed. 712; *Dakota Co. v. Glidden*, 113 U. S. 225, 28 L. ed. 981, 5 Sup. Ct. Rep. 428; *Gardner v. Goodyear Co.* 131 U. S. 311, 21 L. ed. 141; *Little v. Bowers*, 134 U. S. 558, 559, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *East Tenn. etc. R. R. v. Southern Tel. Co.* 125 U. S. 696, 31 L. ed. 853, 8 Sup. Ct. Rep. 1391. See

gate upon motion and affidavits, any suggestion that the parties have composed their differences and are imposing upon the court.¹¹ If one party has unconditionally paid the amount in dispute appeal will be dismissed.¹² Courts will not decide abstract or moot questions; there must be an actual controversy in regard to rights which actually exist and are capable of enforcement.¹³

[f] "Arising under" the Federal constitution, etc.

"A case in law or equity consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the right construction of either."¹⁴ This construction is necessary to support the extension of the appellate power to cases in the State courts not founded upon a Federal right, but in which a Federal right is asserted and denied during the progress of the cause to final judgment. In construing the law granting jurisdiction, original or by removal, to the circuit courts in cases "arising under" the Federal Constitution, etc., the term has been given a narrower meaning and requires that the cause be founded upon a Federal right which must appear from plaintiff's bill or complaint.¹⁵ It is not necessary that a case involve nothing but a Federal question to come within the constitutional grant, nor is the Federal jurisdiction necessarily limited to a consideration of that question.¹⁶

[g] Cases under the Federal Constitution, laws and treaties.

Criminal cases are included within these terms as well as civil cases.¹⁷ If the title or right set up would be defeated by one construction of the Federal Constitution and laws, and sustained by the opposite construction,

Security etc. Ins. Co. v. Preivitt, 200 U. S. 446, 50 L. ed. 545, 26 Sup. Ct. Rep. 314.

¹¹Hatfield v. King, 184 U. S. 165, 46 L. ed. 481, 22 Sup. Ct. Rep. 477.

¹²San Mateo Co. v. Southern Pacific R. R. Co. 116 U. S. 141, 142, 29 L. ed. 589, 6 Sup. Ct. Rep. 317; Singer Mfg. Co. v. Wright, 141 U. S. 700, 35 L. ed. 906, 12 Sup. Ct. Rep. 103; California v. San Pablo etc. R. R. 149 U. S. 313, 37 L. ed. 747, 13 Sup. Ct. Rep. 876.

¹³Waite v. Dowley, 94 U. S. 534, 24 L. ed. 181; Williams v. Hagood, 98 U. S. 75, 25 L. ed. 51; Cheong Ah Moy v. United States, 113 U. S. 218, 28 L. ed. 983, 5 Sup. Ct. Rep. 431; Marye v. Parsons, 114 U. S. 330, 29 L. ed. 205, 5 Sup. Ct. Rep. 932, 962; Mills v. Green, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; Kimball v. Kimball, 174 U. S. 161, 43 L. ed. 932; Tyler v. Judges, 179 U. S.

409, 45 L. ed. 254, 21 Sup. Ct. Rep. 206, Security etc. Ins. Co. v. Prewitt, 200 U. S. 446, 50 L. ed. 545, 26 Sup. Ct. Rep. 314.

¹⁴Cohens v. Virginia, 6 Wheat. 379, 5 L. ed. 257; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; U. S. v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; Nashville etc. Ry. v. Taylor, 86 Fed. 181.

¹⁵Speer v. Colbert, 200 U. S. 130, 50 L. ed. 403, 26 Sup. Ct. Rep. 201. See post, §§ 129, 133. This was necessary to prevent impositions upon the Federal jurisdiction since in causes triable in the Federal courts, non-Federal questions are equally examinable. See post, § 4.

¹⁶Osborn v. Bank of U. S. 9 Wheat. 820, 823, 6 L. ed. 204. See also post, § 4, note [b].

¹⁷Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648.

it comes within this provision.¹⁸ The section covers the case of a controversy depending upon the construction and effect of an act of Congress,¹⁹ such as a controversy over the exercise of a right to construct and operate a road, derived from Congress.²⁰ A claim by the owner of a fugitive slave is a case arising under the Constitution and laws.¹ So, also is a seizure for violation of the slave trade act.² Controversies as to land titles founded on acts of Congress and depending upon the construction of those acts;³ controversies under patent laws⁴ and under copyright⁵ and revenue laws,⁶ are all included. It is well settled that where a corporation is created by act of Congress a suit by or against it is one arising under the Federal laws.⁷ Hence a provision in the charter authorizing suit by or against it in the circuit court is valid.⁸ An application for habeas corpus alleging that petitioner is in custody of State officers in violation of the Federal Constitution presents a controversy under the Federal Constitution which Congress has power to make cognizable in the Federal courts.⁹ A full discussion of cases arising under the Federal Constitution and laws, will be found in the chapters dealing with the jurisdiction of the circuit court, both original and on removal,¹⁰ and with the jurisdiction of the Supreme Court and the circuit court of appeals.¹¹

[h] Cases affecting ambassadors and other public ministers.

"Other public ministers" includes envoys, ministers, commissioners, *chargés d'affaires*, and agents, duly accredited by the state department and empowered to discharge diplomatic duties for their respective governments.¹² In deciding the question of the diplomatic character of a foreign representative, the courts are controlled by the action of the state department.¹³ The next clause of the Constitution vests in the Supreme

¹⁸*Osborne v. U. S. Bank*, 9 Wheat. 822, 6 L. ed. 204.

¹⁹*Railroad Co. v. Mississippi*, 102 U. S. 140, 26 L. ed. 96.

²⁰*Southern Kansas R. R. v. Briscoe*, 144 U. S. 135, 36 L. ed. 377, 12 Sup. Ct. Rep. 538.

¹*Prigg v. Pennsylvania*, 16 Pet. 616, 10 L. ed. 1060.

²*The Slavers (Reindeer)*, 2 Wall. 402, 17 L. ed. 911.

³*Chouteau v. Eckhart*, 2 How. 372, 11 L. ed. 293; *Stanley v. Schwalby*, 147 U. S. 518, 37 L. ed. 259, 13 Sup. Ct. Rep. 418.

⁴*Birdsall v. Coolidge*, 93 U. S. 68, 23 L. ed. 802.

⁵*Little v. Hall*, 18 How. 171, 15 J. ed. 328.

⁶*Insurance Co. v. Ritchie*, 5 Wall. 543, 18 L. ed. 540.

⁷*Osborn v. U. S. Bank*, 9 Wheat. 828, 6 L. ed. 225; *Northern Pac. R. R. v. Amato*, 144 U. S. 471, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; *Washington etc. Ry. v. Coeur D'Alene Ry.*

160 U. S. 93, 40 L. ed. 346, 16 Sup. Ct. 231; *Texas etc. Ry. v. Cody*, 166 U. S. 609, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703.

⁸*Osborn v. U. S. Bank*, 9 Wheat. 828, 6 L. ed. 225.

⁹*Ex parte Royall*, 117 U. S. 250, 29 L. ed. 868, 6 Sup. Ct. Rep. 739. Compare *Clifford v. Williams*, 131 Fed. 100 where application was based on allegation of denial of full faith and credit to a decree as to custody of a child.

¹⁰*Post*, §§ 129, 133.

¹¹*Post*, §§ 39, 42.

¹²*Ops. Atty. Gen.* 186, R. S. § 4130. An *attaché* is also included. *United States v. Benner, Baldw.* 234, Fed. Cas. No. 14568.

¹³*Ex parte Hitz*, 111 U. S. 767, 28 L. ed. 592, 4 Sup. Ct. Rep. 698; *In re Baiz*, 135 U. S. 421, 10 Sup. Ct. Rep. 854, 34 L. ed. 222; *United States v. Liddle*, 2 Wash. C. C. 205, Fed. Cas. No. 15,598; *United States v. Benner, Baldw.* 234, Fed. Cas. No.

Court exclusive jurisdiction of suits or proceedings against such diplomatic functionaries and their domestics or domestic servants. It further vests original but not exclusive jurisdiction in that court of suits by such dignitaries.¹⁴ This provision of the Constitution was incorporated by Congress in the judiciary act of 1789 and has been retained in the Revised Statutes. But Congress has not vested in any inferior court a concurrent original jurisdiction of suits by diplomatic agents, *eo nomine*, nor has it made specific provision for review of cases voluntarily brought by such persons in the State or inferior Federal courts. There is no provision or principle of law forbidding suit by a public minister in the inferior Federal courts in cases otherwise of Federal cognizance, e. g., because arising under the Federal laws or because between an alien and citizens.¹⁶ If any such person were impleaded as defendant in the State court and his constitutional immunity from such suit were denied or even ignored, error would lie from the Federal Supreme Court.¹⁷ By the Crimes act of 1790, R. S. §§ 4062-4066, Congress has forbidden issue of process against foreign ministers and their registered domestics and has prescribed penalties for the issue of such process and for the offence of assaulting or violating the safe conduct of any public minister.¹⁸ But an indictment for such an assault is not a case affecting a public minister, within the provision of the Constitution here under consideration.¹⁹

[i] Suits against consuls.

The term "consul" includes consuls-general, vice consuls-general, consuls, vice consuls, commercial agents, and vice commercial agents.¹ A consul is a commercial and not a diplomatic agent,² and Congress has kept this distinction in view in all its legislation upon the subject. The jurisdiction of the Supreme Court while original, is not exclusive; it may therefore be exercised in appellate form and Congress may vest original jurisdiction in the inferior Federal courts.³ Accordingly Congress gave the district court jurisdiction of all suits civil and criminal against consuls or vice consuls except in criminal cases of more than a prescribed penalty in which latter cases the circuit court has jurisdiction.⁴ The judiciary act of 1789 made

14,568; *United States v. Ortega*, 4 Wash. C. C. 531, Fed. Cas. No. 15,971.

¹⁴Post, §§ 35, 36.

¹⁵See post, §§ 35, 36.

¹⁶See *Bors v. Preston*, 111 U. S. 261, 28 L. ed. 419, 4 Sup. Ct. Rep. 407.

¹⁷*Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684. See 76 Am. Dec. 668 note.

¹⁸Post, § 861. These provisions have been construed in *United States v. Benner*, *Baldw.* 234, Fed. Cas. No. 14,568; *U. S. v. Ortega*, 4 Wash. C. C. 531, Fed. Cas. No. 15,971; *United States v. Liddle*, 2 Wash. C. C. 205, Fed. Cas. No. 15,598; *In re Baiz*, 135 U. S. 421, 10 Sup. Ct. Rep. 854, 34 L. ed. 222.

¹⁹*United States v. Ortega*, 11 Wheat. 467, 6 L. ed. 521.

¹R. S. §§ 1130, 1674.

²*The Anne*, 3 Wheat. 445, 4 L. ed. 428; *Gittings v. Crawford*, *Taney* 1, Fed. Cas. No. 5,465.

³*Bors v. Preston*, 111 U. S. 256, 257, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; *U. S. v. Ravara*, 2 Dall. 297, Fed. Cas. No. 16,122.

⁴See post, § 209, R. S. § 563, Cl. 17. See, also, *Lorway v. Lusada*, 1 Low. 77, Fed. Cas. No. 8517; *Bixby v. Janssen*, 6 Blatchf. 315, Fed. Cas. No. 1452; *In re Baiz*, 135 U. S. 403, 34 L. ed. 222, 10 Sup. Ct. Rep. 854; *Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684.

this jurisdiction exclusive of the State courts⁵ but the revised statutes do not make the jurisdiction of suits against consuls exclusive, *eo nomine*,⁶ Hence if the case is one in which the Federal jurisdiction is not exclusive by reason of the subject-matter, the State courts may take jurisdiction. They may commit a consul for extradition to another State.⁷ Suits against consuls involving merely local law, and not presenting diverse citizenship or any Federal question, might apparently be entertained by a State court without any right of removal, or of review on error to the Federal Supreme Court unless some Federal right arose and was denied prior to final judgment.⁸ This could not have been done under the original law.⁹ It would seem therefore that in such cases Congress has failed in the performance of its "imperative duty"¹⁰ to provide a Federal tribunal either of original or appellate cognizance, for "all cases" affecting consuls

[j] Suits by foreign consuls.

These are cognizable originally in the Supreme Court,¹¹ but the jurisdiction is not exclusive. A consul is apparently free, therefore, to sue in the Supreme Court in any case; or to proceed in the inferior Federal court if it has jurisdiction of the subject-matter involved; or in the State courts, where the matter is not of exclusive Federal cognizance.¹² Cases are frequent in which consuls have proceeded in the district court under the admiralty jurisdiction in prize cases or for the protection of foreign seamen.¹³

[k] The admiralty and maritime jurisdiction—tort cases.

Admiralty cases were included in the grant of Federal jurisdiction because as the seas are the joint property of nations, the jurisdiction is necessarily national.¹ It is closely connected with the grant of Federal power over commerce.² The principal subjects of admiralty jurisdiction are maritime contracts and torts.³ But salvage, jettison and general average which are neither contract nor tort, are also included.⁴ The word "maritime" was used to guard against a narrow interpretation of the word "admiralty."⁵ Admiralty and maritime jurisdiction includes jurisdiction

⁵Act of 1789, c. 20, § 9. And see *Mannhardt v. Soderstrom*, 1 Binn. 138; *Commonwealth v. Kosloff*, 5 Serg. & R. 545.

⁶See post, § 15 note [a].

⁷In *re Iasigi*, 79 Fed. 754.

⁸*Wilcox v. Luco*, 118 Cal. 642, 62 Am. St. Rep. 306, 50 Pac. 759, 45 L. R. A. 582; *De Give v. Grand Rapids etc. Co.* 94 Ga. 605, 21 S. E. 582.
⁹*Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684; *Valarino v. Thompson*, 7 N. Y. 576.

¹⁰*Martin v. Hunter*, 1 Wheat. 328, 331, 4 L. ed. 203, 104; supra note [b].

¹¹R. S. § 687, post, § 36.

¹²*Sagory v. Wissman*, 2 Ben. 240, Fed. Cas. No. 12,217.

¹³*The Bello Corrunes*, 6 Wheat. 168, 5 L. ed. 229; *Robson v. The Huntress*, 2 Wall. Jr. 59, Fed. Cas. No. 11,971; *The London Packet*, 1 Mason 14, Fed. Cas. No. 8474.

¹*Chisholm v. Georgia* 2 Dall. 475, 1 L. ed. 440.

²*New Jersey etc. Co. v. Merchants'* Bk. 6 How. 392, 12 L. ed. 465.

³*The Belfast*, 7 Wall. 637, 19 L. ed. 266.

⁴*The Eagle*, 8 Wall. 23, 19 L. ed. 365.

⁵*Fretz v. Bull*, 12 How. 466, 13 L. ed. 1068; *The Hine v. Trevor*, 4 Wall. 555, 561, 18 L. ed. 453; *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397.

of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea.⁶ The question whether a matter is of admiralty cognizance is determined by the locality where an act occurred in cases of tort,⁷ as also in cases of prize, jettison, and salvage; in cases of contract it is determined by the subject-matter.⁸ It has several times been declared that the limits of the admiralty jurisdiction conferred by the Constitution, are to be defined and declared by the courts and that neither Congress nor the States have any power to enlarge or restrict them. In other words the question whether a given matter is of admiralty cognizance is exclusively judicial.⁹ This is not equivalent to saying that the question whether a matter is cognizable in the Federal court as a court of admiralty is exclusively judicial. The inferior Federal courts derive their admiralty¹⁰ and all other jurisdiction, from Congress which might, conceivably, omit to give them jurisdiction of matters essentially maritime,¹¹ and conversely, extend their jurisdiction to matters essentially maritime within judicial definitions, not previously made justiciable before them. Moreover Congress has undoubted power to regulate admiralty practice;¹² and to change the substantive rules of admiralty law applied in the Federal courts.¹³ Indeed the States also have power to create rights such as a lien for supplies in a vessel's home port, which being essentially maritime in nature will be recognized and enforced in admiralty.¹⁴

With regard to place or locality as the test of admiralty jurisdiction, it is settled that in addition to the seas and waters where the tide ebbs and flows, within the United States and waters within a foreign country,¹⁵ the admiralty jurisdiction of the Federal courts extends to all public navigable lakes and rivers of the United States.¹⁶ It makes no difference that the tide does not ebb and flow,¹⁷ although the early cases made

⁶De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3776, per Story S.

⁷Philadelphia etc. R. R. v. Tow-boat Co. 23 How. 215 16 L. ed. 433; The Plymouth, 3 Wall. 33, 18 L. ed. 125; Waring v. Clarke, 5 How. 452, 12 L. ed. 226.

⁸Ex parte Easton, 95 U. S. 72, 24 L. ed. 373. See infra note [kk].

⁹The Lottawanna, 21 Wall. 576, 22 L. ed. 654; Butler v. Boston S. S. Co. 130 U. S. 557, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

¹⁰United States v. Bevans, 3 Wheat. 337, 4 L. ed. 404; Jackson v. Magnolia, 20 How. 296, 15 L. ed. 909; Carpenter v. Emma Johnson, 1 Cliff 633, Fed. Cas. No. 2430.

¹¹This would of course be in violation of the imperative duty imposed on Congress. See supra note [b].

¹²The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058.

¹³See post, § 11 [a].

¹⁴See post, § 11 [b].

¹⁵The Eagle, 8 Wall. 21, 19 L. ed. 365; Panama R. R. v. Napier etc. Co. 166 U. S. 285, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572.

¹⁶The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; Fretz v. Bull, 12 How. 466, 13 L. ed. 1068; Jackson v. The Magnolia, 20 How. 296, 15 L. ed. 909; Nelson v. Leland, 22 How. 48, 16 L. ed. 269; The Propeller Commerce, 1 Black, 574, 17 L. ed. 107; The Hive v. Trevor, 4 Wall. 555, 18 L. ed. 451; The Belfast, 7 Wall. 624, 19 L. ed. 266; The Eagle, 8 Wall. 15, 19 L. ed. 365; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; The Montello, 20 Wall. 430, 22 L. ed. 391; Ex parte Boyer, 109 U. S. 629, 3 Sup. Ct. Rep. 434, 27 L. ed. 1056; In re Garnett, 141 U. S. 15, 35 L. ed. 631, 11 Sup. Ct. Rep. 843.

¹⁷The Genesee Chief v. Fitzhugh, 12 How. 454, 13 L. ed. 1058; The

that the test of jurisdiction.¹⁸ It is equally immaterial that the lake or stream is wholly within a State¹⁹ or within the body of a county.²⁰ The jurisdiction does not depend upon the fact that the commerce in which the vessel is involved or which is otherwise affected is interstate or foreign commerce.¹ If the voyage or contract is merely between places in the same State or the vessel exclusively engaged in commerce within a State, it is within Federal admiralty jurisdiction so far as locality determines that jurisdiction.² The act of 1845 extending admiralty jurisdiction to the great lakes was therefore merely declaratory and inoperative as a grant of jurisdiction.³ Temporary interruption by low water does not destroy the character of water as navigable.⁴ The fact that a canal is entirely artificial, created and owned by a State, does not make it any the less public navigable water;⁵ nor does the fact that a stream is made navigable by artificial improvements.⁶ But under a law as to license of vessels on public navigable waters of the United States a river is not such where only navigable between places in a State and where it does not in connection with other waters, form a continued highway for commerce with other States or foreign countries.⁷

A right of action for a tort committed in any of the places or localities above declared to be within the admiralty jurisdiction, is therefore cognizable in the Federal court in admiralty.⁸ But if the substance and consummation of the wrong be upon the land or to something upon or affixed to the land, the tort is not maritime though the instrumentality of the injury is of a maritime character.⁹ No maritime tort is committed where buildings, bridges, wharves or property thereon, are injured by

Hine v. Trevor, 4 Wall. 565, 18 L. ed. 451.

¹⁸The Thomas Jefferson, 10 Wheat. 429, 6 L. ed. 358; Peyroux v. Howard, 7 Pet. 343, 8 L. ed. 707; Waring v. Clarke, 5 How. 464, 12 L. ed. 226.

¹⁹The Belfast, 7 Wall. 640, 19 L. ed. 266.

²⁰Jackson v. The Magnolia, 20 How. 301, 15 L. ed. 909; The Propeller Commerce, 1 Black. 580, 17 L. ed. 107; Leathers v. Blessing, 105 U. S. 630, 26 L. ed. 1192.

¹In re Garnett, 141 U. S. 18, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; The Mary Washington, 1 Abb. 6, Fed. Cas. No. 9229; The Barge Leonard, 3 Ben. 266, Fed. Cas. No. 8,256; The Sarah Jane, 1 Low. 205, Fed. Cas. No. 12,349. See U. S. v. Wishkah B. Co. 136 Fed. 42, 68 C. C. A. 592.

²The Belfast, 7 Wall. 624, 19 L. ed. 266; The Montello, 20 Wall. 430, 22 L. ed. 391; Ex parte Boyer, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434; In re Garnett, 141 U. S. 18, 35 L. ed. 631, 11 Sup. Ct. Rep. 843. See

Nelson v. Leland, 22 How. 56, 16 L. ed. 269; Bondies v. Sherwood, 22 How. 217, 16 L. ed. 238.

³Jackson v. The Magnolia, 20 How. 301, 15 L. ed. 909; The Eagle, 8 Wall. 25, 19 L. ed. 365.

⁴Nelson v. Leland, 22 How. 56, 16 L. ed. 269.

⁵Ex parte Boyer, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434; The McChesney, 8 Ben. 157, Fed. Cas. No. 4463; Maloney v. Milwaukee, 1 Fed. 613; The Oler, 2 Hughes 15, Fed. Cas. No. 10,485.

⁶The Montello, 20 Wall. 430, 22 L. ed. 391.

⁷The Montello, 11 Wall. 411, 20 L. ed. 191.

⁸Fretz v. Bull, 12 How. 468, 13 L. 1068; The Eagle, 8 Wall. 21, 19 L. ed. 365; The Propeller Commerce, 1 Black. 580, 17 L. 107.

⁹The Plymouth, 3 Wall. 33, 18 L. ed. 125; Johnson v. Chicago Elev. Co. 119 U. S. 397, 30 L. ed. 447, 7 Sup. Ct. 254; The Ottawa, Brown's Adm. 357, Fed. Cas. No. 10,616.

fire from a vessel,¹⁰ or by its collision therewith.¹¹ Nor where persons are injured on shore by negligence on board ship.¹² But admiralty has jurisdiction of a suit for injury to a vessel, by wharves or a drawbridge, or sunken obstructions;¹³ or of a suit for injury to a floating dock.¹⁴ So also it has jurisdiction where a person is injured aboard ship by negligence of persons loading from a wharf;¹⁵ or injured while leaving a vessel, if the act is incomplete, or by falling therefrom.¹⁶

[kk] — maritime contracts—prize.

As respects contracts the admiralty jurisdiction extends to all such as are of a maritime character.¹ In determining this question our courts have virtually laid out of view the restricted and illiberal conceptions of the matter forced upon the admiralty courts of England by the common law tribunals,² and have proceeded upon enlarged views of the jurisdiction which admiralty should rationally and properly exercise. The maritime character of a contract is determined by considering its nature and subject-matter.³ It is obviously proper that all contracts which require or may require for their interpretation and construction, a knowledge of the peculiar principles of the law maritime, or the peculiar usages or implements of the sea, should be deemed of a maritime nature; and that is perhaps the ultimate test to be applied in deciding whether a contract is in fact maritime.

All contracts which are made to be performed in places within the admiralty jurisdiction are maritime.⁴ Thus, contracts of affreightment and for transportation of freight or passengers,⁵ when to be performed in places

¹⁰The Plymouth, 3 Wall. 36, 18 L. ed. 125; Ex parte Phenix Ins. Co. 118 U. S. 616, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; Goodrich Co. v. Gagnon, 36 Fed. 124.

¹¹Johnson v. Chicago Elev. Co. 119 U. S. 397, 7 Sup. Ct. Rep. 254, 30 L. ed. 447; The Neil Cochran, Brown's Adm. 164, Fed. Cas. No. 7,996; Milwaukee v. The Curtis, 37 Fed. 705, 3 L.R.A. 712; The John C. Sweeney, 55 Fed. 542; The Arkansas, 17 Fed. 388, 5 McCrary, 364; The Maud Webster, 8 Ben. 552, Fed. Cas. No. 9,302; Homer Ramsdell, etc. Co. v. Compagnie Gen. Trans. 63 Fed. 848.

¹²The Mary Stewart, 5 Hughes 313, 10 Fed. 138; The Epsilon, 6 Ben. 381, Fed. Cas. No. 4506; The H. S. Pickards, 42 Fed. 240; The Mary Garrett, 63 Fed. 1011; The Belle of the Coast, 66 Fed. 62.

¹³Boston v. Crowley, 38 Fed. 204, Etheridge v. Philadelphia, 26 Fed. 43; Leonard v. Decker, 22 Fed. 742; Panama R. R. v. Napier etc. Co. 166 U. S. 285, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572.

¹⁴Simpson v. The Ceres, 22 Fed. Cas. 173.

¹⁵Hermann v. Port Blakely Co. 69 Fed. 647.

¹⁶The Strabo, 90 Fed. 110; The Manhasset, 19 Fed. 435.

¹Steamboat Orleans v. Phoebus, 11 Pet. 183, 9 L. ed. 677; The Thomas Jefferson, 10 Wheat. 429, 6 L. ed. 358; The Belfast, 7 Wall. 637, 19 L. ed. 266.

²De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3776.

³Philadelphia etc. R. R. v. Towboat Co. 23 How. 215, 16 L. ed. 433; New England etc. Co. v. Dunham, 11 Wall. 26, 20 L. ed. 90; The Gilbert Knapp, 37 Fed. 210; Wortmann v. Griffith, 3 Blatchf. 528, Fed. Cas. No. 18,057.

⁴Waring v. Clarke, 5 How. 452, 12 L. ed. 226.

⁵Marshall v. Bazin, 7 N. Y. Leg. Obs. 342, Fed. Cas. No. 9,125; The Aberfoyle, 1 Abb. Adm. 242, Fed. Cas. No. 16; Morewood v. Enequist, 23 How. 493, 16 L. 516; The Moses Taylor, 4 Wall. 427, 18 L. ed. 397;

within maritime jurisdiction, contracts for pilotage or navigation of a vessel⁶ for seamen's wages;⁷ for wharfage⁸ and towage;⁹ for docking a vessel,¹⁰ for consortship, or assistance,¹¹ are all maritime contracts enforceable in admiralty. It is not necessary that the entire performance be in places within the admiralty jurisdiction so long as a substantial portion is.¹² Other contracts which may fairly be deemed performable in places within admiralty jurisdiction and which are therefore cognizable in admiralty are, a contract to furnish cargo space for a foreign cotton shipment,¹³ a stevedore's contract,¹⁴ a contract to remove ballast,¹⁵ a docking contract,¹⁶ and a contract to act as watchman while vessel at dock.¹⁷ The services rendered by a shipkeeper,¹⁸ cabin boy,¹⁹ chambermaid,²⁰ steamboat clerk,¹ ships carpenter,² cook or steward,³ deckhand,⁴ engineer and fireman,⁵ surgeon,⁶ of a cooper in putting cargo in order,⁷ or cargo weigher and inspector,⁸ have all been deemed maritime and cognizable in admiralty.

But place of performance is not a final test of jurisdiction, although long made so in England,⁹ and other contracts besides those performable upon

Sears v. Wills, 1 Black 112, 17 L. ed. 35; The Eddy, 5 Wall. 494, 18 L. ed. 489; New Jersey S. Nav. Co. v. Merchants' Bank, 6 How. 385, 12 L. ed. 465; The Hammonia, 10 Ben. 514, Fed. Cas. No. 6,006; The Priscilla, 106 Fed. 739; The Richard Winslow, 71 Fed. 428; 18 C. C. A. 344.

⁶Hobart v. Drogan, 10 Pet. 120, 9 L. ed. 363; Ex parte McNeil, 13 Wall. 243, 20 L. ed. 624; Ex parte Hagar, 104 U. S. 521, 26 L. ed. 816; The Laurel, 113 Fed. 373; Ex parte Loud, 154 U. S. 582, 20 L. ed. 627, 14 Sup. Ct. Rep. 1204.

⁷Sheppard v. Taylor, 5 Pet. 711, 8 L. ed. 269; The Thomas Jefferson, 10 Wheat. 429, 6 L. ed. 358; Leon v. Galceran, 11 Wall. 188, 20 L. ed. 74.

⁸The Falls of Keltie, 114 Fed. 357; Ex parte Easton, 95 U. S. 68, 24 L. ed. 373; Braisted v. Denton, 115 Fed. 428; The Kate Tremaine, 5 Ben. 69, Fed. Cas. No. 7,622.

⁹The Oscoda, 66 Fed. 347.

¹⁰The Vidal Sala, 12 Fed. 207.

¹¹Andrews v. Wall, 3 How. 571, 11 L. ed. 729; Boutin v. Rudd, 82 Fed. 686, 27 C. C. A. 526.

¹²New Jersey etc. Co. v. Merchants' Bk. 6 How. 392, 12 L. ed. 465; The Thomas Jefferson, 10 Wheat. 429, 6 L. ed. 358; The Willamette Valley, 71 Fed. 714; Phenix Ins. Co. v. Erie etc. Co. 10 Biss. 18, Fed. Cas. No. 11,112; Domenico v. Alaska P. A. 112 Fed. 554. See Pacific C. S. Co. v. Ferguson, 76 Fed. 996, 22 C. C. A. 671.

¹³Baltimore S. P. Co. v. Patterson, 106 Fed. 736, 45 C. C. A. 575.

¹⁴The Gilbert Knapp, 37 Fed. 210; The Canada, 7 Feb. 123, 7 Sawy. 173; The Hattie M. Bain, 20 Fed. 390; Florez v. The Scotia, 35 Fed. 917; The Main, 51 Fed. 956, 2 C. C. A. 569 *contra*; The Esteban, 31 Fed. 924.

¹⁵Roberts v. The Windemere, 2 Fed. 725.

¹⁶The Vidal Sala, 12 Fed. 211.

¹⁷The Maggie P. 32 Fed. 301. But see Gurney v. Crockett Abb. Adm. 493, Fed. Cas. No. 5,874.

¹⁸The Geo. T. Kemp, 2 Low. 477, Fed. Cas. No. 5,341.

¹⁹Gurney v. Crockett, 1 Abb. Adm. 490, Fed. Cas. No. 5,874.

²⁰The Farmer, Gilp. 524, Fed. Cas. No. 13,852.

¹The Sultana, 1 Browns Adm. 13, Fed. Cas. No. 13,602.

²The Farmer, Gilp. 524, Fed. Cas. No. 13,852.

³The Pekin, Gilp. 203, Fed. Cas. No. 13,090.

⁴The Ohio, Gilp. 505, Fed. Cas. No. 17,825.

⁵The Ohio, Gilp. 505, Fed. Cas. No. 17,825.

⁶Gurney v. Crockett, 1 Abb. Adm. 490, Fed. Cas. No. 5,874.

⁷The Onore, 6 Ben. 564, Fed. Cas. No. 10,538.

⁸The River Queen, 2 Fed. 731.

⁹See De Lovis v. Boit, 2 Gall. 393, Fed. Cas. No. 3,776; Insurance Co. v. Dunham, 11 Wall. 1, 20 L. ed. 98.

navigable waters may be maritime. It is the peculiar and exclusive function of courts of admiralty to enforce all rights in rem that may exist against vessels afloat.¹⁰ Hence all contracts which give rise to liens or rights in rem are of admiralty cognizance. Thus contracts for supplies and repairs,¹¹ wharfage contracts,¹² towage contracts,¹³ and all others creating maritime liens are necessarily of admiralty cognizance. Salvage,¹⁴ jettison and general average¹⁵ although matters of quasi contract only, also create rights in rem enforceable only in admiralty, besides being distinctively maritime in character. There are yet other contracts deemed maritime, neither made nor performable upon navigable waters, nor giving rise to rights in rem, which are nevertheless so concerned with maritime matters and risks that a court construing or enforcing them may be called upon to determine any and all the questions that can arise in maritime commerce, such as jettison, abandonment, average, salvage, capture, prize, bottomry, etc.¹⁷ It is appropriate that admiralty should have jurisdiction over them. Among contracts of this type may be mentioned bottomry and respondentia,¹⁸ marine insurance,¹⁹ and charter parties.²⁰ Both the owner¹ and charterer² may sue on charter parties. They sometimes contain or are accompanied by other contracts, such as one giving the charterer an agency for general average,³ or a bond for performance,⁴ which are also maritime. A stipulation in a charter party has been enforced in admiralty though not of itself maritime.⁵

But an agreement which creates a sort of partnership and not a charter party, is not of admiralty cognizance,⁶ nor has admiralty any juris-

¹⁰See post, § 15 [e].

¹¹The General Smith, 4 Wheat. 443, 4 L. ed. 609; The Aurora, 1 Wheat. 105, 4 L. ed. 45; Cutler v. Rae, 7 How. 731, 12 L. 890; Lawrence v. Morrisina S. B. Co. 9 Fed. 208.

¹²Ex parte Easton, 95 U. S. 68, 24 L. ed. 373.

¹³The Oscoda, 66 Fed. 347.

¹⁴The Williams, 1 Brown 215, Fed. Cas. No. 17,710; The Roanoke, 50 Fed. 577; The John Gilpin, Olc. 82, Fed. Cas. No. 7345.

¹⁵Coast wrecking Co. v. Phenix Ins. Co. 7 Fed. 242; San Fernando v. Jackson, 12 Fed. 341; National Bd. v. Melchers, 45 Fed. 646; Wellman v. Morse, 76 Fed. 576, 22 C. C. A. 318; Dike v. The Joseph, 6 McLean, 574, Fed. Cas. No. 3908. After the goods are delivered to consignee, libel for contribution on general average has been held not maintainable: Cutler v. Rae, 7 How. 731, 12 L. ed. 890. This case is, however, practi-

cally overruled. See Bk. 4 U. S. Notes 741, 742.

¹⁷Insurance Co. v. Dunham, 11 Wall. 1, 20 L. ed. 99.

¹⁸Blaine v. The Chas. Carter, 4 Cranch 332, 2 L. ed. 636.

¹⁹Insurance Co. v. Dunham, 11 Wall. 1, 20 L. ed. 99; De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3776.

²⁰Morewood v. Linguist, 23 How. 493, 16 L. ed. 516; Maury v. Cullifora, 4 Woods, 123, 10 Fed. 391; The City of Carlisle, 39 Fed. 814, 5 L.R.A. 59; The Alberto, 24 Fed. 381.

³Ward v. Thompson Newb. 95 Fed. Cas. No. 17,162.

²The Tribune, 3 Sum. 144, Fed. Cas. No. 14,171.

³The Ripon City, 102 Fed. 176, 42 C. C. A. 247.

⁴Haller v. Fox, 51 Fed. 299.

⁵Keyser v. S. S. S. Co. 91 Fed. 271, 33 C. C. A. 496.

⁶Ward v. Thompson, 22 How. 333, 16 L. ed. 249; Vandewater v. Mills, 19 How. 90, 15 L. ed. 554.

diction over matters of account between part owners.⁷ The premium on a marine insurance policy is recoverable in admiralty,⁸ although no lien exists therefor.⁹ While bottomry and respondentia are maritime hypothecations, enforceable in admiralty an ordinary mortgage of a vessel is not.¹⁰ Not only are all vessels subjects of admiralty cognizance, but floating boat houses,¹¹ barges,¹² dredges,¹³ and canal boats,¹⁴ may become subject to the assertion of maritime claims. Petitory actions to recover vessel or cargo are maintainable in admiralty,¹⁵ though a merely equitable title will not sustain such an action.¹⁶

Without attempting to discuss exhaustively, contracts held not maritime, it is settled that a contract to build a vessel is not maritime;¹⁷ and a lien given by State law thereon is not enforceable in admiralty.¹⁸ A broker's contract for customary services,¹⁹ or for commissions in obtaining a charter,²⁰ or for buying vessel,¹ or for obtaining a guano concession,² is not maritime. A contract for storage at the end of a voyage is not maritime;³ nor for preparing a cargo;⁴ nor one for compressing cotton for shipment;⁵ nor one for furnishing all supplies at a certain place for one year;⁶ nor for furnishing coal to a dredge pumping mud and water.⁷ Admiralty does not recognize merely equitable rights or titles nor will it enforce a trust.⁸ Agreements merely preliminary to a maritime con-

⁷Steamboat Orleans v. Phoebus, 11 Pet. 182, 9 L. ed. 677; Grant v. Polton, 20 How. 169, 15 L. ed. 871; Kellum v. Emerson, 2 Curtis, 83, Fed. Cas. No. 7669.

⁸The Dolphin, 1 Flip. 581, Fed. Cas. No. 3,973; The Guiding Star, 9 Fed. 524.

⁹In re Insurance Co. 22 Fed. 115.

¹⁰Bogart v. The John Jay, 17 How. 402, 15 L. ed. 95; Schuehardt v. Babidge, 19 How. 240, 15 L. ed. 625; The J. E. Rumbell, 148 U. S. 15, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; The Sailor Prince, 1 Ben. 468, Fed. Cas. No. 12,219.

¹¹Woodruff v. Scow, 30 Fed. 270.

¹²The City of Pittsburgh, 45 Fed. 700; The Dick Keyes, 1 Biss. 608 Fed. Cas. No. 3898.

¹³McRae v. Bowers, etc. Co., 86 Fed. 348.

¹⁴Ex parte Easton, 95 U. S. 68, 24 L. ed. 373.

¹⁵Ward v. Peck, 18 How. 267, 15 L. ed. 383; The Friendship, 2 Curt. 426, Fed. Cas. No. 5123; Wenberg v. A Cargo, etc., 15 Fed. 287; The Clarissa Ann, 2 Hughes, 89, Fed. Cas. No. 5826.

¹⁶Hill v. The Amelia, 6 Ben 475, Fed. Cas. No. 6487; Kynoch v. The Ives, Newb. 205, Fed. Cas. No. 7,958; The Perseverance, 1 Blatchf. 385, Fed. Cas. No. 11017.

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¹⁷Peoples F. Co. v. Beers, 20 How. 401, 15 L. ed. 961; Roach v. Chapman, 22 How. 132, 16 L. ed. 294; Morewood v. Enequist, 23 How. 494, 16 L. ed. 516; Edwards v. Elliott, 21 Wall. 556, 22 L. ed. 487; Norton v. Switzer, 93 U. S. 366, 23 L. ed. 903.

¹⁸Peoples F. Co. v. Beers, 20 How. 401, 15 L. ed. 961; The Count De Lessep, 17 Fed. 461.

¹⁹The Humbolt, 86 Fed. 351

²⁰Brown v. West, 112 Fed. 1018, 50 C. C. A. 664; Taylor v. Weir, 110 Fed. 1005.

¹Doolittle v. Knoblock, 39 Fed. 40.

²Wenberg v. A Cargo, etc., 15 Fed. 288.

³The Richard Winslow, 71 Fed. 428, 18 C. C. A. 344.

⁴Coyne v. The Alex. McNeil, 20 Int. Rev. Rec. Fed. Cas. No. 3312a.

⁵The Pavla R. 32 Fed. 175.

⁶Diefenthal v. Hamburg, etc., 46 Fed. 397.

⁷In re Hydraulic Dredge, 80 Fed. 556, 25 C. C. A. 628.

⁸Ward v. Thompson, 22 How. 330, 16 L. ed. 249; Kellum v. Emerson, 2 Curt. 79 Fed. Cas. No. 7669; Davis v. Child, 2 Ware, 78, 87 Fed. Cas. No. 3,628; The William D. Rice, 3 Ware, 134, Fed. Cas. No. 17,691; Kynoch v. The S. C. Ives, Newb. 205, Fed. Cas. No. 7,958; Andrews v. The Essex, etc.

tract are not cognizable in admiralty.⁹ The following are not maritime contracts: A contract to furnish blocks to save a wrecked vessel;¹⁰ a supercargo's contract to sell in a foreign port;¹¹ a warehouseman's contract of bailment;¹² a contract to procure parties to care for a cargo;¹³ a contract for storage of grain on a vessel during winter.¹⁴ The services rendered by a drayman taking cargo to or from a vessel,¹⁵ by a day laborer on a boat or dock,¹⁶ or watchman on vessel out of commission,¹⁷ or by a captain's body servant,¹⁸ or by musicians,¹⁹ or by a solicitor of freight,²⁰ are not maritime nor cognizable in admiralty.

Cases of prize are peculiarly of admiralty cognizance.¹ The common-law courts have no jurisdiction.² Prize jurisdiction is vested by the revised statutes chiefly in the district court.³

[1] Controversies to which United States is party.

Congress is not required to vest the judicial power in "all" cases in which United States is party and to do so would be to waive the government's immunity from suit.⁵ The ancient doctrine that the sovereign is not suable without its consent, applies in full force to the United States.⁶ Congress has however authorized suits against the government upon a great variety of claims and in some other cases, and vested jurisdiction in the Court of Claims, and the circuit and district courts, and sometimes in the Supreme Court.⁷ The doctrine of the Supreme Court as to its original jurisdiction over suits by or against the United States, seems to have undergone substantial changes since earlier days. At the time of the decision in *Florida v. Georgia*,⁸ it was taken for granted that as the Supreme Court

3 *Mason*, 6 Fed. Cas. No. 374; *Wenberg v. A Cargo, etc.*, 15 Fed. 285.

⁹*Andrews v. Essex Ins. Co.* 3 *Mason* 6. Fed. Cas. No. 374; *The Tribune*, 3 Sum. 144, Fed. Cas. No. 14,171.

¹⁰*Tons of Iron*, 2 Ben. 21, Fed. Cas. No. 13270.

¹¹*The Virginia*, 2 Paine, 115, Fed. Cas. No. 141.

¹²*The Mary Washington*, Chase, 125, Fed. Cas. No. 9,229.

¹³*The Gustavia*, 1 Blatchf. 189, Fed. Cas. No. 5876.

¹⁴*The Pulaski*, 33 Fed. 383; *The Richard Winslow*, 71 Fed. 426, 18 C. C. A. 344.

¹⁵*The Harriet*, Olcott, 229, Fed. Cas. No. 6,097.

¹⁶*Graham v. Hoskins*, Olcott 244 Fed. Cas. No. 5669.

¹⁷*The Sirius*, 65 Fed. 226.

¹⁸*The Farmer*, Gilp. 524, Fed. Cas. No. 13852.

¹⁹*The Superior*, Gilp. 514, Fed. Cas. No. 14136.

²⁰*The Pavla R.* 32 Fed. 174.

¹*Glass v. The Betsey*, 3 Dall. 6, 1

L. ed. 485; *Penhallow v. Doane*, 3 Dall. 54, 1 L. ed. 507; *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; *Jecker v. Montgomery* 13 How. 498, 14 L. ed. 240.

²*Doane v. Penhallow*, 1 Dall. 218, 1 L. ed. 108; *Ross v. Rittenhouse*, 2 Dall. 160, 1 L. ed. 331.

³See post, §§ 15, 200.

⁵See supra note [c].

⁶*Cohens v. Virginia*, 6 Wheat. 411, 412, 5 L. ed. 257; *U. S. v. Ringgold*, 8 Pet. 163, 8 L. ed. 899; *Cary v. Curtis*, 3 How. 245, 11 L. ed. 576; *U. S. v. King*, 7 How. 854, 12 L. ed. 934; *DeGroot v. U. S.* 5 Wall. 431, 18 L. ed. 700; *The Siren*, 7 Wall. 154, 19 L. ed. 129; *Haycraft v. U. S.* 22 Wall. 98, 22 L. ed. 738; *U. S. v. Thompson*, 98 U. S. 489, 25 L. ed. 194; *Minnesota v. Hitchcock*, 185 U. S. 386, 46 L. ed. 954, 22 Sup. Ct. 650; *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568.

⁷See post §§ 139, 22 et seq.. See *Minnesota v. Hitchcock*, 185 U. S. 386, 46 L. ed. 954, 22 Sup. Ct. 650.

⁸17 How. 478, 15 L. ed. 181.

was not given original jurisdiction of cases where the United States is a party, under the doctrine of *Marbury v. Madison*,⁹ it could entertain jurisdiction only in the appellate form; that as the judicial power was not extended in terms to controversies between the United States and any State or States of the union, such cases were not justiciable; and that after the adoption of the eleventh amendment,¹⁰ the only cases as to which the States had waived their sovereign immunity from suit were in controversies between States. In that case the boundary dispute between Florida and Georgia vitally interested the Federal government because its title and that of its grantees to public lands in northern Florida would be destroyed by a decree in accordance with the contentions of the state of Georgia and believing that the United States could not intervene as a party of record, application was made for leave to be heard and to file testimony in the case, without becoming parties of record. A majority of the court was constrained by the apparent necessity of the case to sanction this anomalous proceeding although combatted by the dissenting judges as permitting intervention by a party not authorized either to sue one of the States of the union or to proceed originally in the Supreme Court. Recent cases have disregarded these principles without apparently examining the decision in *Florida v. Georgia*, or considering its reasoning. In one such case the Supreme Courts original jurisdiction of a suit by the United States against the State of Texas was sustained;¹¹ and in the other and later case, a suit by a State against the Secretary of the Interior was upheld because in effect a suit against the United States.¹² In other words the United States may either sue or be sued originally in the Supreme Court where a State is the other litigant party. Jurisdiction over actions brought by the United States has been vested in the circuit and district courts;¹³ and it has been held that the United States may sue in the State courts and often does so.¹⁴ Aside from the many cases where the United States has appeared as plaintiff in actions *ex contractu* against its officers it has sued as for money had and received,¹⁵ and for benefit of a surety;¹⁶ also to set aside land patents,¹⁷ and patents for inventions,¹⁸

⁹*Marbury v. Madison*, 1 Cranch 137, 2 L. ed. 60

¹⁰Post § 7.

¹¹*United States v. Texas*, 143 U. S. 621, 36 L. ed. 285 12 Sup. Ct. 488.

¹²*Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. 650.

See *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568. These holdings are not easily reconcilable with rules of interpretation applied in early cases to the constitutional grant of judicial power, nor with the doctrine that the sovereign immunity of the States from suit should not be deemed waived by them except as it has been expressly waived in the Federal constitution. A further holding that a

state may sue the United States in the Court of Claims does not violate the principles early established since the Supreme Court's original jurisdiction is not exclusive. *United States v. Louisiana*, 123 U. S. 37, 31 L. ed. 69, 8 Sup. Ct. Rep. 17.

¹³Post, §§ 130, 196.

¹⁴*Clafin v. Houseman*, 93 U. S. 136, 23 L. ed. 833. See *United States v. Pedrol*, 111 Fed. 14.

¹⁵*United States v. Grundy*. 3 Cranch, 350, 2 L. ed. 459.

¹⁶*Meredith v. United States*, 13 Pet. 496, 10 L. ed. 258.

¹⁷*United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

¹⁸*United States v. American etc.*

for cancellation of other instruments,¹⁹ and to enjoin labor leaders from interfering with the transportation of the mails.²⁰ Nor is the government restricted to cases in which its pecuniary interests are involved. It is enough that the wrongs complained of affect the public at large in respect to a matter within the national powers and involving the national duties.²¹

[m] What are suits against the United States.

A suit in which the United States were made parties defendant of record would doubtless be a suit against the United States just as it has similarly been held of suits against a State;¹ and a suit against the property of the United States is similarly inhibited except by consent.² A suit against a United States officer where the United States, though not named, is the real party against whom the relief is asked and the judgment will operate, is in fact a suit against the government; although the doctrine of *U. S. v. Lee*,³ and of several cases following it somewhat modifies this general proposition. Those cases have sustained actions of ejectment and trespass against officers in possession of land as government officers, and under claim of title in the government. The gist of these actions is the tort of the individuals, but the decision turns entirely upon the existence of valid title in the government whose rights are thus indirectly litigated. Another line of cases affirms the right of the individual to sue even high executive officers of the government to compel the performance of ministerial duties or to restrain a violation of private rights.⁴

[n] Cases in which a State is party.

The provision applies to States that are members of the union, and to public bodies owing obedience and conformity to its Constitution and laws.⁵ To constitute a state, a political organization must be a State in contemplation of the Constitution.⁷ Indian nations are not States.⁸ The District of Columbia is not a State within the term as here used.⁹ A Federal corporation, not being a citizen of any State is not within the terms

Tel. Co. 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90.

¹⁹*United States v. Union Pac. Ry.* 160 U. S. 50, 40 L. ed. 319, 16 Sup. Ct. Rep. 190.

²⁰*In re Debs*, 158 U. S. 586, 39 L. ed. 1103, 15 Sup. Ct. Rep. 900.

²¹*In re Debs*, 158 U. S. 586, 39 L. ed. 1103, 15 Sup. Ct. Rep. 907.

¹*Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204.

²*Stanley v. Schwalby*, 162 U. S. 270, 40 L. ed. 966, 16 Sup. Ct. Rep. 760; *In re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 655.

³*United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, 27 L. ed. 171; and see *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup.

Ct. Rep. 418; *Same v. Same*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 760.

⁴*Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *United States v. Commissioner*, 5 Wall. 565, 18 L. ed. 692; *Kendall v. United States*, 12 Pet. 610, 9 L. ed. 1181; *United States v. Blaine*, 139 U. S. 319, 35 L. ed. 183, 11 Sup. Ct. Rep. 607; *Carroll v. Safford*, 3 How. 463, 11 L. ed. 671.

⁵*Scott v. Jones*, 5 How. 377, 12 L. ed. 198.

⁷*Cherokee Nation v. Georgia*, 5 Pet. 18, 8 L. ed. 25.

⁸*Cherokee Nation v. Georgia*, 5 Pet. 16, 8 L. ed. 31; *Snead v. Sellers*, 66 Fed. 371, 13 C. C. A. 518.

⁹*Hepburn v. Ellzey*, 2 Cranch, 453, 2 L. ed. 332.

of the jurisdiction here granted.¹⁰ The fact that a State is the nominal party plaintiff in suit on attachment bond does not oust the circuit court's jurisdiction.¹¹ While the constitution extends the judicial power to all cases arising under the constitution and laws, a suit against a State may not be held justiciable on that ground unless also within the class of cases as to which the States have expressly waived their nonsuability.¹² Since the 11th amendment forbidding suits against States by individuals,¹³ the judicial power extends only to suits against them by other States, domestic or foreign, and to suits by them against other States, domestic or foreign, and their citizens or subjects. In all cases the jurisdiction is original in the Supreme Court. A State cannot there sue its own citizens,¹⁴ and if they be necessary parties to a suit otherwise cognizable, the jurisdiction is ousted.¹⁵ Suits between States have been principally over boundaries, as to which the jurisdiction is well settled,¹⁶ though recent cases have sometimes been instituted in an attempt to protect private rights,¹⁷ or to protect the public health against sanitary works in another State,¹⁸ or to restrain the diversion of the waters of an interstate river.¹⁹ Federal jurisdiction is not extended to "all" controversies between States, although none are in terms excluded.²⁰ But political questions and all questions which on the settled principles of public law are not cognizable in courts of justice are not justiciable as controversies between States.¹ The controversy must be one directly between two States involving state property, or powers, and not an attempt to protect private contract rights, e. g., by assuming the prosecution of debts owing by de-

¹⁰Smith v. Rackliffe, 87 Fed. 964, 31 C. C. A. 328, Affirmed, Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919.

¹¹State of Missouri v. Bowles Mill Co. 80 Fed. 161.

¹²Hans v. Louisiana, 134 U. S. 14, 16-21, 33 L. ed. 845, 849, 10 Sup. Ct. Rep. 507; Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. Rep. 923, 44 L. ed. 1140.

¹³Post, § 7.

¹⁴California v. Southern Pac. R. R. 157 U. S. 258, 39 L. ed. 694, 15 Sup. Ct. Rep. 603; Pennsylvania v. Quick-silver Co. 10 Wall. 556, 19 L. ed. 998.

¹⁵Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308.

¹⁶New Jersey v. New York, 5 Pet. 290, 8 L. ed. 127; Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1234; Alabama v. Georgia, 23 How. 510, 16 L. ed. 559; Iowa v. Illinois, 202 U. S. 59, 50 L. ed. 934, 26 Sup. Ct. Rep. 571; Louisiana v. Mississippi, 202 U. S. 1, 58, 50 L. ed. 913, 934,

26 Sup. Ct. Rep. 408, 571; Virginia v. Tennessee, 148 U. S. 504, 37 L. ed. 537, 13 Sup. Ct. Rep. 728. A controversy over boundary exists where a dispute is between two States as to the enforcement of the oyster legislation of one of them in certain waters. Louisiana v. Mississippi, 202 U. S. 1, 58, 50 L. ed. 913, 934, 26 Sup. Ct. Rep. 408, 571.

¹⁷Louisiana v. Texas, 176 U. S. 23, 44 L. ed. 356, 20 Sup. Ct. Rep. 251; New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176.

¹⁸Missouri v. Illinois, 180 U. S. 241, 45 L. ed. 512, 21 Sup. Ct. Rep. 331.

¹⁹Kansas v. Colorado, 185 U. S. 142, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782.

²⁰Rhode Island v. Massachusetts, 12 Pet. 721, 9 L. ed. 1233.

¹Louisiana v. Texas, 176 U. S. 23, 44 L. ed. 356, 20 Sup. Ct. Rep. 251; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504.

defendant State to citizens of the plaintiff State.² Controversies *ex contractu*, between States are necessarily rare and where tortious action by a State is alleged it has been said it must appear to be the action of the State and not merely of an officer in the maladministration of its laws.³ Thus where the tort committed was that of officers in the malevolent misapplication of the quarantine laws of Texas the State injured was held not entitled to relief against the State of Texas as such; but where the injury alleged was to the health of the people in an adjoining State, by the action of a sanitary district acting as agent of the State government and according to lawful authority, the tort was held that of the State.⁴ "It would be objectionable and indeed impossible for the court to anticipate by definition" what controversies can and what cannot be brought under this provision.⁵ Torts affecting the public health against which other relief would be inadequate, and torts affecting the public property of a State probably constitute the chief justiciable controversies. Absence of other adequate relief and ability to make an effective decree in case jurisdiction is entertained are important and often controlling factors.

[o] Suits by State against citizens of another State, etc., or arising under Federal laws.

Suits against citizens of other States in the Federal court have been infrequent. Ordinarily a State would proceed in its own courts where defendant was within its jurisdiction, since the right to do so is not ousted by the grant of Federal jurisdiction;⁷ and actionable controversies against a non-resident for injuries to the State as such, do not often arise. The cases in which jurisdiction has been sustained under this clause have been mainly for the protection of State property rights.⁸ The jurisdiction is confined to civil causes and this grant of judicial power does not authorize the Supreme Court to administer the penal laws of a State. Hence a suit against a foreign insurance company to enforce payment of a penalty for violation of its municipal laws, cannot be entertained under this section.⁹ In one or two cases in which a State has brought proceedings against a sister State, members of the court have intimated that citizens or municipal districts of the defendant States would have been the proper defendant.¹⁰ The removal acts have never permitted the removal of a cause because

²New Hampshire v. Louisiana, 108 U. S. 91, 27 L. ed. 662, 2 Sup. Ct. Rep. 184.

³Louisiana v. Texas, 176 U. S. 23, 44 L. ed. 356, 20 Sup. Ct. Rep. 258.

⁴Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 498, 21 Sup. Ct. Rep. 344.

⁵Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 343, 344. Costs may be decreed against the losing State in litigation with another State. Missouri v. Illinois, 202 U. S. 598, 50 L. ed. 1160, 26 Sup. Ct. Rep. 713.

⁷Plaquemines, etc. Co. v. Hender-

son, 170, U. S. 521, 42 L. ed. 1126, 18 Sup. Ct. Rep. 685.

⁸Pennsylvania v. Wheeling Bridge Co. 13 How. 518, 14 L. ed. 249; Texas v. White, 7 Wall. 700, 19 L. ed. 227; Florida v. Anderson, 91 U. S. 667, 23 L. ed. 290; Alabama v. Burr, 115 U. S. 413, 29 L. ed. 435, 6 Sup. Ct. Rep. 81.

⁹Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. Such suits must be brought in State court. Postal, etc. Co. v. Alabama, 155 U. S. 487, 39 L. ed. 231, 15 Sup. Ct. Rep. 192.

¹⁰See Louisiana v. Texas, 176 U.

between a State and citizens of another State or aliens, but the act of 1875 permitting removal of causes arising under the Federal constitution, laws or treaties, was held to include suits brought by a State where such a question was involved.¹¹ The fact that the Supreme Court has original jurisdiction where a State is a party does not prevent Congress conferring also appellate jurisdiction,¹² and the principle forbidding suits against a State though arising under the Federal Constitution and laws,¹³ does not apply to suits by a State.

[p] Procedure in suits affecting States.

Rule 5 of the Supreme Court provides for service of process against States.¹⁶ Early cases held that a State might properly sue by the governor in behalf of the State.¹⁷ But the practice now is for the State to sue as such, by its Attorney General.¹⁸ In one case an authority and ratification by the governor, of the solicitor's action in filing a bill, was filed in the Supreme Court.¹⁹ Filing of demurrer signed by A. B., "Attorney General of New York," is an appearance by the State.²⁰ Subpoena has issued to be served sixty days before the return day.¹ In boundary cases the chancery practice prevails, but technical principles of pleading may be disregarded.² Disputed matters of fact and the proper location of the boundary when settled, are adjusted through the appointment of commissioners.³

[q] Suits between citizens of different States and aliens.

This jurisdiction was conferred on the Federal courts to secure an impartial tribunal for settlement of such controversies.⁸ Congress has vested the jurisdiction principally in the circuit court, both original, and on removal from State courts.⁹ Certain general principles, however, growing out of this grant of Federal judicial power, may appropriately be considered here. It is apparent from the wording of the constitutional provision that controversies merely between two or more aliens are not of Federal cog-

S. 23, 44 L. ed. 356, 20 Sup. Ct. Rep. 251; *Missouri v. Illinois*, 180 U. S. 241, 45 L. ed. 512, 21 Sup. Ct. Rep. 331.

¹¹*Railroad Co. v. Mississippi*, 102 U. S. 141, 26 L. ed. 96; *Ames v. Kansas*, 111 U. S. 472, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Southern Pac. R. R. v. California*, 118 U. S. 112, 30 L. ed. 104, 6 Sup. Ct. Rep. 994; *Arkansas v. Kansas*, etc. Co. 96 Fed. 355. See post, § 133.

¹²See post, § 36.[a]

¹³See post, § 7, note.[c]

¹⁶See post, § 858.

¹⁷*Georgia v. Brailsford*, 2 Dall. 402, 1 L. ed. 433; *Kentucky v. Dennison*, 24 How. 97, 16 L. ed. 717.

¹⁸See *Minnesota v. Northern Sec.*

Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308.

¹⁹*Texas v. White*, 7 Wall. 719, 19 L. ed. 227; so governor may engage counsel in re Paschal, 10 Wall. 493, 19 L. ed. 992.

²⁰*New Jersey v. New York*, 6 Pet. 327, 8 L. ed. 414.

¹*Grayson v. Virginia*, 3 Dall. 321, 1 L. ed. 619.

²*Rhode Island v. Massachusetts*, 14 Pet. 257, 10 L. ed. 423.

³*Fowler v. Lindsey*, 3 Dall. 413, 1 L. ed. 658; *Missouri v. Iowa*, 7 How. 667, 12 L. ed. 861.

⁸*Barrow S. S. Co. v. Kane*, 170 U. S. 111, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

⁹Post, §§ 131, 134.

nizance.¹⁰ A territory is not a State within this provision and its citizens cannot sue, or be sued by, citizens of States or aliens under this grant of judicial power.¹¹ Nor is a State a citizen within this provision.¹² Federal jurisdiction fails where all the parties on one side of the controversy have not a right by diverse citizenship or alienage, to sue all the parties on the other side.¹³ To protect defendants properly entitled to a removal from State to Federal court against devices to defeat the right by joinder of other parties under this principle, Congress has provided a right of removal where a case contains a controversy between citizens of different states or aliens, which is separable from other issues in the cause.¹⁴ To this end also, the courts will not permit a right of removal to be defeated by the joinder of nominal or unnecessary parties;¹⁵ but will rearrange the parties according to their interest, in determining the right to removal.¹⁶ They will also entertain jurisdiction originally when the joinder of proper, but not necessary, parties would defeat it.¹⁷

[r]—suits by assignee and transfers to give jurisdiction.

From the first, Congress has legislated to prevent undue enlargement of Federal jurisdiction through the device of assignments made to parties who having the requisite diverse citizenship could sue in the Federal court.¹⁹

[s]—representative parties and real party in interest.

Another settled principle in the construction of the grant of jurisdiction for diverse citizenship or alienage, is that where a nominal plaintiff is made by law the conduit through whom the real complainant seeks relief, the latter is regarded as the real party for jurisdictional purposes.¹ But this principle is not to be confused with another, equally well settled, that the courts look to the citizenship of the party in whom the cause of action is vested and not to the status of his predecessor in interest or

¹⁰*Mossman v. Higginson*, 4 Dall. 14, 1 L. ed. 720; *Montalet v. Murray*, 4 Cranch, 47, 2 L. ed. 545.

¹¹*Hepburn v. Ellzey*, 2 Cranch, 453, 2 L. ed. 332; *New Orleans v. Winter*, 1 Wheat. 94, 4 L. ed. 44; *Cameron v. Hodges*, 127 U. S. 325, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154; *Hool v. Jamieson*, 166 U. S. 397, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596; *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Weller v. Hanaur*, 105 Fed. 193.

¹²*Stone v. South Carolina*, 117 U. S. 433, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Missouri, etc. R. R. v. Missouri, etc. Comrs.* 183 U. S. 58, 46 L. ed. 78, 22 Sup. Ct. Rep. 18; *Arkansas v. Kansas, etc. Co.* 183 U. S. 188, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.

¹³*Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. ed. 435; *New Orleans v. Winter*, 1 Wheat. 95, 4 L. ed. 44;

Hool v. Jamieson, 166 U. S. 397, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596.

¹⁴*Post*, § 135.

¹⁵*Wood v. Davis*, 18 How. 469, 15 L. ed. 460; *Bacon v. Rives*, 106 U. S. 104, 27 L. ed. 69, 1 Sup. Ct. Rep. 3; *Einstein v. Georgia, etc. Ry.* 120 Fed. 1008.

¹⁶*Harter v. Kernochan*, 103 U. S. 566, 567, 26 L. ed. 411; *Carson v. Hyatt*, 118 U. S. 279, 30 L. ed. 167; *Evers v. Watson*, 156 U. S. 532, 39 L. ed. 520, 15 Sup. Ct. Rep. 430.

¹⁷*Cameron v. McRoberts*, 3 Wheat. 594, 4 L. ed. 467; *Vattier v. Hinde*, 7 Pet. 263, 8 L. ed. 675; *Horn v. Lockhart*, 17 Wall. 579, 21 L. ed. 657; *Hotel Co. v. Wade*, 97 U. S. 20, 24 L. ed. 917; *Delaware, etc. R. R. v. Frank*, 110 Fed. 689.

¹⁹See *post*, § 23.

¹*Irvine v. Lowry*, 14 Pet. 300, 10

those beneficially interested.² Thus the citizenship of an executor or administrator controls, regardless of the citizenship of decedent;³ and the citizenship of a trustee, regardless of the beneficiaries.⁴ In the case of a guardian suing for an infant or for an insane person, or of an infant suing by his next friend, the question in whom the right of action is vested, controls. If it is vested in the guardian, his citizenship is decisive,⁵ but if he merely sues in the ward's name,⁶ or if an infant sues by his next friend⁷ the citizenship of the ward or infant controls.

[t]—citizenship of corporations, partnerships and associations.

After some vacillation in early cases, the rule finally became and is now well established that, for jurisdictional purposes, a corporation is a citizen of the State of its incorporation and its stockholders are conclusively presumed citizens of such State,¹⁰ though there is otherwise no legal presumption that a corporation's president is a citizen of the same State.¹¹ The presumption of uniform citizenship is not extended to unincorporated associations, joint stock companies, or partnerships and the actual citizenship of members thereof controls.¹² State laws requiring foreign corporations to file their articles of incorporation, even though adopting them as domestic corporations upon compliance with this requirement, do not deprive such foreign corporations of their original citizenship for jurisdictional purposes.¹³ A corporation which goes into another State and obtains a charter there remains for Federal jurisdictional

L. ed. 462; *Coal Co. v. Blatchford*, 11 Wall. 177, 20 L. ed. 179; *Maryland v. Baldwin*, 112 U. S. 491, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; *Stewart v. Baltimore, etc. R. R.* 168 U. S. 449, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Williams v. Ritchey*, 3 Dill. 406, Fed. Cas. No. 17,734; *Jack v. Williams*, 113 Fed. 823; *Cincinnati, etc. R. Co. v. Thiebaud*, 114 Fed. 918, 52 C. C. A. 538; *Bishop v. Boston, etc. R. R.* 117 Fed. 771; *Franklin v. Conrad-S. Co.* 137 Fed. 737, 70 C. C. A. 171.

²*Knapp v. Railroad Co.* 20 Wall. 124, 22 L. ed. 328.

³*Chappedelaine v. Dechenaux*, 4 Cranch 308, 2 L. ed. 629; *Mexican, etc. R. R. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 213; *New Orleans v. Gaines*, 138 U. S. 606, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; *Dodge v. Perkins*, 4 Mason, 435 Fed. Cas. No. 3,954.

⁴*Dodge v. Tulleys*, 144 U. S. 455, 456, 36 L. ed. 501, 12 Sup. Ct. Rep. 728.

⁵*Mexican, etc. R. R. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211.

⁶*Stout v. Rigney*, 107 Fed. 545, 46

C. C. A. 459. See *Toledo T. Co. v. Cameron*, 137 Fed. 48, 69 C. C. A. 28.

⁷*Williams v. Ritchey*, 3 Dill. 406, Fed. Cas. No. 17,734; *Toledo T. Co. v. Cameron*, 137 Fed. 48, 69 C. C. A. 28.

¹⁰*Louisville, etc. R. R. v. Letson*, 2 How. 555, 558, 11 L. ed. 353; *Railroad Co. v. Koontz*, 104 U. S. 12, 26 L. ed. 643; *St. Louis, etc. Ry. v. James*, 161 U. S. 562, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Barrow S. S. Co. v. Kane*, 170 U. S. 106, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

¹¹*Utah-Nevada Co. v. De Lamar*, 133 Fed. 113, 66 C. C. A. 179.

¹²*Great Southern, etc. Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426. See *Fred Macey Co. v. Macey*, 135 Fed. 725, 68 C. C. A. 363, holding Michigan organization a partnership; and *Derk, etc. Co. v. Charles, etc. Agency*, 135 Fed. 613, holding citizenship of partners sufficiently alleged.

¹³*Railway Co. v. Whitton*, 13 Wall. 285, 20 L. ed. 571; *Pennsylvania R.*

purposes a citizen of the State of its original corporation. It can neither sue nor be sued in the Federal courts as a citizen of the second State.¹⁴ If it comes into court alleging its incorporation in both States it cannot maintain suit against a citizen or other corporation of either State, since such a pleading is deemed to show a joinder of two plaintiffs who are citizens of two different States.¹⁵ A consolidation of two corporations works a dissolution of the original concerns and creates a new corporation,¹⁶ unless the legislature otherwise intend.¹⁷ The citizenship of the new company is that of the State first granting it a charter.¹⁸

[u] Change of status after suit brought and to confer jurisdiction.

The status of the party at the time suit is brought, and not before¹ or afterwards, governs;² hence Federal jurisdiction can neither be divested³ nor conferred⁴ by a change of citizenship pending suit. Moreover if jurisdiction properly attached when suit was brought, a change in parties, such as the substitution of the administrator of a deceased party, will not oust it;⁵ nor will the fact that the party originally bringing suit has ceased to take an active part therein.⁶ It has been held that in the absence of objection to the jurisdiction it is sufficient if it existed at the time judgment was entered.⁷ It has also been decided that a voluntary transfer of plaintiff's interest to one whose citizenship does not entitle to a Federal tribunal, will not oust the jurisdiction after it has properly attached.⁸ The fact that a party changes his domicile prior to suit, though with the express purpose of acquiring a right to sue in the Federal court,

Co. v. St. Louis, etc. R. R. 118 U. S. 297, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; St. Louis, etc. Ry. v. James, 161 U. S. 566, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; St. Joseph, etc. R. R. v. Steele, 167 U. S. 663, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; Southern Ry. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713.

¹⁴Louisville, etc. Ry. v. Louisville Trust Co. 174 U. S. 563, 43 L. ed. 1081, 19 Sup. Ct. Rep. 821, and cases cited; Walters v. Chicago, etc. R. R. 104 Fed. 377; Freeman v. Amer. Sur. Co. 116 Fed. 548.

¹⁵Ohio, etc. R. R. v. Wheeler, 1 Black. 297, 298, 17 L. ed. 130; Louisville, etc. Ry. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 821.

¹⁶Clearwater v. Meredith, 1 Wall. 40, 17 L. ed. 604; Shields v. Ohio, 95 U. S. 325, 24 L. ed. 357.

¹⁷Central R. R. v. Georgia, 92 U. S. 670, 23 L. ed. 757.

¹⁸Westheider v. Wabash R. R. 115 Fed. 841.

¹Noyes v. Crawford, 134 Fed. 796.

²Connolly v. Taylor, 2 Pet. 565, 7 L. ed. 518; Colorado, etc. Min. Co. v. Turck, 150 U. S. 144, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

³Mollan v. Torrance, 9 Wheat. 539, 6 L. ed. 154; Morgan v. Morgan, 2 Wheat. 297, 4 L. ed. 242; Dunn v. Clarke, 8 Pet. 3, 8 L. ed. 845; Collins v. City of Ashland, 112 Fed. 175.

⁴Connolly v. Taylor, 2 Pet. 565, 7 L. ed. 518; Gibson v. Bruce, 108 U. S. 563, 27 L. ed. 826, 2 Sup. Ct. Rep. 873.

⁵Clarke v. Matthewson, 12 Pet. 171, 9 L. ed. 1041; Hemingway v. Stansell, 106 U. S. 402, 27 L. ed. 245, 1 Sup. Ct. Rep. 473; Hardenbergh v. Ray, 151 U. S. 118, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; Whyte v. Gibbs, 20 How. 542, 15 L. ed. 1016.

⁶Washington, etc. Ry. v. Coeur D'Alene Ry. 160 U. S. 94, 40 L. ed. 346, 16 Sup. Ct. Rep. 231.

⁷Pacific R. R. v. Ketchum, 101 U. S. 298, 25 L. ed. 932.

⁸Glover v. Shepperd, 21 Fed. 481; Ross v. City of Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288; Jarboe v. Tem-

does not defeat that right if the change is bona fide.⁹ The wife's domicile for jurisdictional purposes is presumed to be that of her husband though in fact she reside elsewhere.¹⁰

[v] — intervenors and cross complainants.

The general rule that intervenors in a case where jurisdiction depends on diverse citizenship or alienage, must themselves have the necessary diverse citizenship,¹⁴ is subject to important exceptions. When the Federal court has acquired a jurisdiction over the subject matter of the litigation either because in possession of its officers, or otherwise, of such a nature that no State court could properly entertain jurisdiction over the same, it is obvious that justice might be thwarted unless third persons asserting rights in that subject matter were permitted to appear and protect them.¹⁵ In such cases diverse citizenship of the intervenor need not appear and his application is regarded as ancillary to the main suit.¹⁶ Thus in foreclosure proceedings brought by certain bondholders for themselves and others, or in other proceedings to enforce a lien, and in creditors' suits to reach assets, other bondholders and other creditors may come in regardless of their citizenship.¹⁷ So where property has been attached, a third person may intervene to protect his rights.¹⁸ The principle applies also to a cross bill or complaint filed by a defendant in the original bill. If he seeks affirmative relief respecting the property which has come within the court's exclusive custody, e. g. to foreclose an asserted lien of his own, or to cancel the plaintiff's claim, he may do so and join other par-

pler, 38 Fed. 217; but see *Adams Exp. Co. v. Denver*, etc. Ry. 16 Fed. 717,⁴ *McCrary*, 77.

⁹ *Morris v. Gilmer*, 129 U. S. 328, 32 L. ed. 690, 9 Sup. Ct. Rep. 289. See also post, § 23.

¹⁰ *Thompson v. Stalman*, 139 Fed. 93.

¹⁴ *Clyde v. Richmond*, etc. R. R. 65 Fed. 336; *Forest Oil Co. v. Crawford*, 101 Fed. 849, 42 C. C. A. 54; *Rouse v. Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *United, etc. Co. v. Louisiana*, etc. Co. 68 Fed. 673.

¹⁵ *Conwell v. White*, etc. Canal Co. 4 Biss. 195, Fed. Cas. No. 3,148; *Henderson v. Goode*, 49 Fed. 887; *United, etc. Co. v. Louisiana*, etc. Co. 68 Fed. 673.

¹⁶ *Stewart v. Dunham*, 115 U. S. 61, 115 L. ed. 329, 5 Sup. Ct. Rep. 1164; *Rouse v. Letcher*, 156 U. S. 49, 39 L. ed. 342, 15 Sup. St. Rep. 266; *Sioux City, etc. Co. v. Trust Co. of North America*, 82 Fed. 128, 27 C. C. A. 73; *Rice v. Durham Water Co.* 91 Fed. 433; *Park v. New York*, etc. R. R. 70 Fed. 641. See *Society of*

Shakers v. Watson, 68 Fed. 736, 15 C. C. A. 632; *Clarke v. Eureka Co. Bank*, 116 Fed. 534, and *Everett v. School Dist.* 102 Fed. 529, where the principle is more broadly stated.

¹⁷ *Galveston, etc. R. R. v. Cowdery*, 11 Wall. 478, 20 L. ed. 205; *Chicago, etc. R. R. v. Union, etc. Co.* 109 U. S. 717, 718, 27 L. ed. 1081, 3 Sup. Ct. Rep. 594; *Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1164; *Lilienthal v. McCormick*, 117 Fed. 89, 54 C. C. A. 475; *McBee v. Marietta*, etc. R. R. 48 Fed. 247; *Central Trust Co. v. Bridges*, 57 Fed. 762, 6 C. C. A. 539; *Osborne v. Barge*, 30 Fed. 806; *Forbes v. Memphis*, etc. R. R. 2 Woods, 323, Fed. Cas. No. 4,926; *Belmont Nail Co. v. Columbia, etc. Co.* 46 Fed. 336. But it has been otherwise held where all bondholders were necessary parties. See *Mangels v. Donau*, etc. Co. 53 Fed. 513; *Tug River Co. v. Brigel*, 67 Fed. 625, 14 C. C. A. 577.

¹⁸ *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Raisin v. Statham*, 22 Fed. 146.

ties who have not the requisite diverse citizenship, without ousting the jurisdiction that originally attached.¹⁹ And the cross bill may be retained where independent relief is prayed, though the original bill be dismissed.²⁰ The right to a hearing in the court having possession of the res, may be asserted by the ordinary bill of intervention, or by cross bill of original defendants or by a bill in the nature of an original bill. The form of pleading is immaterial if the court proceed upon it in connection with the other pleadings respecting the property before the court.¹ Bills which would be deemed original under ordinary rules of equity pleading are not so regarded by the Federal courts in proceedings of this sort.² The principle of these cases merges itself in the broader subject of the ancillary jurisdiction of the Federal courts.³

[w] Probate jurisdiction resulting from diverse citizenship.

The Federal courts have no probate jurisdiction, at least, in so far as probate is an *ex parte* proceeding.⁸ But as they have jurisdiction of "controversies" between citizens of different States and aliens, it follows that if such a controversy arises in the course of probate proceedings it is justiciable in the Federal courts.⁹ Accordingly they may take jurisdiction of a suit against an administrator to establish a claim against the estate;¹⁰

¹⁹*Morgan, etc. Co. v. Texas, etc. Ry.* 137 U. S. 171, 201, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Chicago, etc. R. v. Third Nat. Bank*, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Toledo, etc. R. v. Continental Trust Co.* 95 Fed. 504, 36 C. C. A. 155; *Springfield, etc. Co. v. Barnard Co.* 81 Fed. 264, 26 C. C. A. 389; *Schenck v. Peay, Woolw.* 175, Fed. Cas. No. 12,450; *First Nat. Bank v. Salem, etc. Co.* 31 Fed. 583, 12 Sawy. 485, 496; *Jesup v. Illinois Cent. R. R.* 43 Fed. 496; *Mercantile Trust Co. v. Atlantic & P. R. R.* 70 Fed. 518.

²⁰*Barnard v. Hartford, etc. R. R.* Fed. Cas. 1,003; *Jesup v. Illinois Cent. R. R.* 43 Fed. 496; *Railroad Co. v. Chamberlain*, 6 Wall. 748, 18 L. ed. 859. See *Kromer v. Everett Imp. Co.* 110 Fed. 22, where proceedings in intervention were dismissed after dismissal of original cause. See also post, § 963.

¹*Morgans, etc. Co. v. Texas, etc. Ry.* 137 U. S. 201, 34 L. ed. 636, 11 Sup. Ct. Rep. 71; *Rouse v. Letcher*, 156 U. S. 48, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; *Compton v. Jesup*, 68 Fed. 263, 281, 15 C. C. A. 397; *Lumley v. Wabash R. Co.* 76 Fed. 66, 22 C. C. A. 60; *Blake v. Coal Co.* 84 Fed. 1014, 28 C. C. A. 678; *Conti-*

mental, etc. Co. v. Toledo, etc. R. R. 87 Fed. 133, 32 C. C. A. 44, s. c. on appeal, 95 Feu. 504, 505, 36 C. C. A. 155; *Caray v. Houston, etc. Ry.* 52 Fed. 674; *Fish v. Ogdensburgh, etc. R. R.* 79 Fed. 131.

²*Minnesota Co. v. St. Paul Co.* 2 Wall. 633, 17 L. ed. 895; *Schenck v. Peay, Woolw.* 175, Fed. Cas. No. 12,450.

³Post, § 3.

⁸*Fouvergne v. New Orleans*, 18 How. 473, 15 L. ed. 399; *Gaines v. Fuentes*, 92 U. S. 21, 23 L. ed. 524; *Byers v. McAuley*, 149 U. S. 619, 620, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Clark v. Guy*, 114 Fed. 783.

⁹*Everhart v. Everhart*, 34 Fed. 82; *Brodhead v. Shoemaker*, 44 Fed. 518, 11 L.R.A. 567; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; *Kirby v. Chicago, etc. R. R. Co.* 106 Fed. 551.

¹⁰*Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Alice E. M. Co. v. Blanden*, 136 Fed. 252. The right to sue to establish a claim has been held to be confined to cases where some special equitable feature and necessity exist. *Schurmeier v. Conn. etc. Ins. Co.* 137 Fed. 47, 69 C. C. A. 22.

or to obtain payment.¹¹ Proceedings for the probate of a will are merely *ex parte* and not a suit or controversy.¹² And a contest prior to probate has been held not Federally cognizable.¹³ It is also decided that proceedings to set aside the probate of a will or the issue of letters of administration on the ground of fraud is not a proper subject for equitable relief, and Federal jurisdiction has accordingly been denied.¹⁴ But a suit to set aside a will is a controversy justiciable in the Federal courts at the suit of a citizen of another State or alien.¹⁵ In general, it seems to be settled that a Federal court may take jurisdiction in equity where diverse citizenship exists, whenever by established Federal equity principles, a creditor or other party interested in the probate proceedings would have a right to resort to a court of equity for the protection or enforcement of some right.¹⁶ The fact that the State provides a method for relief in the probate court cannot affect this right, provided it is in fact of an equitable nature. Hence a distributee may sue the administrator in a Federal court where citizenship is diverse upon allegations of fraud and waste, to compel an accounting and for complainants' share of the estate.¹⁷ So a creditor may sue the administrator for discovery of assets.¹⁸ A legatee may sue an executor to compel payment of legacy claimed to be void.¹⁹ Suits for the construction of a will and to have complainant's rights adjudged, have been sustained in the circuit court.²⁰ So, also Federal jurisdiction to set aside a sale of property by a probate court, on the ground of fraud has been upheld.²¹ But a suit to compel the personal representatives to settle a debt of their decedent will not lie in the Federal court where it presents no ground for equitable interference with probate proceedings.¹ Nor will any proceeding be cognizable in the Federal court

¹¹Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377.

¹²In re Cilley, 58 Fed. 977; Wahl v. Franz, 100 Fed. 680, 40 C. C. A. 638.

¹³Copeland v. Benning, 72 Fed. 5. See also Reed v. Reed, 31 Fed. 49; Oakley v. Taylor, 64 Fed. 245.

¹⁴Case of Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Simmons v. Saul, 138 U. S. 459, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

¹⁵Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Ellis v. Davis, 109 U. S. 498, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; Lawrence v. Nelson, 143 U. S. 223, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; Hayes v. Pratt, 147 U. S. 570, 37 L. ed. 279, 13 Sup. Ct. Rep. 503; Everhart v. Everhart, 34 Fed. 82; Williams v. Crabb, 117 Fed. 197, 54 C. C. A. 213, 59 L.R.A. 425; Wart v. Wart, 117 Fed. 766; Richardson v. Green, 61 Fed. 431, 9 C. C. A. 565.

¹⁶See cases supra; also Schurmeier v. Conn. etc. Ins. Co. 137 Fed.

47, 69 C. C. A. 22. In O'Callaghan v. O'Brien, 199 U. S. 110, 50 L. ed. 111, 25 Sup. Ct. Rep. 727, the cases are reviewed at length and the law upon the question of Federal jurisdiction in probate matters is summarized.

¹⁷Payne v. Hook, 7 Wall. 425, 19 L. ed. 261; Pulliam v. Pulliam, 10 Fed. 23; Mayer v. Foulkrod, 4 Wash. C. C. 349, Fed. Cas. No. 9,341; Herron v. Comstock, 139 Fed. 377 (C. C. A.).

¹⁸Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075.

¹⁹Domestic, etc. Church v. Gaither, 62 Fed. 422.

²⁰Toms v. Owen, 52 Fed. 417; Wood v. Paine, 66 Fed. 807. See Central Nat. Bank v. Fitzgerald, 94 Fed. 19.

²¹Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; Arrowsmith v. Gleason, 129 U. S. 99, 32 L. ed. 634, 9 Sup. Ct. Rep. 241.

¹Bedford Quarries Co. v. Thimlinson, 95 Fed. 208, 36 C. C. A. 272.

which would interfere with the State courts' custody of the estate under the rules limiting another court's concurrent jurisdiction of property in custodia legis;² and if a claim established by the Federal court is not paid, the creditor must, at least in the first instance, resort to the State court of probate for relief.³

[x] Suits by land claimants under grants from different States.

The jurisdiction over such suits has been vested in the circuit court both original⁷ and on removal.⁸

[y] Suits affecting foreign States.

The reports contain a few cases in which foreign States have appeared as plaintiffs in the Federal courts under the grant of jurisdiction contained in the Constitution.¹⁰ Suit against a foreign State cannot be maintained as of right in the domestic court, and impleading such State as defendant is a mere invitation to it to come in and litigate.¹¹ In New York the State court has entertained suit by a foreign State.¹²

§ 3. Ancillary jurisdiction of Federal courts.

On grounds of necessity and expediency and to prevent conflicts of jurisdiction^[a] certain causes may be brought in the Federal court if auxiliary to some other case or controversy there pending, though neither diverse citizenship, nor a Federal question capable of sustaining jurisdiction, nor the requisite value in dispute, exists.^[b] If by a receivership, or a suit to enforce a lien or creditors suit, or the like, property has been brought into the custody or under the control of a Federal court in some suit of Federal cognizance,^[c] other claimants and parties in interest are permitted to come into that court and there have their rights adjudicated and enforced, regardless of their citizenship. Proceedings to construe,^[d] or enforce,^[dd] or to set aside and restrain^{[e]-[f]} a Federal judgment or decree, are deemed ancillary and maintainable in the Federal court regardless of ordinary jurisdictional restrictions. The same is true of proceedings to enforce some incidental right arising in a Federal suit, such as a liability on an appeal or attachment bond and the like.^[g] Proceedings to redress some

²See post, § 16, note.

³Thiel Detective Service Co. v. McClure, 130 Fed. 55.

⁷Pawlet v. Clark, 9 Cranch, 323, 3 L. ed. 735. See post, § 131.

⁸Colson v. Lewis, 2 Wheat. 378, 4 L. ed. 266. See post, § 134.

¹⁰The Sapphire, 11 Wall. 164, 20

L. ed. 127; Republic of Colombia v. Cauca Co. 106 Fed. 339; King of Spain v. Oliver, 2 Wash. C. C. 429, Fed. Cas. No. 7,814.

¹¹Manning v. Nicaragua, 14 How. Pr. 517.

¹²Republic of Mexico v. Arrangois, 5 Duer, 634, 11 How. Pr. 576.

abuse or misapplication of a Federal court's process in a suit cognizable in the Federal court, are also within the ancillary rule.^{[b]-[d]} The same considerations which justify the Federal courts in taking cognizance of all such proceedings as ancillary to some other cause, forbid their taking jurisdiction on removal of any similar ancillary proceeding in a State court.^[d] A bill in equity in such ancillary proceeding is not original and substituted service is permissible.^[k] On appeal the jurisdiction is governed by and rested upon the same grounds as the jurisdiction in the original cause.^[j]

Author's Section.

[a] Grounds of the ancillary jurisdiction.

The courts have stated the grounds of the ancillary jurisdiction in a number of cases.²¹ In those cases where the basis of the jurisdiction is property in custody, it would obviously result in conflicts of jurisdiction between State and Federal courts, to deny others interested in such property the right of resort to the court having the property under its control. In the cases where the jurisdiction is founded upon the fact of a Federal judgment or decree and the need for aid in its enforcement, construction or restriction, a denial of the ancillary jurisdiction would give to State tribunals a supervisory power not intended, and deprive Federal courts of the necessary right fully to regulate the course of proceedings before them, secure to a successful party the fruits of his judgment, and protect injured parties against a judgment wrongfully obtained. In cases where the ancillary jurisdiction is exercised over abuses or misapplication of Federal process, it is obvious that it is a mere incident to the power of a court to control its own process. It is amply justifiable upon a consideration of the abuses and conflicts that would result from permitting other courts to interfere.

[b] Regardless of citizenship or amount in controversy.

The jurisdiction depends neither upon the value in dispute nor the existence of a Federal question, nor the citizenship of the parties.¹ It is concerned usually with cases where the jurisdiction originally was based upon the character of the parties. While an auxiliary jurisdiction is frequently exercised by Federal courts in matters essentially of Federal cog-

²¹Krippendorf v. Hyde, 110 U. S. 283, 28 L. ed. 145, 4 Sup. Ct. Rep. 21. See Compton v. Jesup, 68 Fed. 279, 15 C. C. A. 397; Central Trust Co. v. Bridges, 57 Fed. 762, 6 C. C. A. 539; Conwell v. White Water Valley, etc. Co. 4 Biss. 200, Fed. Cas. No. 3,148; Lamb v. Ewing, 54 Fed. 273, 4 C. C. A. 320.

¹Lamb v. Ewing, 54 Fed. 273, 4 C. C. A. 320; Pullman's P. C. Co. v. Washburn, 66 Fed. 794; White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1019; Sullivan v. Barnard, 81 Fed. 886.

nizance such as admiralty and bankruptcy causes, it would not seem to be necessary to justify that jurisdiction under the doctrine here considered.²

[c] Receivership and other foreclosure cases.

Frequent instances of the exercise of ancillary jurisdiction have occurred in railroad foreclosure suits where receivers have been appointed and the various liens and other claims against the property have been litigated.³ The right of other than the original parties, to a hearing continues even after decree in the original cause, so long as the property is still in the court's custody.⁴ If the receiver was first appointed in a suit of general creditors, the court appointing him is the proper one before which foreclosure proceedings should be instituted, regardless of citizenship.⁶ Where the fund for payment of bonds has been realized and is in the court's possession, this warrants an intervening petition before that court to determine rights to the fund.⁷ It is proper also for stockholders in a defendant company, alleging fraud in the foreclosure proceedings to intervene in such a proceeding regardless of citizenship.⁸ In other cases general creditors, bondholders, or mortgagees, of a commercial corporation claimed to be insolvent or to be dissipating its assets have commenced the proceedings, and all the various claimants have resorted to the Federal tribunal regardless of citizenship, to litigate their rights.¹⁰ The fact that a receiver is in possession under direction of a Federal court makes it proper to authorize, as ancillary, proceedings in that court by him for the collection of the assets of the defendant corporation to protect its rights, and generally to accomplish the ends sought and directed by the suit in which he was appointed.¹¹ He is not, however, necessarily entitled to a

²See, however, in re Sabin, 21 Fed. Cas. p. 123, where Federal jurisdiction over a controversy as to a fund in the hands of a bankrupt assignee was justified under the doctrine of the ancillary jurisdiction.

³People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101; Morgan's etc. Co. v. Texas, etc. Ry. 137 U. S. 201, 34 L. ed. 636, 11 Sup. Ct. Rep. 61; Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; Compton v. Jesup, 68 Fed. 279, 15 C. C. A. 397; State Trust Co. v. Kansas, etc. Ry. 115 Fed. 367; Farmers L. & T. Co. v. Lake, etc. R. R. 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; Carey v. Houston, etc. R. R. 52 Fed. 671, 674; Toledo, etc. R. Co. v. Continental Trust Co. 95 Fed. 504, 36 C. C. A. 155; Manhattan Trust Co. v. Sioux City Ry. 76 Fed. 658; Central Trust Co. v. Bridges, 57 Fed. 753, 6 C. C. A. 539; Farmers L. & T. Co. v. Houston, etc. R. R. 44 Fed. 115.

⁴Compton v. Jesup, 68 Fed. 278.

⁶Toledo, etc. R. R. v. Continental, etc. Co. 95 Fed. 497, 36 C. C. A. 155; Fish v. Ogdensburgh, etc. R. R. 79 Fed. 131; Cole v. Philadelphia, etc. Ry. 140 Fed. 944.

⁷Central Trust Co. v. Carter, 78 Fed. 225, 24 C. C. A. 73.

⁸Carey v. Houston, etc. R. R. 52 Fed. 671; Pacific R. R. v. Missouri P. R. R. 111 U. S. 506, 28 L. ed. 504, 4 Sup. Ct. Rep. 583. See also post, under note[e].

¹⁰White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1019; Hollins v. Brierfield Coal, etc. Co. 150 U. S. 379, 37 L. ed. 1114, 14 Sup. Ct. Rep. 127; Ross-Meehan, etc. Co. v. Southern, etc. Co. 72 Fed. 959; Dewey v. West Fairmont, etc. Coal Co. 123 U. S. 329, 31 L. ed. 179, 8 Sup. Ct. Rep. 150; Montgomery v. McDermott. 103 Fed. 801, 42 C. C. A. 348; Central Trust Co. v. United States, etc. Milling Co. 112 Fed. 371.

¹¹Davis v. Gray, 16 Wall. 219, 21 L. ed. 453; White v. Ewing, 159 U. S.

Federal tribunal in prosecuting other suits.¹² Suits against such a receiver growing out of his administration of his trust are ancillary and cognizable in¹³ and removable to¹⁴ the Federal court appointing him regardless of citizenship or amount in controversy.¹⁵

Where jurisdiction was wrongfully taken in the original suit appointing the receiver,¹⁷ or a receiver was improperly appointed *ex parte*, and the order has since been vacated,¹⁸ the ancillary jurisdiction likewise fails. A dismissal of the original cause will prevent jurisdiction of subsequent ancillary proceedings from attaching,¹⁹ but probably will not oust ancillary jurisdiction that has already attached in cases where the subject matter of the controversy is in the court's custody.²⁰ Bank receivers appointed by the comptroller of the currency are not officers of the court nor entitled upon that ground to maintain ancillary proceedings in the Federal court.¹ Ancillary equity proceedings cannot be supported where the attachment issued by creditors at law has not been effective in bringing any specific property within the control of the court.² A bill filed in the court where proceedings for foreclosure on certain notes, are pending, by strangers to the litigation who claim an equitable assignment of such notes, is an original bill and not sustainable as ancillary to the foreclosure case.³ A stockholders' suit five years after settlement of foreclosure litigation cannot be maintained, as ancillary, where it really concerns subsequent dealings between themselves and the company;⁴ and though proceeds of a sale of land to the United States are in custody, a bill to reach them is not an-

36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Pope v. Louisville, etc. R. R.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Miles v. New S. Bldg. & L. Assn.* 95 Fed. 921; *Ex parte Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 787; *Memphis Sav. Bank v. Houchens*, 115 Fed. 96, 52 C. C. A. 176; *Connor v. Alligator, etc. Co.* 98 Fed. 155; *Gunby v. Armstrong*, 133 Fed. 417, 66 C. C. A. 627. See *Bausman v. Denny*, 73 Fed. 69, 70, where the ancillary jurisdiction is explained on other grounds.

¹²*Pope v. Louisville, etc. R. R.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500. See *Gilmore v. Herrick*, 93 Fed. 526, 527. See also post, § 129.

¹³*Rouse v. Letcher*, 156 U. S. 47, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; *Chattanooga, etc. R. R. v. Felton*, 69 Fed. 273; *Washington v. Northern Pac. R. R.* 75 Fed. 333.

¹⁴*Carpenter v. Northern P. R. R.* 75 Fed. 850; *Sullivan v. Barnard*, 81 Fed. 886. But see *Ray v. Pierce*, 81 Fed. 881; *Pitkin v. Cowen*, 91 Fed. 599; and *Gilmore v. Herrick*, 93 Fed. 526, 527.

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¹⁵See *Gilmore v. Herrick*, 93 Fed. 526, 527.

¹⁷*Baltimore, etc. Assn. v. Anderson*, 90 Fed. 146, 32 C. C. A. 542.

¹⁸*Sullivan v. Swain*, 96 Fed. 259.

¹⁹*Cabaniss v. Reco Min. Co.* 116 Fed. 318, 54 C. C. A. 190; in *Kromer v. Everett Imp. Co.* 110 Fed. 22, an intervention was dismissed along with the original controversy, but it does not appear that any property was in the custody of the court.

²⁰At least it has been held that a cross bill may be retained after the original has been dismissed. *Barnard v. Hartford, etc. R. R.* 2 Fed. Cas. 836; *Jesup v. Illinois C. R. R.* 43 Fed. 496; *Railroad Co. v. Chamberlain*, 6 Wall. 748, 18 L. ed. 859.

¹*Follett v. Tillinghast*, 82 Fed. 241. But they are officers of the United States and hence may sue in the circuit court. See post, § 124.

²*Montgomery v. McDermott*, 103 Fed. 801, 813, 42 C. C. A. 348.

³*Christmas v. Russell*, 14 Wall. 69, 20 L. ed. 762.

⁴*Central, etc. Co. v. Farmers' L. & T. Co.* 114 Fed. 263, 52 C. C. A. 149.

illary to a suit at law in which the title was litigated and adjudged to the claimants and against the United States.⁵ A bill to restrain persons from selling stock of a railroad company is not ancillary to a foreclosure suit to which the stockholders were not parties.⁶

[d] Proceedings to construe judgments.

Proceedings to construe a judgment are ancillary and maintainable regardless of citizenship or other grounds of Federal jurisdiction.⁸ A bill by a railroad to have a foreclosure decree of its property construed and its rights thereunder declared, is ancillary to such foreclosure suit.⁹

[dd] Enforcement and revival of judgments.

It is well settled that the jurisdiction of a court does not terminate with the judgment but continues until its satisfaction.¹¹ Proceedings on execution are part of the proceedings in the cause;¹² and actions in aid of execution at law are merely ancillary.¹³ It would be an impairment of a court's jurisdiction to deprive it of power to execute its decrees.¹⁴ It is under this principle that the circuit court's power to issue mandamus chiefly arises. For while the circuit court has no original jurisdiction to issue the writ, it may be issued when ancillary to jurisdiction already acquired;¹⁵ e. g., to compel the funding or payment of a judgment at law by a municipality;¹⁶ to compel a corporation to issue stock certificates to a purchaser at marshal's execution sale.¹⁷ A creditor's bill is properly brought in the circuit court where based on a judgment at law in that court;¹⁸ but not where based on judgment at law in the district court.¹⁹ A bill is maintainable by purchaser at Federal foreclosure sale, to enjoin an improper State court proceeding which would cloud his title,²⁰ or any attack upon

⁵Stillman v. Combe, 197 U. S. 438, 49 L. ed. 822, 25 Sup. Ct. Rep. 480.

⁶Raphael v. Trask, 118 Fed. 777.

⁸Jenks v. Brewster, 96 Fed. 625.

⁹Milwaukee, etc. R. R. v. Soutter, 2 Wall. 632, 17 L. ed. 895.

¹¹Wayman v. Southard, 10 Wheat. 23, 6 L. ed. 253; Campbell v. Hadley, 1 Spr. 470, Fed. Cas. No. 2,358.

¹²Union Bank v. Geary, 5 Pet. 113, 8 L. ed. 60.

¹³United States v. Halstead, 10 Wheat. 64, 6 L. ed. 264; Claffin v. McDermott, 12 Fed. 375, 20 Blatchf. 522.

¹⁴Central Nat. Bank v. Stevens, 169 U. S. 465, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

¹⁵Bath Co. v. Amy, 13 Wall. 249, 250, 20 L. ed. 539; Davenport v. County of Dodge, 105 U. S. 242, 243, 26 L. ed. 1018; Rosenbaum v. Bauer, 120 U. S. 408, 30 L. ed. 743, 7 Sup.

Ct. Rep. 633; Indiana v. Lake Erie, etc. R. R. 85 Fed. 1; Smith v. Bourbon Co. 127 U. S. 112, 32 L. ed. 73, 8 Sup. Ct. Rep. 1043. See also post, § 841.

¹⁶Board of Liquidation v. United States, 108 Fed. 689, 47 C. C. A. 587; Brooks v. Memphis, Fed. Cas. No. 1954; Knox Co. v. Aspinwall, 24 How. 384, 16 L. ed. 738; Riggs v. Johnson Co. 6 Wall. 187, 194, 18 L. ed. 773; Ex parte Flippin, 94 U. S. 350, 24 L. ed. 195.

¹⁷Hair v. Burnell, 106 Fed. 280. See also post, § 841.

¹⁸Babcock v. Millard, 2 Fed. Cas. 299; Hatch v. Dorr, 4 McLean, 112, Fed. Cas. No. 6,206.

¹⁹Winter v. Swinburne, 8 Fed. 50, 10 Biss. 454.

²⁰Julian v. Central T. Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399.

his title based upon alleged irregularity in the foreclosure proceedings.¹ A bill praying that possession of property be delivered up is ancillary to a previous decree quieting complainant's title.³ A cross bill to have a judgment declared a lien on certain property by virtue of a lease which secured such judgment is ancillary to the case in which the judgment was obtained.⁴ A proceeding to satisfy costs recovered in equity, against patent rights of defendant is a mere incident to the original cause.⁵ A bill to revive and continue prior decrees in force is cognizable by the court rendering such decrees regardless of citizenship of parties thereto.⁶ Nor is diverse citizenship requisite in a proceeding to compel payment of a Federal judgment out of a fund made liable therefor by such judgment,⁷ or to subject attached property to a judgment.⁸ In all these cases the proceeding must be in the court rendering the original judgment, in order to be deemed ancillary.⁹

[e] Relief against judgments.

A bill to set aside a decree as fraudulent is maintainable in the circuit court rendering it, regardless of citizenship.¹² A suit to set aside a foreclosure decree and a reorganization plan thereunder, as fraudulent, is cognizable as ancillary to the foreclosure proceedings.¹³ So a suit to set aside a judgment for fraud may be maintained against an assignee of the judgment regardless of citizenship.¹⁴ An ancillary bill to set aside a judgment may be maintained though it has been carried into execution, and the court by its decree will seek to restore the status prior to its rendition.¹⁵ But where defendant in the original cause had died and the suit was not revived, and the bill filed to set aside the former decree in his favor was not against defendant's estate and did not join her personal representatives, it was held not sustainable as ancillary, and dismissed because diverse citizenship did not appear.¹⁶ In proceedings to set aside a decree for fraud the party in whose favor the original decree was rendered should be made a party and given an opportunity to rebut the alleged fraud.¹⁷ A bill to set aside a judgment in partition for irregularity in service of

¹Riverdale, etc. Mills v. Alabama 454; Wheeling v. Mayor, 1 Hughes, G. Co. 198 U. S. 188, 49 L. ed. 1008, 94, Fed. Cas. No. 17,502.
²⁵Sup. Ct. Rep. 629.

³Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 139.

⁴Milwaukee, etc. R. R. v. Ohamberlain, 6 Wall. 750, 18 L. ed. 861.

⁵Maitland v. Gibson, 79 Fed. 136; Wonderly v. Lafayette Co. 77 Fed. 665.

⁶Shainwold v. Lewis, 69 Fed. 494.

⁷City of New Orleans v. Fisher, 180 U. S. 185, 45 L. ed. 485, 21 Sup. Ct. Rep. 347.

⁸Hatcher v. Hendrie, etc. Co. 133 Fed. 267, 68 C. C. A. 19.

⁹Mercantile Trust Co. v. Kana-wha, etc. R. R. 39 Fed. 337; Winter v. Swinburne, 8 Fed. 50, 10 Biss.

454; Wheeling v. Mayor, 1 Hughes, 94, Fed. Cas. No. 17,502.

¹²Richardson v. Loree, 94 Fed. 375, 36 C. C. A. 301.

¹³Carey v. Houston, etc. R. R. 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 541; Pacific R. R. v. Missouri P. R. R. 111 U. S. 522, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Foster v. Mansfield, etc. R. R. 36 Fed. 627, 628; Symmes v. Union T. Co. 60 Fed. 855.

¹⁴O'Brien Co. v. Brown, 1 Dill. 588, Fed. Cas. No. 10,399.

¹⁵Osborn v. Michigan, etc. R. R. 2 Flip. 503, Fed. Cas. No. 10,594.

¹⁶Ralston v. Sharon, 51 Fed. 712.

¹⁷Harwod v. Railroad, 17 Wall. 80, 21 L. ed. 558; Wickliffe v. Eve, 17 How. 470, 15 L. ed. 163.

process and to annul an agreement subsequent to the judgment has been held not maintainable, because adequate remedy existed at law by ejectment.¹⁸ The circuit court rendering a judgment may entertain a suit to impeach same though between two aliens.¹⁹

[f] Injunction against actions at law or other proceedings.

Bills of injunction against judgments in the Federal courts are deemed dependent, and ancillary to the original cause.²⁰ Hence the Federal court rendering judgment in ejectment may entertain a bill to restrain its enforcement as ancillary to the ejectment case;¹ or permit a landlord to come in and open a judgment in ejectment.² So it may entertain bill to enjoin garnishment proceedings on a judgment fraudulently obtained at law, regardless of citizenship;³ to enjoin execution of a judgment on writ of entry;⁴ to enjoin the assignment of a judgment;⁵ to enjoin execution and for permission to intervene in the action at law;⁶ to restrain enforcement of judgment because complainant not properly served;⁷ to prevent marshal's sale on foreclosure.⁸ But where the bill joins many new parties and is not merely to restrain execution, but mainly seeks the establishment of an equitable title it is not sustainable as ancillary.⁹

A bill on the equity side of the court to enjoin the prosecution of actions at law in the same court is ancillary and maintainable regardless of citizenship.¹¹ Ejectment proceedings may be thus enjoined by a bill seeking also the cancellation of certain deeds as a cloud on title.¹² A bill for reformation in equity is ancillary to an action on the law side of the court.¹³ Proceedings on a creditors bill have also been enjoined on an ancillary application.¹⁴ An ancillary bill is maintainable against proceedings in a number of cases at law to prevent multiplicity of suits

¹⁸Yeatman v. Bradford, 44 Fed. 538.

¹⁹Lacassagne v. Chapuis, 144 U. S. 126, 36 L. ed. 368, 12 Sup. Ct. Rep. 659.

²⁰Dunlap v. Stetson, 4 Mason, 349, Fed. Cas. No. 4,164; Krippendorf v. Hyde, 110 U. S. 285, 28 L. ed. 147, 4 Sup. Ct. Rep. 27; Sims v Guthrie, 9 Cranch, 25, 3 L. ed. 642; DeViginer v. New Orleans, 16 Fed. 11, 4 Woods, 206.

¹Johnson v. Christian, 125 U. S. 646, 31 L. ed. 821, 8 Sup. Ct. Rep. 1135; Webb v. Barnwall, 116 U. S. 193, 29 L. ed. 595, 6 Sup. Ct. Rep. 350; Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845.

²King v. Davis, 137 Fed. 198.

³Jones v. Andrews, 10 Wall. 333, 19 L. ed. 935.

⁴Dunlap v. Stetson, 4 Mason, 349, Fed. Cas. No. 4,164.

⁵Thompson v. McReynolds, 29 Fed. 657.

⁶McDonald v. Seligman, 81 Fed. 753.

⁷Brown v. Walker, 84 Fed. 532.

⁸Broadis v. Broadis, 86 Fed. 951, 954.

⁹Sterling v. Barnwall, 12 Fed. 324.

¹¹Cortes Co. v. Thannhauser, 9 Fed. 227, 20 Blatchf. 59; Hauf v. Wilson, 31 Fed. 384; Widaman v. Hubbard, 88 Fed. 806, 812; St. Lukes Hospital v. Barclay, 3 Blatchf. 259, Fed. Cas. No. 12,241; South P. O. Co. v. Calf Creek, etc. Co. 140 Fed. 507; Campbell v. Golden M. Co. 141 Fed. 610.

¹²Smythe v. Henry, 41 Fed. 705, 713.

¹³Rosenbaum v. Council, etc. Ins. Co. 37 Fed. 728.

¹⁴Bradshaw v. Miners' Bank, 81 Fed. 902, 26 C. C. A. 673.

where the defense in all was the same and the interest of all a common one.¹⁵

[g] Enforcement of liability on bond given in original cause.

An action on an undertaking given to stay proceedings pending motion for new trial, is ancillary and cognizable by the court in which the cause was pending.¹ The Federal court will entertain ancillary jurisdiction regardless of citizenship, in an action on an appeal bond given therein;² on a bond staying execution;³ on the statutory liability of the endorser of a writ issued by such court;⁴ on a replevin bond;⁵ on an attachment bond;⁶ and on a forthcoming bond given in attachment proceedings.⁷

[h] Proceedings to redress abuse or⁸ misapplication of Federal court's process.

The leading case upon this branch of the ancillary jurisdiction, was concerned with a conflict between State and Federal courts growing out of a Federal attachment claimed to be wrongful, and against which relief was sought in the State court. That case laid down the principle that a bill filed on the equity side of the Federal court to prevent injustice or an inequitable advantage under its mesne or final process is not original but ancillary, and that such a bill was the proper way for a claimant of property attached by the marshal on process from the circuit court to establish his right.¹⁰ It is not proper for State court to attempt to replevy property held by the marshal either under attachment or execution.¹¹ Later cases have also recognized the propriety of other proceedings less formal than bill in equity,¹² such as petition of intervention, motions supported by affidavits, and interpleaders at law.¹³ If the claimant proceed by bill in equity, appeal and not writ of error is the proper mode for obtaining a review.¹⁴ The attachment laws of many States provide a summary mode for determining claims to attached property and the Federal courts usually follow such practice and afford ancillary relief in the mode prescribed by the local law and re-

¹⁵Virginia-Carolina Chem. Co. v. Home Ins. Co. 113 Fed. 1, 51 C. C. A. 21, 126 Fed. 1002, 1003.

¹Merchants, etc. Bank v. Leland, 38 How. Pr. 31, Fed. Cas. No. 9,452.

²Arnold v. Frost, 9 Ben. 267, Fed. Cas. No. 558; Seymour v. Phillips, 7 Biss. 460, Fed. Cas. No. 12,689.

³Lamb v. Ewing, 54 Fed. 269, 4 C. C. A. 320.

⁴Pullman's P. C. Co. v. Washburn, 66 Fed. 790.

⁵Patterson v. Mather, 26 Fed. 31.

⁶Files v. Davis, 118 Fed. 465.

⁷Reilly v. Golding, 10 Wall, 56, 19 L. ed. 858.

¹⁰Freeman v. Howe, 24 How. 450, 16 L. ed. 749, 752.

¹¹Freeman v. Howe, 24 How. 450, 16 L. ed. 749, 752; Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

¹²Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27.

¹³Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1129, 5 Sup. Ct. Rep. 616; S. C. on second appeal, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 383. In an early case replevin in the circuit court was deemed a proper proceeding. Maddux v. Usher, 2 Hask. 261, Fed. Cas. No. 8,936.

¹⁴Brochon v. Wilson, 91 Fed. 619, 34 C. C. A. 31.

gardless of citizenship of the parties.¹⁵ Where a circuit court judgment was reversed by the Supreme Court for want of jurisdiction, it has been held that the former might decree restitution of the property taken under execution on such judgment prior to appeal, regardless of the want of jurisdiction.¹⁶

The reports also contain other instances of the ancillary Federal jurisdiction respecting process of the court and its satisfaction. An ancillary bill to restrain further prosecution of garnishment proceedings has been upheld;¹ also to restrain a marshal from using papers seized illegally upon replevin and to compel him to return them.² Judgment entered on motion against the marshal for execution money not paid over, has been sustained.³ So where corporate stock was about to be sold on execution by the marshal, it has been held that a litigant from a State court might maintain a bill in the circuit court to protect his rights by preventing the threatened sale.⁴

[i] Independent action against marshal for abuse of process.

The exclusive jurisdiction of the Federal court prevents replevin in the State court for property seized by the marshal, but not an action of trespass, since that does not affect the possession of the property;⁵ nor does it prevent an action on the marshal's bond.⁷

[j] Ancillary matters in State court not removable.

It results from the doctrine of the ancillary nature of proceedings to try claims to attached property, that such proceedings in a suit in the State court are not removable to the Federal tribunal upon grounds of diverse citizenship.⁹ But where removal would not result in a conflict of jurisdiction because the res in controversy was in possession of a State court, the right to remove to a Federal tribunal for diverse citizenship will not be denied when a separate suit or controversy really arises in the course of State court proceedings. Thus when a proceeding to set aside a State court judgment may be taken by original suit in the State court and

¹⁵*Clarke v. Matthewson*, 12 Pet. 164, 172, 9 L. ed. 1041; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 387; *Bates v. Days*, 17 Fed. 167, 5 McCrary, 342.

¹⁶*Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. ed. 152, 11 Sup. Ct. Rep. 523. This case is sustainable under the principles of ancillary jurisdiction, though the doctrine is not invoked by the court.

¹*Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935.

²*Gibbs v. Usher*, Holmes 348, Fed. Cas. No. 5,387.

³*Gwin v. Breedlove*, 2 How. 29, 11 L. ed. 167.

⁴*New York Commercial Co. v. Francis*, 83 Fed. 769, 28 C. C. A. 199.

⁵*Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257.

⁷*Lammon v. Fensier*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286.

⁹*First Nat. Bank v. Turnbull*, 16 Wall. 190, 21 L. ed. 296; *DuVivier v. Hopkins*, 116 Mass. 125, 17 Am. Rep. 141; *Buell v. Cincinnati, etc., Construction Co.* 9 Fed. 351, 10 Biss. 555; *Poole v. Thatcherdeft*, 19 Fed. 49; *Hospes v. Car Co.* 22 Fed. 565; *Ladd v. West*, 55 Fed. 353; *Coeur D'Alene Ry. v. Spalding*, 93 Fed. 280, 35 C. C. A. 295.

is not a mere supplementary proceeding, such suit may be removed to the Federal court.¹⁰ So also a removable suit or controversy may arise in the progress of probate proceedings in a State court.¹¹

[k] Ancillary bills not original—substituted service.

Mr. Justice Story termed a bill to enjoin enforcement of a judgment “dependent.”¹⁴ The cases for the most part are content to point out that while bills in ancillary proceedings would often be termed original under the ordinary rules of equity pleading, they are not properly such “with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts.”¹⁵ Substituted service of process in such proceedings is accordingly upheld,¹⁶ though the court may order personal service as well.¹⁷ Mere notice without subpoena has been sustained when preceeding by bill was really unnecessary.¹⁸ The substituted service should have the sanction of an order of court.¹⁹ Service of subpoena in bill of review upon the United States district attorney has been upheld as service upon the United States.²⁰

[l] Ancillary cases appealable to circuit court of appeals.

Since causes in which Federal jurisdiction is based on diverse citizenship are appealable to the circuit court of appeals, whose judgment is final, the appeal in ancillary proceedings growing out of diverse citizenship, follows the same course.¹

§ 4. Federal courts power to decide non-Federal questions and entire controversy.

When jurisdiction arises from the character of the parties, the questions involved are mainly, if not entirely, of a local or non-

¹⁰Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407; Cowley v. Northern Pac. R. R. 159 U. S. 579, 40 L. ed. 263, 16 Sup. Ct. Rep. 130. See also under removal of causes, post, §134.

¹¹See ante, § 2. [w].

¹⁴Clarke v. Mathewson, 12 Pet. 172, 9 L. ed. 1044.

¹⁵Milwaukee etc. R. R. v. Soutter, 2 Wall. 609, 17 L. ed. 895. And see Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 146, 4 Sup. Ct. Rep. 27; Pacific R. R. v. Missouri etc. R. R. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Pope v. Louisville, etc. R. R. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 501.

¹⁶Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; Milwaukee etc. R. R. v. Soutter, 2 Wall. 609, 17 L. ed. 895; Farm-

ers' L & T. Co. v. Houston, etc. R. R. 44 Fed. 115; Shainwald v. Davids, 69 Fed. 701, 703.

¹⁷Cortes Co. v. Thannhauser, 9 Fed. 226, 228, 20 Blatchf. 59.

¹⁸Maitland v. Gibson, 79 Fed. 136.
¹⁹Gregory v. Pike, 79 Fed. 520, 25 C. C. A. 48; Pacific R. R. v. Missouri P. R. R. 3 Fed. 772, 1 McCrary, 647.

²⁰Bush v. United States, 13 Fed. 627, 8 Sawy. 322; Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266,

¹Rouse v. Hornsby, 161 U. S. 588, 40 L. ed. 818, 16 Sup. Ct. Rep. 610, Gregory v. Van Eé, 160 U. S. 643, 40 L. ed. 567, 16 Sup. Ct. Rep. 431; Carey v. Railway Co. 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; Pope v. Louisville etc. R. R. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 501. See post, § 77.

Federal nature, and the Federal courts have as complete a power to decide upon them as have the local courts.^[a] It is a settled principle that Congress has power to provide a Federal tribunal for all cases involving a Federal question, even though other questions of law and fact not in themselves of Federal cognizance are involved.^[b] This being so it is obviously proper that jurisdiction should extend to the entire case. Hence, where jurisdiction of a Federal court has rightfully attached, either originally or by removal before trial, because a Federal right is involved, it extends to the whole case and to all issues raised whether Federal or non-Federal, and the court has power to decide upon all questions.^[c] But when a cause is tried in the State court, review in the Federal supreme court is confined to the validity of the Federal right alleged to have been impaired in the State tribunal.^[d]

Author's Section.

[a] Where jurisdiction rests on character of parties.

Where Federal jurisdiction rests upon diverse citizenship the Federal court is an auxiliary State court and has the same power as the latter to decide the whole case and to examine and decide the validity of any ordinance or law under the State constitution as well as under the Federal Constitution.¹ Nor is the scope of the jurisdiction narrowed by the fact that a Federal question arises incidentally in the progress of the cause.²

[b] Jurisdiction not ousted by non-Federal questions.

Where jurisdiction rests upon a Federal question it is not ousted by the existence of non-Federal questions. This principle was laid down in an early case and is obviously necessary as otherwise the mandate of the Constitution that jurisdiction should extend to "all" cases arising under Federal laws etc., would generally be defeated.³ A case "arises under" the Federal Constitution and laws whenever its correct decision depends upon the right construction of either,⁴ so that it matters not how many other questions be involved, provided a Federal question is one ingredient of the mass.⁵ The intent was to give those claiming Federal rights a trial in a Federal court.⁶

¹Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 154, 41 L. ed. 369, 17 Sup. Ct. Rep. 61.

²Jew Ho v. Williamson, 103 Fed. 10. See note [c] infra.

³Osborn v. Bank of United States, 9 Wheat. 823, 6 L. ed. 204, 224.

⁴Cohens v. Virginia, 6 Wheat. 379, 5 L. ed. 285; Railroad Co. v. Mississippi, 102 U. S. 140, 26 L. ed. 98; Ames v. Kansas, 111 U. S. 449, 28 L.

ed. 487, 4 Sup. Ct. Rep. 437; Southern Pac. R. R. v. California, 118 U. S. 112, 30 L. ed. 104, 6 Sup. Ct. Rep. 993.

⁵Mayor v. Cooper, 6 Wall. 252, 18 L. ed. 853; Railroad Co. v. Mississippi, 102 U. S. 141, 26 L. ed. 98; Tennessee v. Davis, 100 U. S. 264, 25 L. ed. 650.

⁶Osborn v. Bank of United States, 9 Wheat. 823, 6 L. ed. 204, 224.

[c] Jurisdiction of entire cause.

It is a general principle of law that a court having jurisdiction may decide every question which occurs in a cause.⁷ The inconvenience of confining Federal courts to the examination of Federal questions in cases where the jurisdiction rests thereon, made the adoption of this principle in the administration of their jurisdiction, of obvious propriety.⁸ To guard against an undue extension of Federal jurisdiction, however, the courts have found it necessary to require that the Federal question upon which Federal jurisdiction is invoked shall appear plainly from plaintiff's statement of his case in the complaint.⁹ Otherwise litigants could bring almost any cause into the Federal court upon plausible allegations of a Federal question. In a recent case at circuit, the question of the validity of a State law under the State Constitution was avoided on grounds of propriety, where not really necessary to a decision.¹⁰ There can be no doubt, however, of the power of Federal courts to determine the validity of State statutes under the State constitution, where the question is involved in the decision of a cause on trial before them.¹¹ Where a controversy when commenced involves a substantial Federal question, its elimination during the progress of the cause does not prevent the court deciding other issues under the State law and constitution.¹² So where it appears that the amount in controversy really falls below the sum required for jurisdictional purposes, the jurisdiction which rightfully attached under an averment of sufficient value in dispute, is not ousted.¹³ It has been intimated that in cases where Federal jurisdiction is invoked on the ground that a State ordinance or law violates the Federal Constitution, the Federal court may not examine its repugnancy to the State constitution.¹⁴ This seems unsound.

[d] Non-Federal questions not examinable on error to State court.

In exercising its right of reviewing State court decisions, the Supreme court has recognized the propriety of confining its examination of the record to the correctness of the decision on the Federal question raised

But this is not secured under the law as it exists to-day, in cases where the defense rests on Federal grounds.

⁷Elliott v. Peirsol, 1 Pet. 340, 7 L. ed. 170; Grignon v. Astor, 2 How. 343, 11 L. ed. 283; Wilcox v. Jackson, 13 Pet. 511, 10 L. ed. 264; In re Sawyer, 124 U. S. 220, 31 L. ed. 402, 8 Sup. Ct. Rep. 493.

⁸Osborn v. Bank of United States, 9 Wheat. 738, 823, 6 L. ed. 204; Mayor v. Cooper, 6 Wall. 247, 252, 18 L. ed. 851; Railroad Co. v. Mississippi, 102 U. S. 135, 141, 26 L. ed. 98; New Orleans N. W. & La. Sugar Co. 125 U. S. 32, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Nashville etc. R. R. v. Taylor, 86 Fed. 177; Fisk v. Union Pac. R. R. 8 Blatchf. 248, Fed. Cas. 10.

4,828; Whelan v. New York, etc. R. R. 35 Fed. 859.

⁹Post, § 129.

¹⁰Peoples Gas, etc. Co. v. Chicago, 114 Fed. 384.

¹¹Satterlee v. Matthewson, 2 Pet. 414, 7 L. ed. 458.

¹²Michigan R. R. Tax Cases, 138 Fed. 223; Omaha Horse Ry. Co. v. Cable etc. Co. 32 Fed. 727; Peoples S. Bk. v. Layman, 134 Fed. 635.

¹³Cowley v. Northern Pacific R. R. 159 U. S. 582, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; Scott v. Donald, 165 U. S. 89, 41 L. ed. 632, 17 Sup. Ct. Rep. 266; Stillwell, etc. Co. v. Williams-ton Oil Co. 80 Fed. 70.

¹⁴Jew Ho v. Williamson, 103 Fed.

and decided.¹⁵ The provision of the statute that review shall be by writ of error¹⁶ confines the examination to questions of law.

§ 5. States may not impair or regulate Federal jurisdiction or procedure.

Having delegated to the general government jurisdiction over certain subject matters and between certain parties, the States may not regulate or impair or forbid any part of that jurisdiction. This principle forbids any attempt by the States to confer jurisdiction, or prescribe the modes of proceeding in Federal courts, or the remedies enforced;^{[a]-[d]} or to restrict the right of removal where permitted by the Federal Constitution and laws;^[e] or to confer general rights enforceable only in the State courts and forbidden to parties suing in the Federal courts.^[f]

Author's Section.

[a] State regulation of Federal jurisdiction or modes of proceeding.

The States have no power to confer jurisdiction on the Federal courts nor limit or impair the jurisdiction granted by Congress,²⁰ or prescribe exclusive modes of invoking it.¹ The forms and modes of proceeding in the Federal courts are not subject to State regulation.² The modes of redress furnished by State law do not bind the Federal courts in controversies between citizens of different States and aliens.³ While Congress has declared that the local procedure shall be followed in actions at law in Federal courts,⁴ the State laws respecting process and procedure can have no effect *proprio vigore*, in the Federal courts.⁵ The regulation of Federal practice, procedure and remedies is for Congress, and for the

¹⁵Post, § 2084.

¹⁶Post, § 38.

²⁰United States v. Peters, 5 Cranch, 138, 3 L. ed. 53; Payne v. Hook, 7 Wall. 425, 19 L. ed. 261; Greely v. Townsend, 25 Cal. 604; Steamboat Orleans v. Phoebus, 11 Pet. 184, 9 L. ed. 677; Union Bk. v. Jolly, 18 How. 503, 15 L. ed. 472; Toland v. Sprague, 12 Pet. 330, 9 L. ed. 1093; Hyde v. Stone, 20 How. 175, 15 L. ed. 875; Cowles v. Mercer Co. 7 Wall. 122, 19 L. ed. 86; Payne v. Hook, 7 Wall. 430, 19 L. ed. 260; Insurance Co. v. Morse, 20 Wall. 453, 22 L. ed. 365; Southern Pac. Co. v. Denton, 146 U. S. 209, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; Leadville Coal Co. v. McCreery, 141 U. S. 477, 35 L. ed. 824, 12 Sup. Ct. Rep. 28; Bigelow v. Nickerson, 70 Fed. 120, 17 C. C. A. 1, 30 L.R.A. 336.

¹Barber etc. Co. v. Morris, 132 Fed. 945, 66 C. C. A. 55.

²Keary v. Farmers etc. Bk. 16 Pet. 94, 10 L. ed. 897; Beers v. Haughton, 9 Pet. 359, 9 L. ed. 145; Clark v. Smith, 13 Pet. 203, 10 L. ed. 123; Campbell v. Boyreau, 21 How. 227, 16 L. ed. 96; Kelsey v. Forsyth, 21 How. 88, 16 L. ed. 32.

³Union Bank v. Vaiden, 18 How. 507, 15 L. ed. 472; Watson v. Tarpley, 18 How. 520, 521, 15 L. ed. 509; Hyde v. Stone, 20 How. 175, 15 L. ed. 874; Payne v. Hook, 7 Wall. 430, 19 L. ed. 260; Chicot Co. v. Sherwood, 148 U. S. 534, 37 L. ed. 546, 13 Sup. Ct. Rep. 695.

⁴Post, § 900.

⁵Ogden v. Saunders, 12 Wheat. 367, 6 L. ed. 606; Duncan v. Darst, 1 How. 305, 11 L. ed. 139; The Mayor v. Lord, 9 Wall. 413, 19 L. ed. 707.

Federal courts, under its control.⁶ Neither the fundamental, nor the statutory State law can forbid the practice prevailing in the Federal courts of charging juries as to matters of fact;⁷ nor is the State practice as to mandamus proceedings effective in the Federal court unless regularly adopted.⁸ The States may not control or discriminate against Federal judgments as respects the period within which suit may be maintained thereon; and while they may limit suit on judgments to a certain time, the judgments of Federal courts within the State must be as favorably treated as domestic State judgments.⁹ The provision of State law that no *lis pendens* shall bind a purchaser unless recorded in a specified way is not operative on the Federal courts.¹⁰

[b] In equity cases.

In equity causes the jurisdiction and procedure of Federal courts are uniform throughout the United States and not subject to restraint or regulation by the States.¹² The fact that the State has abolished the distinction between law and equity can make no difference in the Federal court there sitting.¹³ That the State has provided a remedy at law cannot oust Federal equity jurisdiction if the cause is within recognized grounds of Federal equity cognizance;¹⁴ nor can the fact that the State permits recourse to equity, justify proceeding upon the equity side of the Federal court if by its practice the proceeding is regarded as properly at law.¹⁵ The practice of the Federal courts as to deficiency decree on foreclosure is not subject to State control,¹⁶ nor the allowance of costs and attorney's fees to a trustee therein.¹⁷ The Federal courts preserve the

⁶Noonan v. Lee, 2 Black, 509, 17 L. ed. 278; St. Louis etc. Ry. v. Vickers, 122 U. S. 363, 30 L. ed. 1161; Dodge v. Talleys, 144 U. S. 457, 36 L. ed. 501, 12 Sup. Ct. Rep. 728.

⁷St. Louis etc. Ry. v. Vickers, 122 U. S. 363, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1216.

⁸The Mayor v. Lord, 9 Wall. 413, 19 L. ed. 704.

⁹Metcalf v. Watertown, 153 U. S. 679, 38 L. ed. 861, 14 Sup. Ct. Rep. 951.

¹⁰King v. Davis, 137 Fed. 223.

¹²United States v. Howland, 4 Wheat. 115, 4 L. ed. 526; Kirby v. Lake Shore etc. R. R. 120 U. S. 137, 33 L. ed. 569, 7 Sup. Ct. Rep. 430; Dodge v. Woolsey, 18 How. 347, 15 L. ed. 401; Green v. Creighton, 23 How. 105, 16 L. ed. 419; McConihay v. Wright, 121 U. S. 206, 30 L. ed. 932, 7 Sup. Ct. Rep. 940; Ridings v. Johnson, 128 U. S. 217, 32 L. ed. 401, 9 Sup. Ct. Rep. 72.

¹³Mississippi Mills v. Cohn, 150 U. S. 36 L. ed. 501, 12 Sup. Ct. Rep. 728.

S. 207, 37 L. ed. 1052; 14 Sup. Ct. Rep. 75; United States v. Wilson, 118 U. S. 90, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; Scott v. Neely, 140 U. S. 110, 111, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; Cates v. Allen, 149 U. S. 456, 459, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; Hollins v. Brierfield Coal Co. 150 U. S. 379, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127.

¹⁴Smyth v. Ames, 169 U. S. 516, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ray v. Tatum, 72 Fed. 114, 18 C. C. A. 464; Barrett v. Twin City Co. 118 Fed. 861; Mississippi Mills Co. v. Cohn, 150 U. S. 207, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75.

¹⁵Whitehead v. Shattuck, 138 U. S. 151, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Scott v. Neely, 140 U. S. 110, 111, 35 L. ed. 358, 11 Sup. Ct. Rep. 712.

¹⁶Noonan v. Lee, 2 Black, 507. 17 L. ed. 278.

¹⁷Dodge v. Talleys, 144 U. S. 457, 36 L. ed. 501, 12 Sup. Ct. Rep. 728.

distinction between common law and equity as recognized and defined in England at the time of the revolution.¹⁸ But when the creation of a new equitable remedial proceeding by a State, establishes a new equitable right or an enlargement of existing equitable rights, this may be administered and enforced by the Federal court sitting in equity.¹⁹ This is so because in all controversies where jurisdiction depends wholly upon diverse citizenship the substantive rights administered are created or exist under the State law. It is only the mode of enforcement that is beyond the control of the local law.

[c] In admiralty.

State courts cannot enlarge or limit the admiralty jurisdiction of the Federal courts.¹ They cannot confer on their own courts the cognizance of admiralty causes.² But the States may create a right essentially of a maritime nature, such as a lien for repairs in the home port, and this will be enforced in the Federal court in admiralty³ just as new equitable rights will be enforced by the Federal court in equity. So an action for death by marine tort given by a State statute is enforceable in admiralty.⁴

[d] In criminal cases.

The jurisdiction, modes of procedure, and the law administered, in criminal trials in the Federal courts are altogether independent of State control.⁵ The State law forbidding comments by the judge on the facts in his charge to the jury,⁶ or prescribing the modes of challenge, or of

¹⁸*McCullum v. Eager*, 2 How. 64, 11 L. ed. 179; *In re Sawyer*, 124 U. S. 209, 31 L. ed. 402, 8 Sup. Ct. Rep. 482. *Scott v. Neely*, 140 U. S. 111, 35 L. ed. 358; 11 Sup. Ct. Rep. 712; *White v. Berry*, 171 U. S. 376, 43 L. ed. 199, 18 Sup. Ct. Rep. 917; *Thompson v. Railroad Co.'s* 6 Wall. 137, 18 L. ed. 765; *New Orleans v. Louisiana etc. Co.* 129 U. S. 46, 32 L. ed. 607, 9 Sup. Ct. Rep. 223; *National Surety Co. v. State Bank*, 120 Fed. 593, 56 C. C. A. 657.

¹⁹*Clarke v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Broderick's Will*, 21 Wall. 520, 22 L. ed. 606; *Holland v. Challen*, 110 U. S. 24, 28 L. ed. 55, 3 Sup. Ct. Rep. 495; *Dick v. Foraker*, 155 U. S. 415, 39 L. ed. 205, 15 Sup. Ct. Rep. 124; *Rich v. Braxton*, 158 U. S. 405, 39 L. ed. 1032, 15 Sup. Ct. Rep. 1017; *Bardon v. Land, etc. Co.* 157 U. S. 330, 39 L. ed. 720, 15 Sup. Ct. Rep. 650. See post, § 10 note [aa].

¹*The St. Lawrence*, 1 Black, 526, 527, 17 L. ed. 180; *The S. E. Rumbell*, 148 U. S. 12, 37 L. ed. 345; *Steamboat*

Orleans v. Phoebe, 11 Pet. 184, 9 L. ed. 677; *Smith v. Maryland*, 18 How. 76, 15 L. ed. 269.

²*Taylor v. Carryl*, 20 How. 598, 605, 15 L. ed. 1028; *The Moses Taylor*, 4 Wall. 427, 18 L. ed. 397; *The Hine v. Trevor*, 4 Wall. 570, 571, 18 L. ed. 451; *The Lottawanna*, 21 Wall. 580, 22 L. ed. 654; *In re Steamboat Josephine*, 39 N. Y. 27. Contra see *Warner v. Uncle Sam*, 9 Cal. 726.

³*The Lottawanna*, 21 Wall. 580, 22 L. ed. 654. See post, § 11, note [b].

⁴*In re Long, etc. Co.* 5 Fed. 608; *The City of Norwalk*, 55 Fed. 105; *The Transferer No. 4*, 61 Fed. 368, 9 C. C. A. 521; *The Williamette*, 70 Fed. 878, 18 C. C. A. 366, 31 L.R.A. 715.

⁵See post §§ 15, 1537 et seq, 1571 et seq.

⁶*Starr v. United States*, 153 U. S. 625, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; *Allis v. United States*, 155 U. S. 124, 39 L. ed. 91, 15 Sup. Ct. Rep. 36; *Simmons v. United States*, 142 U.

excepting to instructions,⁷ or of impaneling grand juries,⁸ have no applicability to Federal criminal trials.

[e] Attempts to restrict right of removal.

In the leading case on this question the State of Wisconsin required foreign insurance companies seeking to do State business, to agree not to remove causes for trial to the Federal court. This agreement was held not binding upon the companies, although the State's power to impose conditions upon foreign corporations seeking to do domestic business was admitted.⁹ The rule thus established has since been adhered to;¹⁰ although its effect is practically nullified by a recent case holding that under the power to impose conditions on foreign corporations a State may validly provide for forfeiture of a right to do domestic business in case such corporations exercise the right of removal.¹¹ In other words while a State may not exact such a stipulation it may enforce such a penalty. It may be questioned whether this decision will prove a final adjudication of the matter. Power to protect the jurisdiction delegated by the States to the Federal government must necessarily exist in some form and in some department; in Congress if not in the courts.

[f] Attempts to limit the enforcement of rights to State courts.

When a general right of action is conferred by State law it cannot be withdrawn from Federal cognizance by enacting that it shall only be enforced in a State court. Thus, where a right of action for death is given by State statute, it can be enforced by any Federal court within the State having jurisdiction by diverse citizenship or otherwise.¹² So a law requiring counties to be sued in the county courts, cannot oust Federal jurisdiction.¹³ But a law permitting suit against the State may provide that the suitor must resort to the State court since such a suit is not within the Federal jurisdiction and would only be there cognizable upon the consent of the State.¹⁴ The fact that the State law provides for the bringing of will contests or the distribution of a decedent's

S. 148, 35 L. ed. 969, 12 Sup. Ct. Rep. 171.

⁷St. Clair v. United States, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002, 1010.

⁸United States v. Ambrose, 3 Fed. 285.

⁹Insurance Co. v. Morse, 20 Wall. 445, 22 L. ed. 365.

¹⁰Doyle v. Insurance Co. 94 U. S. 538, 24 L. ed. 148; Barron v. Burnside 121 U. S. 200, 30 L. ed. 915, 7 Sup. Ct. Rep. 931; Southern Pac. Co. v. Denton, 146 U. S. 207, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; Goldey v. Morning News, 156 U. S. 523, 39 L. ed. 519, 15 Sup. Ct. Rep. 559; Ashe v. Union, etc. Ins. Co. 115 Fed. 234. See Allen v. Texas, etc. R. R. 25 Fed. 515.

¹¹Security etc. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619. See also United, etc. Ins. Co. v. Cable, 98 Fed. 767, 39 C. C. A. 264. There is a provision enforcing such a penalty in California. See Pol. Code, § 595.

¹²Chicago, etc. R. R. v. Whitton, 13 Wall. 270, 286, 20 L. ed. 571; Bigelow v. Nickerson, 70 Fed. 120, 17 C. C. A. 1, 30 L. R. A. 336.

¹³Lincoln Co. v. Luning, 133 U. S. 530, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; Cunningham v. Ralls Co. 1 Fed. 455, 1 McCrary, 117; Hoover v. Crawford Co. 39 Fed. 9.

¹⁴Smith v. Reeves, 178 U. S. 445, 44 L. ed. 1145, 20 Sup. Ct. Rep. 922.

estate, in the State probate court does not prevent the Federal court taking jurisdiction if diverse citizenship exists and the proceeding has resolved itself into a suit at law or in equity.¹⁵ A state law providing for creditors bill in the State chancery court may be invoked by a creditor citizen of another State suing in the Federal court.¹⁶ A State law regulating the venue of actions cannot affect the rules as to place of action, enacted by Congress for the Federal courts.¹⁷ A State law limiting remedies of its citizens to its own courts cannot prevent citizens of other States from suing in the Federal courts.¹⁸ Hence a railroad condemnation suit may be removed to the Federal court though the State law makes them cognizable only in the probate court.¹⁹ The provision of a State statute that foreclosure of mortgage given by a guardian shall be in the county court cannot defeat Federal jurisdiction.²⁰ State law authorizing proceeding in rem in its own courts for enforcement of a lien that is really maritime in nature, is void and resort must be had to the Federal court in admiralty.¹ Requirement of a State law that a previous order of court is a necessary preliminary to suit on a judgment, cannot require such an order of a State court before suit in the Federal court.² A litigant loses nothing by appealing to the Federal rather than the State court.³ It is a general rule that whenever a citizen of a state can go into its courts to defend his property against illegal acts of State officers,⁴ and to secure a decision of his controversy with another citizen of the same State;⁵ a citizen of another State has a similar right to resort to the Federal tribunal. Hence if a State provide that the remedy for an illegal schedule of railroad rates is by proceeding at law in the State supreme court, this cannot deprive a citizen of another State of his right to proceed in the Federal court and to apply for equitable relief where the

¹⁵Payne v. Hook, 7 Wall. 425, 19 L. ed. 262; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Hayes v. Pratt, 147 U. S. 570, 37 L. ed. 279, 13 Sup. Ct. Rep. 503; Ellis v. Davis, 109 U. S. 498, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; Lawrence v. Nelson, 143 U. S. 223, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; Clark v. Bever, 139 U. S. 102, 103, 35 L. ed. 88; 11 Sup. Ct. Rep. 468; Richardson v. Green, 61 Fed. 423, 9 C. C. A. 565; Williams v. Crab, 117 Fed. 197, 54 C. C. A. 213, 59 L.R.A. 425 and cases cited. As to Federal probate jurisdiction. See § 2, note. [w]

¹⁶Darragh v. Wetter Mfg. Co. 78 Fed. 7, 23 C. C. A. 609.

¹⁷East etc. R. R. v. Atlanta etc. R. R. 49 Fed. 612, 15 L.R.A. 111.

¹⁸Union Bank v. Vaiden, 18 How. 507; 15 L. ed. 472; Bigelow v. Nickerson, 70 Fed. 121, 30 L.R.A. 341, 17 C. C. A. 1.

¹⁹Mineral etc. R. R. v. Detroit etc. Co. 25 Fed. 520.

²⁰United States Mortgage Co. v. Snerry, 138 U. S. 332, 34 L. ed. 969, 11 Sup. Ct. Rep. 321; Davis v. James, 2 Fed. 620, 10 Biss. 51.

¹The Lottawanna, 21 Wall. 580, 22 L. ed. 654.

²Union T. Co. v. Rochester etc. R. R. 29 Fed. 610.

³Ex parte McNeil, 13 Wall. 236, 20 L. ed. 624; Davis v. Way, 16 Wall. 221, 21 L. ed. 452; Smith v. Reeves, 178 U. S. 445, 44 L. ed. 1145, 20 Sup. Ct. Rep. 922.

⁴Reagan v. Farmers L & T. Co. 154 U. S. 391, 38 L. ed. 1022, 14 Sup. Ct. Rep. 1052.

⁵Schurmeier v. Conn. M. L. Ins. Co. 137 Fed. 46, 69 C. C. A. 22, and cases cited.

facts entitle him thereto under the established principles of equity jurisprudence in the Federal courts.⁶

§ 6. Inherent limitations on Federal judicial power.

Certain limitations upon the exercise of judicial power arise from the fact that the Constitution distributes the powers entrusted to it, among the three great departments of government, legislative, judicial and executive. The first makes, the second construes and the third executes the law. The three are co-ordinate equal and independent. It has been deemed vital that no one of these departments be permitted to encroach upon the powers of the others. Hence the courts may not be required, nor have they a right to exercise non-judicial powers,^{[a]-[c]} and the executive and legislative departments may not be required, nor have they a right to exercise any part of the judicial power confided to the courts.^[d]

Author's Section.

[a] Conferring non-judicial powers on courts.

The courts cannot be required by the other departments to discharge non-judicial functions, such as passing upon pension claims,¹⁰ or reviewing a decision of the court of claims which is merely advisory to the interior department.¹¹

[b] Assumption of non-judicial powers.

Nor can courts make the law, but must expound it as they find it.¹² They must give effect to the will of the legislature, not of the judge.¹⁴ The motive for the passage of a law is not a proper subject of inquiry;¹⁵ nor is the expediency or wisdom of legislation.¹⁶ They may review but it has been said, cannot restrain acts of other departments.¹⁷ As respects the executive they may not interfere with the discharge of ordinary duties,¹⁸ or with executive discretion,¹⁹ or executive action with-

⁶*Smyth v. Ames*, 169 U. S. 516, 42 L. ed. 838, 18 Sup. Ct. Rep. 422.

¹⁰*Hayburns Case*, 2 Dall. 409, 1 L. ed. 436.

¹¹*In re Sanborn*, 148 U. S. 224, 37 L. ed. 429, 13 Sup. Ct. Rep. 577.

¹²*Gelston v. Hoyt*, 3 Wheat. 309, 4 L. ed. 381; *Luther v. Borden*, 7 How. 45, 12 L. ed. 581.

¹⁴*Osborne v. United States Bank*, 9 Wheat. 866, 6 L. ed. 204.

¹⁵*Fletcher v. Peck*, 6 Cranch, 131, 3 L. ed. 162; *Ex parte McCardle*, 7 Wall. 514, 19 L. ed. 264; *Soon Hing v. Crowley*, 113 U. S. 710, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, *United States*

v. Des Moines etc. Ry. 142 U. S. 544, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308.

¹⁶*Wilkes v. Dinsman*, 7 How. 127, 12 L. ed. 618; *Brass v. North Dakota*, 153 U. S. 404, 38 L. ed. 757, 14 Sup. Ct. Rep. 857; *Li Sing v. United States*, 180 U. S. 495, 45 L. ed. 638, 21 Sup. Ct. Rep. 449; *Dred Scott v. Sandford*, 19 How. 405, 15 L. ed. 691.

¹⁷*Mississippi v. Johnson*, 4 Wall. 500, 18 L. ed. 437.

¹⁸*Bartlett v. Kane*, 16 How. 272, 14 L. ed. 931.

¹⁹*Board of Liquidation v. McComb*, 92 U. S. 541, 23 L. ed. 623.

in the scope of duties prescribed by law.²⁰ The question when mandamus or injunction will lie against executive officers is discussed on a subsequent page.¹

[c] Power to entertain political questions.

Similarly it is settled that the courts will not take cognizance of political questions;² but as to them will follow the decision of the political department.³ Thus, the question as to the adoption of a constitution, or amendment or existence of a treaty is political;⁴ so also in the recognition of foreign States;⁵ and of disputed boundary between two sovereign States,⁶ though not between States of the Union.⁷

[d] — assumption of judicial powers by Congress or the executive.

It is equally inadmissible for Congress or the executive departments to assume the exercise of judicial power;¹⁰ though the Federal Constitution does not prohibit an exercise of judicial functions by the State legislatures.¹¹ The construction of statutes is not a legislative power,¹² nor can the legislature impose upon the courts its construction of a prior law.¹³ Similarly the question whether a statute is repealed by a later law is judicial not legislative.¹⁴ A direction by Congress that the Federal courts dismiss certain claims adjudicated against the government, thus denying their previous legal effect, is void as an assumption of ju-

²⁰Craig v. Leitensdorfer, 123 U. S. 211, 31 L. ed. 114; 8 Sup. Ct. Rep. 85; Quackenbush v. United States, 177 U. S. 25, 44 L. ed. 656, 20 Sup. Ct. Rep. 530; Keim v. United States, 177 U. S. 292, 44 L. ed. 775, 20 Sup. Ct. Rep. 574.

¹See post, § 841.

²Marbury v. Madison, 1 Cranch, 169, 170, 2 L. ed. 60; Cherokee Nation v. Georgia, 5 Pet. 20, 8 L. ed. 25; Georgia v. Stanton, 6 Wall. 71-76, 18 L. ed. 721; United States v. Blaine, 139 U. S. 326, 35 L. ed. 183, 11 Sup. Ct. Rep. 607; In re Cooper, 143 U. S. 503, 36 L. ed. 232, 12 Sup. Ct. Rep. 453.

³Foster v. Neilson, 2 Pet. 307, 7 L. ed. 415; United States v. Lee, 106 U. S. 209, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; White v. Hart, 13 Wall. 649, 20 L. ed. 685, More v. Steinbach, 127 U. S. 80, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; In re Baiz, 135 U. S. 432, 34 L. ed. 222, 10 Sup. Ct. Rep. 854.

⁴Luther v. Borden, 7 How. 39, 42, 47, 12 L. ed. 581; Terlinden v. Ames, 184 U. S. 288, 46 L. ed. 534, 22 Sup. Ct. Rep. 484.

⁵Rose v. Hinely, 4 Cranch, 272, 2

L. ed. 608; Gelston v. Hoyt, 3 Wheat, 324, 4 L. ed. 381; United States v. Yorba, 1 Wall. 423, 17 L. ed. 635.

⁶De La Croix v. Chamberlain, 12 Wheat. 600, 6 L. ed. 741; Garcia v. Lee, 12 Pet. 516, 9 L. ed. 1176; United States v. Reynes, 9 How. 154, 13 L. ed. 74.

⁷Rhode Island v. Massachusetts, 12 Pet. 725, 9 L. ed. 1233; United States v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488.

¹⁰Gordon v. United States, 117 U. S. 697, (Appx.); Kilbourn v. Thompson, 103 U. S. 192, 193, 26 L. ed. 377; Interstate Commerce Com. v. Brimson, 154 U. S. 485, 38 L. ed. 1047, 14 Sup. Ct. Rep. 1125.

¹¹Calder v. Bull, 3 Dall. 392, 395, 398, 1 L. ed. 648; Satterlee v. Mathewson, 2 Pet. 413, 7 L. ed. 458.

¹²Ogden v. Blackledge, 2 Cranch, 277, 2 L. ed. 276; Postmaster General v. Early, 12 Wheat. 148, 6 L. ed. 577.

¹³Wheaton v. Peters, 8 Pet. 634, 8 L. ed. 1055.

¹⁴United States v. Claffin, 97 U. S. 549, 24 L. ed. 1082; District of Columbia v. Hutton, 143 U. S. 27, 28, 36 L. ed. 60, 12 Sup. Ct. Rep. 369.

dicial power.¹⁵ The essential difference between judicial and legislative power is that the former declares what the law is while the latter prescribes what the law is to be.¹⁶ The legislature prescribes general rules for the government of society, but the application of those rules belongs elsewhere.¹⁷ The presumption is that the legislature does not intend to assume judicial functions.¹⁸ Cases are few in which executive action has been challenged as a usurpation of judicial power. The question whether public lands have been disposed of is judicial rather than executive.¹⁹ But the executive possesses many important powers respecting the reservation and disposal of public lands;²⁰ and the making and correction of surveys.¹ The issue of a distress warrant from the treasury to satisfy a claim against a tax collector for balance due, has been held an executive and not a judicial act.² Nor is the president's approval of the sum found by a commission to be a fair price for land taken, a judicial act.³

§ 7. Suits against a State prohibited.

The judicial power of the United States shall not be construed^[a] to extend to any suit in law or equity^[b] commenced or prosecuted against one of the United States by citizens of another State,^[c] or by citizens or subjects of any foreign State.^{[d]-[f]}

XIth Amendment, U. S. Constitution.

[a] Origin and retroactive operation of this amendment.

The amendment was held to extend to cases pending at the time of its ratification and further prosecution thereof ceased.¹⁰ Its adoption resulted directly from the decision of the Supreme Court in *Chisholm v. Georgia*¹¹ declaring the States suable in the Supreme Court at the instance of citizens of other States. In effect it denied the soundness of that decision by declaring that the Constitution should not be construed as containing any waiver by the States of their sovereign immunity from suit. It has its full effect if the Constitution be construed as it would have been had the jurisdiction of the court never been extended to the

¹⁵*United States v. Klein*, 13 Wall. 144-147, 20 L. ed. 519.

¹⁶*Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648.

¹⁷*Fletcher v. Peck*, 6 Cranch, 136, 3 L. ed. 162.

¹⁸*Angle v. Chicago, etc. Ry.* 151 U. S. 20, 38 L. ed. 55, 14 Sup. Ct. Rep. 240.

¹⁹*Hardin v. Jordan*, 140 U. S. 401, 35 L. ed. 428.

²⁰*Grisar v. McDowell*, 6 Wall. 381, Fed. Proc.—4.

18 L. ed. 863; *Wisconsin etc. R. R. v. Forsythe*, 159 U. S. 55, 40 L. ed. 71.

¹*Knight v. United States Land Assn.* 142 U. S. 176, 35 L. ed. 974.

²*Den v. Hoboken Land etc. Co.* 18 How. 280, 15 L. ed. 372.

³*Shoemaker v. United States*, 147 U. S. 301, 37 L. ed. 170.

¹⁰*Osborn v. Bank of United States*, 9 Wheat. 858, 6 L. ed. 233.

¹¹*Georgia v. Brailsford*, 2 Dall. 419, 1 L. ed. 440.

suits therein restrained.¹² The amendment saved the States the embarrassment of legal proceedings by their creditors for the collection of debts incurred during and after the war for independence.

[b] Suit in law or equity.

Whether an exception of admiralty proceedings was intended or effected, has not been decided although argued in an early case.¹³

[c] By citizens of another State or aliens.

The fact that citizens of the State sought to be sued and corporations created by Congress, are not included, does not mean that they might sue in the Federal court where the cause is itself of Federal cognizance because arising under the Federal constitution and laws.¹⁴ The true principle of construction is that the sovereign non-suability of a State is not to be deemed waived in the grant of Federal judicial power except in the cases specifically mentioned.¹⁵

[d] What constitutes a suit against a State.

Early cases held that the amendment was satisfied by denying jurisdiction over cases where a State was party defendant of record.¹⁶ But this rule has long since been discarded as an inadequate and unreliable test. The real nature of the proceeding controls.¹⁷ The Constitution contains many prohibitions upon State action and limitations upon State power which the Supreme Court is bound to enforce for the protection of individual rights. In interpreting the eleventh amendment therefore, the court has striven to give it reasonable effect without rendering nugatory the various salutary restrictions upon State action infringing individual rights. The distinction running through all the cases is between preventive and affirmative relief; between those cases in which State action is sought to be restrained by proceedings against State officers, and those in which some affirmative though legal and proper act of the State is sought to be compelled.¹⁸ The amendment does not shield State officers in the performance of unlawful acts though prescribed by State law; but it protects the State against compulsion in the performance of its sovereign functions, against the enforcement of a liability ex

¹²*Osborn v. Bank of United States*, 9 Wheat. 858, 6 L. ed. 233.

¹³*Governor of Georgia v. Madrago*, 1 Pet. 116, 124, 7 L. ed. 76, 80.

¹⁴*Hans v. Louisiana*, 134 U. S. 14, 16-21, 33 L. ed. 845, 10 Sup. Ct. Rep. 507-509; *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1142, 20 Sup. Ct. Rep. 923.

¹⁵See ante, § 2 [o].

¹⁶*Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Chaffraix v. Board of Liquidation*, 11 Fed. 638; *Davis v. Gray*, 16 Wall. 220 21 L. ed. 447.

¹⁷In *re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164, 173; *Poindexter v. Greenhorn*, 114 U. S. 270, 287, 29 L. ed. 185, 5 Sup. Ct. Rep. 903.

¹⁸*Cunningham v. Macon & B. R. R. Co.* 109 U. S. 453, 454, 27 L. ed. 995, 3 Sup. Ct. Rep. 298; *Hagood v. Southern*, 117 U. S. 52, 70, 29 L. ed. 805, 6 Sup. Ct. Rep. 616; *Hans v. Louisiana*, 134 U. S. 20, 21, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 703, 704.

contractu or ex delicto, against direct proceedings for the recovery of property held by the State through its officer. The cases in which by mandamus or other writ State officers have been compelled to perform certain acts at the suit of individuals injured, are no exception to this rule, since the foundation of the relief is the wrong of the officers in disobeying or maladministering the State law and not a wrong committed by the State. Neither are the cases in which detinue, trespass and ejectment have been maintained against State officers holding real or personal property under claim of right or title in the State, although the title of the State is indirectly litigated in such proceedings, since the theory on which such cases proceed is that of a tort by the defendant official.¹⁹

If then, by way of illustration, a State, having agreed that the coupons on its bonds shall be valid tender for State taxes, thereafter prohibits its officers from accepting such coupons in payment, the State cannot be sued directly for breach of contract, nor indirectly by proceeding to compel its officers to accept the coupons in payment contrary to the mandate of the statute, but injunction will lie to restrain sale of the land for non-payment of taxes after coupons have been tendered, and tort proceedings may be maintained against the offending officers after seizure for non-payment, and they cannot plead the invalid statute in defense.²⁰

[e] Proceedings to enforce liability or compel affirmative action.

A suit will not lie to compel a State to pay its bonds;¹ nor to realize upon security given therefor.² The proceeding is equally prohibited where the State is not made party but suit is against its treasurer,³ or second mortgage bondholders proceed against the governor of a State which has foreclosed a first mortgage,⁴ or creditors sue the State auditor.⁵ Suit to enforce payment of the State bonds may not be maintained by another State to which the holders have assigned same in order to evade the eleventh amendment.⁶ Mandamus will not lie to compel State tax collectors to accept State coupons in payment of taxes, where a State has repudiated its agreement that they may be so received, and forbidden

¹⁹It must be confessed, however, that they are close to the border line. See ante, § 2. [m]

²⁰Marye v. Parsons, 114 U. S. 329, 29 L. ed. 205, 5 Sup. Ct. Rep. 932, 962; Poindexter v. Greenhorn, 114 U. S. 270, 330, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; McGahey v. Virginia, 135 U. S. 662, 684, 34 L. ed. 304, 10 Sup. Ct. Rep. 972.

¹Bank of Washington v. Arkansas, 20 How. 532, 15 L. ed. 993; Ex parte Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 181.

²Christian v. Atlantic etc. R. R. 133 U. S. 243, 33 L. ed. 589, 10 Sup. Ct. Rep. 260.

³Louisiana v. Jumel, 107 U. S. 723, 27 L. ed. 448, 2 Sup. Ct. Rep. 128;

Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Smith v. Radcliffe, 87 Fed. 964, 31 C. C. A. 328; McGahey v. Virginia, 135 U. S. 684, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; Smith v. Reeves, 178 U. S. 445, 44 L. ed. 1146, 20 Sup. Ct. Rep. 920.

⁴Cunningham v. Macon, etc. R. R. 109 U. S. 451, 27 L. ed. 992, 3 Sup. Ct. Rep. 292.

⁵Louisiana v. Steele, 134 U. S. 232, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; North Carolina v. Temple, 134 U. S. 52, 33 L. ed. 849, 10 Sup. Ct. Rep. 509.

⁶New Hampshire v. Louisiana, 109 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176.

its collectors from accepting them.⁷ Nor can a State funding board be compelled to issue bonds in lieu of certain destroyed obligations, where no State law so directs.⁸ Specific performance of a State contract cannot be decreed in a suit against its treasurer and other officers.⁹ And if injunction, sought against State officers, would indirectly compel specific performance by preventing all acts which constitute the breach, it has been held that this is equally forbidden.¹⁰ A suit against a State treasurer, Attorney General and other officers to restrain them from paying over an agricultural college fund to defendant and to compel them to pay same to plaintiff has been held to be for affirmative relief against the State and not maintainable;¹¹ so also is a suit against a State auditor to compel tax levy to pay bonds;¹² and a suit to compel State officers to issue a certificate to a foreign corporation to do business, without paying the tax made by State law a condition precedent.¹³

[f] Suits for injunction against State officers.

The leading case on this branch of the subject enjoined a State auditor from executing a State law imposing an arbitrary tax upon the bank of the United States in violation of its charter rights under the Federal constitution.¹⁵ Perhaps the most frequent instances of the exercise of this jurisdiction have been suits to enjoin State boards from putting into effect a schedule of railroad rates, or gas, telegraph, or stockyard rates alleged to be invalid as working a deprivation of property without due process of law,¹⁶ or as violating the Federal commerce laws.¹⁷ The governor and land commissioner of a State have been enjoined from selling lands previously donated to a railroad.¹⁸ A State board of liquidation

⁷McGahey v. Virginia, 135 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

⁸Farmers Nat. Bank v. Jones, 105 Fed. 463.

⁹Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608.

¹⁰Ex parte Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 181. It is hard to reconcile this case except upon the theory that injunction against prosecutions by State officers was refused because adequate remedy existed at law by defending the suits brought.

¹¹Brown University v. Rhode Island College, 56 Fed. 55. But see Yale University v. Sanger, 62 Fed. 177.

¹²North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509.

¹³Manchester etc Ins. Co. v. Herriott, 91 Fed. 711.

¹⁵Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204. A late case is McNeil v. Southern Ry. 202

U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.
¹⁶Prout v. Starr, 188 U. S. 537, 47 L. ed. 585, 23 Sup. Ct. Rep. 398; Haverill Gaslight Co. v. Barker, 109 Fed. 694; Starr v. Chicago etc. R. R. 110 Fed. 3; Reagan v. Farmers L. & T. Co. 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago etc. R. R. v. Day, 35 Fed. 866, 1 L.R.A. 744; Western U. T. Co. v. Mvatt, 98 Fed. 335; Hickman v. Missouri, etc. R. R. 97 Fed. 113; Clyde v. Richmond, etc. R. R. 57 Fed. 436; Cotting v. Kansas, etc. Stock Yards, 79 Fed. 679. See also McNeil v. Southern Ry. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722, enjoining enforcement of void law.

¹⁷Southern Ry. v. Greensboro, L. & C. Co. 134 Fed. 82.

¹⁸Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Cobb v. Clough, 83 Fed. 604.

has been restrained from an over-issue of bonds.¹⁹ Other State officials have been restrained from issue of State books in violation of complainants' copyright;²⁰ from proceedings to collect a license tax on interstate commerce;¹ from interfering with property illegally sold to State for taxes;² from assessing, certifying or collecting a tax claimed to be unlawful;³ from revoking a foreign insurance company's license;⁴ from interfering with the business of a foreign insurance company which had complied fully with the State law;⁵ from carrying out a State statute as to registration of voters;⁶ from distraining property of a railroad company under illegal tax proceedings;⁷ from diverting an agricultural college fund administered by the State but to which a certain college had a vested beneficial right;⁸ from seizing liquors under a dispensary law;⁹ and to prevent the enforcement of a law which would subject complainant to seizure of his property and the closing of his place of business.¹⁰ Some cases have restrained county and State attorneys from instituting civil, criminal, or contempt proceedings in violation of constitutional rights.¹¹ But in others such relief has been refused as constituting a suit against the State,¹² though the real reason for the decisions would seem to be the want of any necessity for equitable interference by injunction.

[g] Suits for recovery of property and torts of State officers.

An early case held that a libel in admiralty against the Governor of a State for slaves seized for illegal importation and placed in his custody and for money, the proceeds of others already sold, was in effect a suit against the State and not maintainable, it appearing that the possession of the State was acquired by entirely lawful means.¹⁴ This case is not inconsistent with the established proposition that the mere suggestion that possession is by an officer in his official capacity and under claim of title or right in the State, will not oust judicial inquiry.¹⁵ The

¹⁹Board v. McComb, 92 U. S. 531, 541, 23 L. ed. 623.

²⁰Howell v. Miller, 91 Fed. 129, 33 C. C. A. 407.

¹State v. Lagarde, 60 Fed. 186.

²Virginia etc. Iron Co. v. Bristol Land Co. 88 Fed. 134.

³Taylor v. Louisville etc. R. R. 88 Fed. 350, 31 C. C. A. 537; Gregg v. Sanford, 65 Fed. 151, 12 C. C. A. 525; Western U. T. Co. v. Henderson, 68 Fed. 588; Union Pac. R. R. v. Alexander, 113 Fed. 347; Secor v. Singleton, 35 Fed. 376.

⁴Metropolitan L. Ins. Co. v. McNall, 81 Fed. 888.

⁵Mutual Life Ins. Co. v. Boyle, 82 Fed. 705.

⁶Mills v. Green, 67 Fed. 818, 69 Fed. 852, 16 C. C. A. 516.

⁷Allen v. Baltimore etc. R. R. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925.

⁸President etc. of Yale v. Sanger, 62 Fed. 177. But see Brown Univ. v. Rhode Island College, 56 Fed. 55.

⁹Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262.

¹⁰Minneapolis Brew. Co. v. McGillivray, 104 Fed. 258.

¹¹Tuchman v. Welch, 42 Fed. 548; Western U. T. Co. v. Myatt, 98 Fed. 335; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

¹²Ball v. Rutland R. R. 93 Fed. 513; Ex parte Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164. Arbuckle v. Blackburn, 113 Fed. 616, 51 C. C. A. 122; Union Trust Co. v. Stearns, 119 Fed. 790.

¹⁴Governor of Georgia v. Madrago, 1 Pet. 110, 7 L. ed. 73.

¹⁵United States v. Peters, 5 Cranch, 115, 3 L. ed. 53; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed.

officer must justify his possession by showing the validity of the right or title of the State and if he fail to show a valid title in the State or a valid law to support the alleged right of the State, his possession will be ousted and enjoined. Individual property rights may thus be vindicated as against the State though it is not a party to the controversy and not technically bound by the decision, and the decree does not actually quiet the title of complainant.¹⁶ Pursuant to this principle detinue has been held maintainable against a sheriff for unlawful seizure of personal property to pay taxes for which a valid tender of State coupons in payment had previously been made.¹⁷ And ejectment, trespass, and other actions regarding possession of real property have been sustained.¹⁸ It has been said that the gist of the action is tort;¹⁹ but the right or title actually litigated is that of the State. Similarly it has been held that actions for damages against State officers or to recover money or property wrongfully taken may be maintained; and if the officer justify under a State law which infringes rights guaranteed by the Federal constitution the relief prayed may be granted, and it will not be deemed a suit against the State.²⁰ But an action against State officers for infringing the provisions of the anti trust law of 1890 is in fact a suit against the State where their acts are done pursuant to a state dispensary law monopolizing the sale of liquors.¹

[h] Waiver of immunity from suit.

A bank in which a State is incorporator is not thereby exempt from suit under the eleventh amendment,² even although the state is the sole stockholder, as its nonsuability is deemed waived, pro tanto.³ The fact that a State is controlling stockholder in a railroad does not affect its sua-

204; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

¹⁶*United States v. Lee*, 106 U. S. 222, 27 L. ed. 182, 1 Sup. Ct. Rep. 262; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 777, 778.

¹⁷*Poindexter v. Greenhorn*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903.

¹⁸*United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Stanley v. Schwalby*, 162 U. S. 255, 271, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 777, 778; *Saranac Land etc. Co. v. Roberts*, 68 Fed. 521. Some of these cases are suits against the United States but the principle has been declared to be the same. The interest of the

State in certain lands has been held not to defeat ejectment brought against a city. *Wheeler v. Chicago*, 68 Fed. 526.

¹⁹*Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; *Same v. Same*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

²⁰*In re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Scott v. McDonald*, 165 U. S. 58, 41 L. ed. 638, 17 Sup. Ct. Rep. 265.

¹*Lowenstein v. Evans*, 69 Fed. 908.

²*Bank of United States v. Planters Bank*, 9 Wheat. 908, 6 L. ed. 244; *Briscoe v. Bank of Kentucky*, 11 Pet. 324, 9 L. ed. 736; *Darrington v. Bank of Alabama*, 13 How. 12, 14 L. ed. 30; *Curran v. Arkansas*, 15 How. 309, 14 L. ed. 705.

³*Bank of Kentucky v. Wister*, 2 Pet. 323, 7 L. ed. 437.

bility.⁴ A State may waive its exemption from suit;⁵ and its appearance in a suit as party defendant is such waiver.⁶ But the filing of a stipulation by the governor of a State in a libel in admiralty for slaves in his custody has been deemed not a waiver of immunity on the part of the State.⁷ In a case at circuit where a suit filed by the State had been removed by the defendants to the Federal court, it was held that the filing of a cross bill did not oust the jurisdiction which the State had voluntarily invoked.⁸ A State in its statute permitting suits against it may limit such suits to its own courts and thus forbid Federal jurisdiction.⁹

[i] Conclusion.

The substantial result of the decided cases is that in all instances except where specific and affirmative fulfilment of State promises is sought to be compelled, or a liability to be enforced; individual rights may be vindicated against wrongful State action by treating its officers as tortfeasors and enjoining or punishing their acts when not supported by valid State law, or ousting their possession when not supported by valid right or title in the State.

§ 8. The Federal courts.

The judicial power of the United States shall be vested in^[a] one Supreme Court,^[b] and in such inferior courts^{[c]-[d]} as the Congress may from time to time ordain and establish.

U. S. Const. art 3, part of § 1.

[a] "Shall be vested" in Federal courts.

This clause imposes an imperative duty on Congress to create the Federal courts and distribute the judicial power among them.¹⁰ And while the original jurisdiction of the Supreme Court is provided by the Constitution,¹¹ all other Federal jurisdiction requires action by Congress for its distribution, organization, and mode of exercise.¹² The inferior Federal courts derive their power from Congress and not directly from the Constitution.¹³ A military commission appointed by the President can exercise no part of the Federal judicial power.¹⁴ It results from the grant

⁴*Southern Ry. v. North Carolina* see *Reinhart v. McDonald*, 76 Fed. 403. etc. R. R. 81 Fed. 595.

⁵*Reagan v. Farmers L & T. Co.* 154 U. S. 392, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047; *Bank of Washington v. Arkansas*, 20 How. 529, 15 L. ed. 993.

⁶*Clark v. Barnard*, 108 U. S. 447, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

⁷*Governor of Georgia v. Madrago*, 1 Pet. 110, 7 L. ed. 73.

⁸*Port Royal etc. R. R. v. South Carolina*, 60 Fed. 552.

⁹*Smith v. Reeves*, 178 U. S. 445, 44 L. ed. 1145, 20 Sup. Ct. Rep. 919. But

¹⁰*Martin v. Hunter*, 1 Wheat. 328, 331, 4 L. ed. 103, 104.

¹¹Post, § 35.

¹²*Cary v. Curtis*, 3 How. 245, 11 L. ed. 576; *McClung v. Silliman*, 6 Wheat. 604, 5 L. ed. 340; *Johnson Co. v. Wharton*, 152 U. S. 260, 38 L. ed. 429, 14 Sup. Ct. Rep. 608.

¹³*Turner v. Bank of North America*, 4 Dall. 10, 1 L. ed. 718. And see post, § 9, note.[a]

¹⁴Ex parte Milligan, 4 Wall. 121, 18 L. ed. 295, 296.

of the Federal judicial power to the Federal courts that the legislative and executive departments are prohibited from judicial functions.¹⁵ It results also that Congress cannot vest any part of the Federal judicial power in State Courts or in any courts save those existing under the Constitution and laws of the United States.¹⁶

[b] Supreme court.

By the judiciary act of 1789 Congress created a Supreme Court consisting of seven members and from time to time has passed various laws respecting the organization of the court, salaries of judges, terms, subordinate officers, clerks, etc. In 1870 the court was increased to nine members. The Constitution defines the original jurisdiction, which Congress is without power to enlarge or modify;¹⁷ but its appellate jurisdiction as to matters within the scope of Federal judicial power, is subject to Congressional regulation and requires action by Congress for its exercise.¹⁸

[c] Inferior courts.

By the judiciary act of 1789 Congress established the district and circuit courts with a jurisdiction similar in the main to that now vested in them. In 1891 the growth of Federal litigation and the crowding of the Supreme Court's docket led to the establishment of circuit courts of appeal in each of the nine circuits which exercise a final appellate jurisdiction in many classes of cases. The tendency of the recent acts has been to restrict Federal jurisdiction.¹ In addition Congress has established a court of claims having cognizance of claims against the United States, which has, since the act of March 17, 1866, exercised all the functions of a court, and from whose judgments appeal lies to the Supreme Court.² By act of March 3, 1891, Congress further created a court of private land claims to investigate and adjudge various claims under unconfirmed grants of public lands.³ That court was required to terminate its functions on March 4th, 1899.⁴

¹⁵Ante, § 6.

¹⁶Houston v. Moore, 5 Wheat. 27, 5 L. ed. 19; Martin v. Hunter, 1 Wheat. 304, 330, 4 L. ed. 97; In re Loney, 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; United States v. Ames, 1 Wood. & M. 76, Fed. Cas. No. 14,441; The Sheazle, 1 Wood. & M. 66, Fed. Cas. No. 12,734; Stearns v. United States, 2 Paine, 300, Fed. Cas. No. 13,341; Ex parte Knowles, 5 Cal. 300; Davison v. Champlin, 7 Conn. 244; Huber v. Reilly, 53 Pa. St. 112; Ely v. Peck, 7 Conn. 239; State v. Wells, 2 Hill (S. C.) 687; United States v. Lathrop, 17 Johns. 4; State v. McBride, Rice, 400; Jackson v. Rose, 2 Va. Cas. 34; Ex parte Stephens, 70 Mass. 559.

¹⁷Post, § 35.

¹⁸Post, § 35.

¹Martin v. Baltimore etc. R. R. 151 U. S. 687, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; Tennessee v. Union etc. R. R. 152 U. S. 462, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

²Great Falls Mfg. Co. v. Attorney General, 124 U. S. 599, 31 L. ed. 527, 8 Sup. Ct. Rep. 631.

³See United States v. Sandoval, 167 U. S. 278, 42 L. ed. 168, 17 Sup. Ct. Rep. 870; Hayes v. United States, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735.

⁴Act, March 3, 1891, 26 U. S. Stats. 862, § 19, as amended, 29 U. S. Stats. 577. It has however been continued from time to time.

[d] Territorial courts.

Within the meaning of the Constitution, and the power of Congress to establish inferior courts, territorial courts are not courts of the United States, in which Congress may vest any part of the Federal judicial power.⁶ They are legislative courts, created by Congress, and the distinction between State and Federal jurisdiction does not obtain as there is but one system of government or of laws operating within a territory of the United States.⁷ The power to establish them is derived from the power of Congress to legislate fully for the territories.⁸ Acts of Congress respecting proceedings in courts of the United States are usually not construed as applying to territorial courts or courts of the District of Columbia, and do not repeal enactments regulating procedure in the latter.⁹ It has been the practice of Congress to establish the territorial courts and outline their jurisdiction, but to permit the territorial courts and legislatures to regulate practice and procedure therein.¹⁰ They may thus provide for the administering of legal and equitable relief in one action notwithstanding the Federal laws maintaining the ancient distinction between law and equity in the Federal courts.¹¹ But they cannot alter the distribution of jurisdiction made by Congress in the territorial organic law, as, by conferring law and chancery powers on the probate court provided by Congress;¹² though an act of the Idaho legislature empowering the territorial supreme court to issue certain writs not provided by Congress, has been upheld.¹³ The court established by act of March 1, 1889, for the Indian Territory has been called a court of the United States, though not a district or circuit court; and in Hawaii and Porto Rico and perhaps other territories Congress has adopted the plan of creating a district court with jurisdiction similar to the Federal circuit

⁶*American Ins. Co. v. Three Hundred etc. Bales of Cotton*, 1 Pet. 546, 7 L. ed. 243; *Benner v. Porter*, 9 How. 242, 13 L. ed. 119; *Good v. Martin*, 95 U. S. 98, 24 L. ed. 341; *Reynolds v. United States*, 98 U. S. 145, 24 L. ed. 244; *McAllister v. United States*, 141 U. S. 184, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; *United States v. McMillan*, 165 U. S. 510, 41 L. ed. 805, 17 Sup. Ct. Rep. 395; *The City of Panama*, 101 U. S. 460, 25 L. ed. 1061; *Wallace v. Adams*, 143 Fed. 725.

⁷*Benner v. Porter*, 9 How. 242, 13 L. ed. 119; *Baker v. Morton*, 12 Wall. 153, 20 L. ed. 262.

⁸*McAllister v. United States*, 141 U. S. 181, 35 L. ed. 693, 11 Sup. Ct. Rep. 949.

⁹*Hornbuckle v. Tombs*, 18 Wall. 655, 21 L. ed. 966; *The Page v. Burnstine*, 102 U. S. 668, 26 L. ed. 268. But the term "any court of the United States" is very broad and the na-

ture of the enactment may show that other than strictly Federal courts are included. See *Cross v. United States*, 145 U. S. 571, 36 L. ed. 821, 12 Sup. Ct. Rep. 844; *Brown v. United States*, 171 U. S. 636, 43 L. ed. 312, 19 Sup. Ct. Rep. 56. See post, § 59.

¹⁰*Hornbuckle v. Tombs*, 18 Wall. 656, 21 L. ed. 966; *Hershfield v. Griffith*, 18 Wall. 658, 659, 21 L. ed. 968; *Davis v. Bilsland*, 18 Wall. 661, 21 L. ed. 969; *Thiede v. Utah*, 159 U. S. 514, 40 L. ed. 237, 16 Sup. Ct. Rep. 62; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 539, 43 L. ed. 796, 19 Sup. Ct. Rep. 513.

¹¹*Hornbuckle v. Toombs*, 18 Wall. 656, 21 L. ed. 966.

¹²*Ferris v. Higley*, 20 Wall. 381, 22 L. ed. 383.

¹³*Clough v. Curtis*, 134 U. S. 368, 33 L. ed. 945, 10 Sup. Ct. Rep. 573.

and district courts;¹⁴ But these are plainly mere legislative courts and that in the Indian Territory a court established by Congress in the discharge of its governmental duties in respect to the Indian tribes.¹⁵ The fact that its judges are appointed for four years instead of during good behavior and that it is given jurisdiction outside the scope of the judicial power defined by the Constitution¹⁶ shows that it is not deemed a court of the United States within the power to establish inferior courts conferred by the section of the Constitution here under consideration.

When a territory is admitted as a State, Congress must establish inferior Federal courts therein,¹⁷ and Congress and the new State government should agree as to the transfer of records from the territorial courts in cases of proper State cognizance, as the State would otherwise have no authority to take them.¹⁸ Cases pending at the time of admission are usually made transferable to the Federal court if of Federal cognizance.¹⁹

[e] Provisional courts.

Provisional courts have been established by the President in conquered territory¹ or in rebel states occupied by military forces of the Union,² and their validity has been recognized and sustained; but they are merely military tribunals and not inferior Federal courts. Congress may validly provide for transfer of pending causes which are of Federal cognizance, into the Federal courts at the close of hostilities.³

[f] District of Columbia courts.

It has been said that the courts of the District are "courts of the United States" and hence that a denial of full faith and credit to the judgment of one of its courts was a denial of an authority exercised under the United States.⁵ Another case has refused to hold that the courts of the District might not be included within the phrase "any court of the United States," in an act of Congress.⁶ It seems plain, however, that

¹⁴In re Mills, 135 U. S. 268, 34 L. ed. 107, 10 Sup. Ct. Rep. 762; Reynolds v. United States, 98 U. S. 145, 154, 25 L. ed. 244; Ex parte Farley, 40 Fed. 66. See Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942, 26 Sup. Ct. Rep. 561, as to Porto Rico court.

¹⁵Stephens v. Cherokee Nation, 174 U. S. 477, 43 L. ed. 1041, 19 Sup. Ct. Rep. 734.

¹⁶Ex parte Farley, 40 Fed. 66.

¹⁷Benner v. Porter, 9 How. 244, 13 L. ed. 119; Koenigsberger v. Richmond etc. Min. Co. 158 U. S. 48, 39 L. ed. 889, 15 Sup. Ct. Rep. 751. See post, § 49.

¹⁸Hunt v. Palao, 4 How. 590, 11 L. ed. 1115.

¹⁹McAllister v. United States, 141 U. S. 199, 35 L. ed. 693, 11 Sup. Ct. Rep. 949, per Field, J.; Koenigs-

berger v. Richmond etc. Min. Co. 158 U. S. 48, 39 L. ed. 889, 15 Sup. Ct. Rep. 751; Washington etc. R. R. v. Coeur D'Alene Ry. 160 U. S. 93, 40 L. ed. 346, 16 Sup. Ct. Rep. 231. See post, § 213.

¹Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891.

²The Grapeshot, 9 Wall. 132, 133, 19 L. ed. 653; Mechanics etc. Bank v. Union Bank, 22 Wall. 296, 22 L. ed. 871; Lewis v. Cocks, 23 Wall. 469, 23 L. ed. 70.

³The Grapeshot, 9 Wall. 132, 133, 19 L. ed. 653; Edwards v. Tanneret, 12 Wall. 449, 20 L. ed. 415.

⁵Embry v. Palmer, 107 U. S. 10, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

⁶Cross v. United States, 145 U. S. 575, 36 L. ed. 821, 12 Sup. Ct. Rep. 844.

the power of Congress to establish courts in the District and define their jurisdiction does not result from the power to establish inferior Federal courts, but from its plenary power to govern and legislate for the District.⁷

§ 9. Federal jurisdiction is limited and must affirmatively appear.

It results from the restricted nature of the Federal judicial power that the Federal courts are termed courts of limited, as distinguished from courts of general or inferior, jurisdiction.^[a] Their jurisdiction must affirmatively appear, as it will not be presumed, any more than in the case of courts of inferior jurisdiction.^[b] But their judgments are merely erroneous and not void if jurisdiction do not appear.^[c] The Federal jurisdiction being limited it is a settled rule that the facts conferring it must be affirmatively pleaded.^{[c]-[e]} The failure of parties to object to a want of jurisdiction or an attempt to waive it does not cure the defect;^[f] as it is the court's duty to notice it, and dismiss the cause^[g] unless the defect is merely one of pleading and can be cured by amendment.^[h]

Author's Section.

[a] Federal courts are limited but not inferior.

This principle was settled in an early case and has ever since been recognized.¹⁰ It extends to the Supreme Court which is itself a court of limited jurisdiction.¹¹ The lower Federal courts are inferior courts in the sense that their judgments are subject to revision by a higher court;¹² but they are not technically such, within the meaning of that term as applied to courts not of record, whose judgments taken alone are entirely disregarded.¹³ Like inferior courts their jurisdiction must affirmatively appear, but when once shown they are entitled to the same presumptions in favor of the regularity of their acts as courts of general jurisdiction.¹⁴

⁷Capital Traction Co. v. Hof, 174 U. S. 5, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

¹⁰Turner v. Bank of North America, 4 Dall. 10, 11, 1 L. ed. 718; Kempes Lessee v. Kennedy, 5 Cranch, 185, 3 L. ed. 70; McCormick v. Sullivant, 10 Wheat. 199, 6 L. ed. 300; Cuddy, Petitioner, 131 U. S. 284, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; Bank of United States v. Moss, 6 How. 40, 12 L. ed. 331.

¹¹Rhode Island v. Massachusetts, 12 Pet. 720, 9 L. ed. 1233.

¹²Kempes Lessee v. Kennedy, 5 Cranch, 185, 3 L. ed. 70; Ex parte Watkins, 3 Pet. 205, 7 L. ed. 650.

¹³Grignon v. Astor, 2 How. 341, 11 L. ed. 283; Kennedy v. Georgia State Bank, 8 How. 612, 12 L. ed. 1209; Hornthall v. Collector, 9 Wall. 565, 19 L. ed. 560; McClaughry v. Denning, 186 U. S. 69, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786.

¹⁴Cuddy, Petitioner, 131 U. S. 284, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; Turner v. Bank of N. A. 4 Dall. 10, 11, 1 L. ed. 718; Miller v. United

None of the Federal courts have a common law jurisdiction;¹⁵ but only such as the Constitution and laws of Congress in execution thereof, have conferred.¹⁶ They have none of the inherent powers of courts existing by prescription or by the common law.¹⁷ Their powers must be conferred by Congress.¹⁸ Territorial courts and courts of the District of Columbia are not Federal courts within the doctrine of limited jurisdiction, as Congress legislates for them under its power to govern territory and not in discharge of its duty to vest the judicial power of the United States.¹⁹

[b] No presumption in favor of Federal jurisdiction.

There is no presumption in favor of the jurisdiction of Federal courts.¹ Indeed it is presumed that a case is outside the jurisdiction of the circuit or district court, unless the contrary affirmatively appears.² But this is a presumption indulged during the progress of the cause and on appeal. It has no application to collateral attack on such a judgment,³ and the absence of affirmative showing of jurisdiction does not make the judgment of a Federal court impeachable collaterally.⁴

[c] Effect of failure of record to show jurisdiction.

Where the proceedings fail to show jurisdiction, the judgment of an inferior Federal court is erroneous but not void.⁵ It is valid between the

States, 11 Wall. 299, 20 L. ed. 135; Comstock v. Crawford, 3 Wall. 403, 18 L. ed. 34.

¹⁵Ex parte Dorr, 3 How. 104, 11 L. ed. 514. See United States v. Coolidge, 1 Wheat. 416, 4 L. ed. 124.

¹⁶Cary v. Curtis, 3 How. 236, 245, 11 L. ed. 576; United States v. Barrett, 135 Fed. 189.

¹⁷Fink v. O'Neil, 106 U. S. 281, 27 L. ed. 199, 1 Sup. Ct. Rep. 325.

¹⁸Ex parte Graham, 10 Wall. 542, 19 L. ed. 981; United States v. More, 3 Cranch, 173, 2 L. ed. 397. The Assessor v. Osborne, 9 Wall. 575, 19 L. ed. 748; McIntire v. Wood, 7 Cranch, 506, 3 L. ed. 420; United States v. Eckford, 6 Wall. 488, 18 L. ed. 920; Case of Sewing Machines Cos. 18 Wall. 577, 21 L. ed. 914. See also ante, § 8, note.[a]

¹⁹Hence justice's courts in the District of Columbia have been held neither inferior courts of the United States nor courts of record. Capitol etc. Co. v. Hof, 174 U. S. 17, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Metropolitan Ry. v. Church, 174 U. S. 46, 43 L. ed. 890, 19 Sup. Ct. Rep. 878. See also ante, § 8, note. [d]-[b]

¹Ex parte Smith, 94 U. S. 456, 26 L. ed. 165.

²Robertson v. Cease, 97 U. S. 649, 24 L. ed. 1057; Bors v. Preston, 111 U. S. 255, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; Continental Ins. Co. v. Rhodes, 119 U. S. 239, 240, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Grace v. American Ins. Co. 109 U. S. 283, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; King Bridge Co. v. Otoe Co. 120 U. S. 226, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; Anderson v. Watt, 138 U. S. 702, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449; Dowell v. Applegate, 152 U. S. 340, 28 L. ed. 463, 14 Sup. Ct. Rep. 611; Hanford v. Davies, 163 U. S. 279, 41 L. ed. 157, 16 Sup. Ct. Rep. 1,051.

³In re Cuddy, 131 U. S. 285, 33 L. ed. 154, 9 Sup. Ct. Rep. 703.

⁴See infra, note.[c]

⁵Des Moines Co. v. Homestead Co. 123 U. S. 557, 31 L. ed. 204, 8 Sup. Ct. Rep. 220; Kemps Lessee v. Kennedy, 5 Cranch, 185, 3 L. ed. 70; Baker v. Biddle, 1 Bald. 394, Fed. Cas. No. 764; Farmers', etc. Co. v. McKinney, 6 McLean, 9, Fed. Cas. No. 4,667; Brown v. Noyes, 2 Wood & M. 80, Fed. Cas. No. 2,023.

parties until reversed,⁶ and may not be impeached collaterally.⁷ The presumptions are in favor of Federal court judgments on collateral attack, unless want of jurisdiction affirmatively appears.⁸ Evidence to prove that the diverse citizenship shown by the record of the Federal judgment did not in fact exist is wholly inadmissible on collateral attack.⁹ It has been held that an admiralty decree may not be attacked collaterally on application for prohibition;¹⁰ condemnation proceedings may not be attacked in subsequent ejectment suit between the parties;¹¹ a judgment failing to show jurisdiction may not be treated as a nullity,¹² or collaterally assailed in a State court;¹³ nor may a State court attack a Federal judgment collaterally because the record does not show ground for removal from a State court.¹⁴ The judgment in a cause removed without objection with no showing of jurisdiction is nevertheless binding until reversed.¹⁵ But failure to show jurisdiction is a defect always available on appeal.¹⁶ And when the record affirmatively discloses a want of jurisdiction, the rule of course does not apply.¹⁷ If the record of proceedings before a court inferior in the technical sense, e. g., a justice of the peace, does not appear it has been held that the judgment is void, at least in so far as supporting proceedings on execution.¹⁸

[d] Jurisdictional facts must be affirmatively pleaded.

The general rule is that facts necessary to the exercise of a special jurisdiction must appear of record.¹ The rule applies with especial force

⁶*McCormick v. Sullivant*, 10 Wheat. 199, 6 L. ed. 302; *Bank of United States v. Moss*, 6 How. 39, 12 L. ed. 335; *Oxley Stave Co. v. Butler Co.* 166 U. S. 660, 41 L. ed. 1153, 17 Sup. Ct. Rep. 713.

⁷*Dowell v. Applegate*, 152 U. S. 337, 38 L. ed. 467, 14 Sup. Ct. Rep. 615; *Kennedy v. Georgia Bank*, 8 How. 611, 12 L. ed. 1219; *Erwin v. Lowry*, 7 How. 180, 12 L. ed. 658; *Evers v. Watson*, 156 U. S. 533, 39 L. ed. 523, 15 Sup. Ct. Rep. 432; *Cutler v. Huston*, 158 U. S. 430, 39 L. ed. 1042, 15 Sup. Ct. Rep. 871; *Board of Comrs. v. Platt*, 79 Fed. 571, 25 C. C. A. 87.

⁸*Cuddy*, Petitioner, 131 U. S. 285, 33 L. ed. 154, 9 Sup. Ct. Rep. 704; and cases supra.

⁹*Erwin v. Lowry*, 7 How. 180, 12 L. ed. 655; *Holmes v. Oregon*, etc. R. R. 7 Sawy. 392, 400, 9 Fed. 237, 244, and cases supra.

¹⁰*In re Cooper*, 143 U. S. 506, 36 L. ed. 243, 12 Sup. Ct. Rep. 462.

¹¹*Foltz v. Railway Co.* 60 Fed. 318, 8 C. C. A. 635.

¹²*Dowell v. Applegate*, 152 U. S.

339, 38 L. ed. 467, 14 Sup. Ct. Rep. 616. ¹³*Erwin v. Lowry*, 7 How. 180, 12 L. ed. 658.

¹⁴*Dexter Co. v. Sayward*, 84 Fed. 303.

¹⁵*Des Moines, etc. Co. v. Iowa Co.* 123 U. S. 558, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

¹⁶*McCormick v. Sullivant*, 10 Wheat. 199, 200, 6 L. ed. 300; *Bank of United States v. Moss*, 6 How. 39, 12 L. ed. 335; *Des Moines Nav. Co. v. Iowa, etc. Co.* 123 U. S. 557, 31 L. ed. 202; 8 Sup. Ct. Rep. 217; *Speigel v. Meredith*, 4 Biss. 127, Fed. Cas. No. 13,227; *Fideliter v. United States*, 1 Sawy. 156, 1 Abb. (U. S.) 579, Fed. Cas. No. 4,667; *Metcalfe v. Watertown*, 128 U. S. 590, 32 L. ed. 543, 9 Sup. Ct. Rep. 173.

¹⁷*Moore v. Edgefield*, 32 Fed. 501; *Elliott v. Peirsol*, 1 Pet. 341, 7 L. ed. 164; *In re Sawyer*, 124 U. S. 221, 31 L. ed. 409, 8 Sup. Ct. Rep. 493.

¹⁸*Walker v. Turner*, 9 Wheat. 548, 549, 6 L. ed. 157.

¹*Galpin v. Page*, 18 Wall. 371, 21 L. ed. 959; *Ex parte Wood*, 9 Wheat. 607, 6 L. ed. 171.

to the Federal courts by reason of the limited nature of their jurisdiction, and makes it imperative that the jurisdictional facts be affirmatively pleaded.² Federal courts should not take jurisdiction either originally or on removal, unless jurisdictional facts appear.³ Where jurisdiction of Federal courts is invoked because of diverse citizenship or alienage it is necessary to set forth the citizenship of the parties to the suit;⁴ supplemental parties as well as original parties.⁵ If the citizenship fairly appears leaving no room for reasonable doubt, it is sufficient.⁶ But the averments must be positive⁷ and they must either be admitted or, if contested, must be proved.⁸ It has been held that defective averment in an amended complaint is immaterial where the original was adequate.⁹ On appeal if it appears that the allegation of diverse citizenship was put in issue but the record contains no findings on such issue, the case will be reversed for a trial thereof.¹⁰ If it does not appear that plaintiff is a citizen of a particular State or an alien the circuit court has no jurisdiction.¹¹ So where removal is sought on ground of diverse citizenship the petition must positively aver the facts,¹² and averments of residence rather than citizenship will not suffice.¹³ The sufficiency of averments of citizenship is discussed hereafter.¹⁴ In suits by an assignee of a chose in action in the Federal court this rule of pleading applies and he must affirmatively show that his assignor was also capable of so suing;¹⁵ otherwise jurisdiction will be denied.¹⁶ The rule applies also where Federal jurisdic-

²Confiscation Cases, 20 Wall. 108, should be contested by proper pleading. Every Eve. P. Co. v. Butler, 144 U. S. 143, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

³Bible Society v. Grove, 101 U. S. 611, 25 L. ed. 847.

⁴Bingham v. Cabot, 3 Dall. 383, 1 L. ed. 646; Assessor v. Osbornes, 9 Wall. 574, 19 L. ed. 748; Godfrey v. Terry, 97 U. S. 175, 24 L. ed. 944; Roberts v. Lewis, 144 U. S. 656, 36 L. ed. 579, 12 Sup. Ct. Rep. 781; Cameron v. Hodges, 127 U. S. 325, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154; Bors. v. Preston, 111 U. S. 263, 28 L. ed. 419, 4 Sup. Ct. Rep. 407. See Clausen v. American Ice Co. 144 Fed. 723.

⁵Course v. Stead, 4 Dall. 27, 1 L. ed. 724.

⁶Jones v. Andrews, 10 Wall. 331, 19 L. ed. 935.

⁷Hanford v. Davis, 163 U. S. 279, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; Chapman v. Barney, 129 U. S. 681, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Mattingly v. N. W. Virginia R. R. 158 U. S. 57, 39 L. ed. 895, 15 Sup. Ct. Rep. 727.

⁸Manufacturing Co. v. Bradley, 105 U. S. 181, 26 L. ed. 1034. They

⁹Toledo T. Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28.

¹⁰Roberts v. Lewis, 144 U. S. 658, 36 L. ed. 579, 12 Sup. Ct. Rep. 781.

¹¹Capron v. VanWoorden, 2 Cranch 126, 2 L. ed. 229; Von Voight v. Michigan C. R. R. 130 Fed. 398.

¹²Amory v. Amory, 95 U. S. 187, 24 L. ed. 428; Grace v. American Ins. Co. 109 U. S. 285, 27 L. ed. 932, 3 Sup. Ct. Rep. 207.

¹³Parker v. Overman, 18 How. 141, 15 L. ed. 318; Pennsylvania Co. v. Bender, 148 U. S. 257, 37 L. ed. 441, 13 Sup. Ct. Rep. 591. As to removal proceedings see post, § 133, et seq.

¹⁴Post, §§ 131, 134.

¹⁵Benjamin v. City of New Orleans, 169 U. S. 164, 42 L. ed. 700, 18 Sup. Ct. Rep. 298; Bradley v. Rhines, 8 Wall. 396, 19 L. ed. 467; Corbin v. Blackhawk Co. 105 U. S. 667, 26 L. ed. 1136; Parker v. Ormsby, 141 U. S. 86, 35 L. ed. 654, 11 Sup. Ct. Rep. 912.

¹⁶Metcalf v. Watertown, 128 U. S. 587, 588, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Brock v. Northwestern Fuel

tion is invoked because a Federal question is alleged to be involved. This must not only appear from the pleadings but must appear from the plaintiff's own statement of his claim when made in legal and logical form such as is required by the rules of good pleading.¹⁷ The absence of proper allegation in the bill or complaint cannot be cured by answer or plea or other subsequent proceedings.¹⁸ So also in proceedings to remove a cause from a State court because arising under the Federal constitution, laws and treaties, this fact must be apparent from plaintiff's bill or complaint.¹⁹ The fact that the amount in controversy exceeds a certain statutory sum, is generally a jurisdictional fact and hence under the rule must affirmatively appear.²⁰ But where the circuit court permitted the filing of affidavits of value sufficient to sustain its jurisdiction, at the same term decree was rendered, this has been held allowable.¹ In the absence of objection it has been held sufficient that jurisdiction existed at the time of judgment;² or at the time objection thereto was raised.³ For while consent cannot give jurisdiction, the want of objection will waive previous irregularities.⁴ But want of necessary diverse citizenship at the time of a court's order of sale renders it invalid.⁵

[e] Record on appeal should show jurisdictional facts.

On appeal the jurisdiction of the lower court must affirmatively appear in the record.⁷ It is not sufficient that jurisdiction may be inferred ar-

Co. 130 U. S. 342, 32 L. ed. 905, 9 Sup. Ct. Rep. 552. As to suits by assignees see post, § 23.

¹⁷Gibbs v. Crandall, 120 U. S. 108, 30 L. ed. 590, 7 Sup. Ct. Rep. 497; Little, etc. Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Blackburn v. Portland G. M. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; Press Pub. Co. v. Monroe, 164 U. S. 110, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; Muse v. Arlington Hotel Co. 168 U. S. 436, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; Metcalf v. Watertown, 128 U. S. 589, 590, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Borgmeyer v. Idler, 159 U. S. 413, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; Western U. T. Co. v. Ann Arbor, etc. R. R. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

¹⁸Tennessee v. Union Bank, 152 U. S. 461, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Third St. etc. Ry. v. Lewis, 173 U. S. 460, 43 L. ed. 766, 19 Sup. Ct. Rep. 451.

¹⁹Post, § 133.

²⁰Lanning v. Dolph, 4 Wash. C. C. 624, Fed. Cas. No. 8,073; United States v. Pratt Coal Co. 18 Fed. 708; Pliable Shoe Co. v. Bryant, 81 Fed. 521; Yellow Aster Min. Co. v. Win-

chell, 95 Fed. 213. As to amount in controversy in trial court see post, § 129; on appeal, see post, § 37, *el passim*.

¹Carr v. Fife, 156 U. S. 497, 39 L. ed. 508, 15 Sup. Ct. Rep. 427.

²Pacific R. R. v. Ketchum, 101 U. S. 298, 25 L. ed. 932.

³Richardson v. Green, 61 Fed. 436, 9 C. C. A. 565; First Nat. Bank v. Radford Trust Co. 80 Fed. 572, 26 C. C. A. 1.

⁴Ibid.

⁵Baltimore, etc. Assn. v. Alderson, 90 Fed. 146, 32 C. C. A. 542.

⁷Emory v. Greenough, 3 Dall. 370, 1 L. ed. 640; Turner v. Enville, 4 Dall. 8, 1 L. ed. 717; Jackson v. Twentyman, 2 Pet. 136, 7 L. ed. 374; Jackson v. Ashton, 8 Pet. 149, 8 L. ed. 898; Keene v. Whittaker, 13 Pet. 459, 10 L. ed. 246; Edwards v. Tanageret, 12 Wall. 450, 20 L. ed. 415; Robertson v. Cease, 97 U. S. 648, 24 L. ed. 1057; Grace v. Insurance Co. 109 U. S. 284, 27 L. ed. 935, 3 Sup. Ct. Rep. 211; Mansfield, etc. Ry. v. Swan, 111 U. S. 382, 844, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Stevens v. Nichols, 130 U. S. 231, 32 L. ed. 914, 9 Sup. Ct. Rep. 518.

gumentatively from the facts stated.⁸ It should appear in the record proper, and not merely in papers surreptitiously introduced for that purpose.⁹ The jurisdictional amount must appear from the record or affidavits filed for the purpose.¹⁰

[f] Waiver,—failure to object—and jurisdiction by consent.

Parties cannot enlarge the Federal judicial power by consent, and failure to object cannot cure a want of power in the Federal courts to entertain the cause.¹² A personal privilege, or rule of procedure or venue enacted for the benefit of suitors, may be waived, but not a defect of power in the court.¹³ Thus objection to removal proceedings because petition therefor was filed too late, may be waived.¹⁴ So appearance and pleading to the merits may waive a failure to bring suit in the proper district.¹⁵ But failure to object to the want of diverse citizenship cannot thus be waived.¹⁶

[g] Court should notice want of jurisdiction and dismiss.

It is the court's duty to notice the want of jurisdiction *sua sponte*,¹⁷ but it should give plaintiff an opportunity to be heard before dismissing cause.¹⁸ Since the act of 1875 a statute has required the circuit court to dismiss or remand a cause not properly within its jurisdiction.¹⁹ A de-

⁸*Oxley Stave Co. v. Butler Co.* 166 U. S. 655, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

⁹*Denny v. Pironi*, 141 U. S. 125, 35 L. ed. 657, 11 Sup. Ct. Rep. 966; *Sullivan v. Fulton Steamboat Co.* 6 Wheat. 451, 5 L. ed. 302.

¹⁰*Hagan v. Folsom*, 10 Pet. 160, 9 L. ed. 381; *Huntington v. Saunders*, 163 U. S. 321, 41 L. ed. 174, 16 Sup. Ct. Rep. 1120.

¹²*Cutler v. Rae*, 7 How. 731, 12 L. ed. 890; *Kelsey v. Forsyth*, 21 How. 88, 16 L. ed. 32; *Ballance v. Forsyth*, 21 How. 389, 16 L. ed. 143; *The Lucy*, 8 Wall. 309, 310, 19 L. ed. 394; *Confiscation Cases*, 20 Wall. 108, 22 L. ed. 320; *Peoples' Bank v. Calhoun*, 102 U. S. 260, 26 L. ed. 101; *Elgin v. Marshall*, 106 U. S. 580, 27 L. ed. 249, 1 Sup. Ct. Rep. 484; *Byers v. McCauley*, 149 U. S. 618, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Minnesota v. Hitchcock*, 185 U. S. 382, 46 L. ed. 958, 22 Sup. Ct. Rep. 650; *Iowa, etc. Co. v. Bliss*, 144 Fed. 446.

¹³*Fourniquet v. Perkins*, 7 How. 171, 172, 12 L. ed. 650; *Jackson v. Ashton*, 8 Pet. 149, 8 L. ed. 898 (decided inferentially); *Mexican, etc. R. v. Davidson*, 157 U. S. 208, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

¹⁴*Martin v. Baltimore, etc. R. R.* 151 U. S. 688, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Connell v. Smiley*, 156 U. S. 339, 39 L. ed. 444, 15 Sup. Ct. Rep. 354; *Knight v. International, etc. Ry.* 61 Fed. 90, 9 C. C. A. 376; *Newman v. Schwerin*, 61 Fed. 870, 10 C. C. A. 129; *Collins v. Stott*, 76 Fed. 614.

¹⁵*Jones v. Andrews*, 10 Wall. 332, 19 L. ed. 935; *St. Louis, etc. Ry. v. McBride*, 141 U. S. 131, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Central Trust Co. v. McGeorge*, 151 U. S. 133, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; *In re Keasbey*, 160 U. S. 229, 40 L. ed. 402, 16 Sup. Ct. Rep. 273.

¹⁶*Dred Scott v. Sandford*, 19 How. 402, 427, 15 L. ed. 691; *Pennsylvania R. R. v. St. Louis, etc. R. R.* 118 U. S. 295, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Parker v. Ormsby*, 141 U. S. 86, 35 L. ed. 654, 11 Sup. Ct. Rep. 912.

¹⁷*Empire Coal, etc. Co. v. Empire Min. Co.* 150 U. S. 163, 37 L. ed. 1037, 14 Sup. Ct. Rep. 66; *Minnesota v. Hitchcock*, 185 U. S. 382, 46 L. ed. 958, 22 Sup. Ct. Rep. 650.

¹⁸*Hartog v. Memory*, 116 U. S. 591, 592, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

¹⁹*Post*, § 818.

fect of jurisdiction may be raised at any stage of the cause and even by the party at whose instance jurisdiction was taken.²⁰

[h] Amendment of pleadings or record to permit showing of jurisdiction.

Where failure of pleadings to show jurisdiction is raised in trial court it should permit amendment for the purpose of remedying the defect.¹ Where the Supreme Court has reversed and remanded a cause for failure of record to show jurisdiction in the lower court, the latter may permit amendment to show that jurisdiction really existed when suit brought, if the facts warrant it.² Or the Supreme Court in its mandate may direct that amendment be permitted.³ Where it is apparent that the defect is not merely in the pleadings but in the absence of facts warranting Federal jurisdiction an appeal will be dismissed if judgment went for defendant, and the cause will be reversed with directions to dismiss the complaint, if judgment below went for plaintiff.⁴ But where the lower court had dismissed a bill on other than jurisdictional grounds the Supreme Court finding a want of jurisdiction, reversed the decree of dismissal below and directed dismissal for want of jurisdiction.⁵ It is settled that the record may not be amended in the Supreme Court to establish the jurisdiction of the court below,⁶ unless by consent.⁷ The cases permitting amendment of the record by consent are early cases; and as the question is one of practice rather than of power in the court, such a proceeding might not be permitted today because of the greater opportunity for imposition upon the court's jurisdiction afforded by amendment in the appellate rather than in the trial court.

²⁰Martin v. Baltimore, etc. R. R. 151 U. S. 689, 38 L. ed. 311, 14 Sup. Ct. Rep. 533. See post, § 818, and note.

¹Howard v. DeCordova, 177 U. S. 614, 44 L. ed. 911, 20 Sup. Ct. Rep. 817.

²Jackson v. Ashton, 10 Pet. 481, 9 L. ed. 502; Halstead v. Buster, 119 U. S. 342, 30 L. ed. 462, 7 Sup. Ct. Rep. 276; King Bridge Co. v. Otoe Co. 120 U. S. 227, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; Menard v. Goggan, 121 U. S. 253, 254, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; Roberts v. Lewis, 144 U. S. 658, 36 L. ed. 579, 12 Sup. Ct. Rep. 781; Metcalf v. Watertown, 128 U. S. 590, 32 L. ed. 543, 9 Sup. Ct. Rep. 173.

³The Sarah, 8 Wheat. 395, 5 L. ed. 644; Morgan v. Gay, 19 Wall. 81, 22 L. ed. 100; Robertson v. Cease, 97 U. S. 651, 24 L. ed. 1057.

⁴Morris v. Cotton, 8 Wall. 511, 512, 19 L. ed. 481; Assessor v. Osbornes, 9 Wall. 575, 19 L. ed. 748; United States v. Huckabee, 16 Wall. 435, 436,

21 L. ed. 457; Stickney v. Wilt, 23 Wall. 162, 163, 23 L. ed. 50; Blacklock v. Small, 127 U. S. 105, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096.

⁵Whittemore v. Amoskeag Nat. Bank, 134 U. S. 530, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592.

⁶Montgomery v. Anderson, 21 How. 388, 16 L. ed. 160; Continental Ins. Co. v. Rhoades, 119 U. S. 240, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Cameron v. Hodges, 127 U. S. 326, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154; Denny v. Pironi, 141 U. S. 124, 35 L. ed. 658, 11 Sup. Ct. Rep. 967.

⁷Hodgson v. Bowerbank, 5 Cranch, 304, 3 L. ed. 308; Kennedy v. Georgia State Bank, 8 How. 611, 12 L. ed. 1209; Warren v. Moody, 9 Fed. 673; United States v. Hopewell, 51 Fed. 800, 2 C. C. A. 510; Fitchburg Co. v. Nichols, 85 Fed. 870, 29 C. C. A. 464. See Jackson v. Ashton, 10 Pet. 480, 9 L. ed. 502, where amendment of record at subsequent term was refused.

§ 10. What law administered.

The jurisdiction of Federal courts extends to many matters of controversy quite beyond the legislative powers of Congress.¹⁰ Its power to establish Federal courts, and prescribe their jurisdiction and modes of procedure, does not enlarge the power of legislation conferred by the Constitution, so as to include the substantive law to be administered in the decision of causes there cognizable.¹¹ It follows therefore that as to matters of controversy beyond the legislative powers of Congress the courts must look elsewhere for the law to be administered. Under our form of government most matters outside the legislative powers of Congress are committed to the full control of the States. To them the national courts must accordingly look for the law by which rights in controversy committed to their control, are measured and adjudged. To declare otherwise would be to affirm a power in Federal courts to do what Congress itself cannot do, viz., to legislate in a national way as to matters committed to the local rather than the national government. Plainly such a doctrine would subvert the distribution of powers, Federal and State, provided by the organization of our government. Hence it may be said that the law administered is local where the subject matter is committed to complete local legislative control,^{[a]-[k]} and national when committed to the legislative control of Congress.^{[l]-[p]} This principle does not, however, quite cover all the ground. There are matters not fully within the legislative control of the States and not committed to Congress, as to which the States can do no more than declare the rules that shall govern their own courts. Questions of comity or of private international law are involved in determining whether a right of action will be enforced, which arises under the laws of another State or foreign country, and whether the law of the place of contract or of the forum shall be made the measure of contract rights of a transitory nature. It may well be that the Federal courts are not bound to follow the principles of private international law laid down by the courts of the State where they are sitting.^[q] There is also a line of Federal cases affirming the right of Federal courts to administer principles of general commercial law generally accepted, in disregard of the decisions of the local courts and sometimes even of local statutes.^{[r]-[u]} Questions of the law to

¹⁰Ante, § 1.

¹¹Post, § 799.

be administered arise only in causes tried in a Federal court and not in State cases taken by writ of error to the supreme court.^[v]

Author's Section.

[a] Local law administered where matter in controversy is within domain of local legislation—equity cases.

Congress has provided that State laws shall be rules of decision in the Federal courts where they apply, in actions at law.¹² If the propositions stated in the foregoing Code section be sound, however, it is plain that this legislation of Congress is largely a mere declaration of a result that naturally and necessarily follows in the absence of statute. Moreover the applicability of the rule declared by the statute would not be and should not be limited to actions at law, and must apply with equal force to equity causes. An examination of the cases shows this to be substantially true, although a few cases have been led by the wording of the act into suggesting the contrary.¹³ The fact that the statute does not in terms cover equity cases, prevents the confusion of law and equity cases that might result in some jurisdictions. But it is submitted that it does not leave the equity courts free to ignore the local law in measuring and adjudging rights in controversy before them that have been committed to the local law making power.¹⁴ A party's substantive equitable rights are the same in the local Federal as in the State court.¹⁵ Congress has provided under its power to prescribe procedure a system of equity practice and procedure which obtains uniformly in all the States and which the States may not regulate or alter.¹⁶ But this merely renders uniform the modes of enforcing equitable rights. It does not and cannot establish uniform rules for testing the existence, scope and validity of rights themselves. The Federal cases dealing with the familiar equity matter of mortgage foreclosure illustrate this. A right of redemption after foreclosure is a substantial right which the legislative power of a State may create. Hence the Federal equity practice of decreeing sale without right of redemption cannot avail to control or defeat this right.¹⁷ The Federal court must therefore alter its practice so as to protect this right although it may adopt its own mode of securing it.¹⁸ The authorities

¹²See post, § 12.

¹³See *Neves v. Scott*, 13 How. 271, 14 L. ed. 140; *Russell v. Southard*, 12 How. 148, 13 L. ed. 931; *Lamb v. Starr*, Deady, 364, Fed. Cas. No. 8,021; *Breeden v. Lee*, 2 Hughes, 488, Fed. Cas. No. 1,828; *Howards v. Selden*, 5 Fed. 473, 4 Hughes, 300. See *Klenk v. Byrne*, 143 Fed. 1011, where local statute as to tender held not binding.

¹⁴See *Independent Dist. v. Beard*, 83 Fed. 15.

¹⁵See *Ewing v. St. Louis*, 5 Wall. 413, 18 L. ed. 657.

¹⁶See ante, § 5.

¹⁷*Brine v. Hartford Ins. Co.* 96 U. S. 634, 24 L. ed. 861, *Orvis v. Powell*, 98 U. S. 178, 25 L. ed. 239; *Swift v. Smith*, 102 U. S. 450, 26 L. ed. 196; *Jackson, etc. Co. v. Burlington, etc. R. R.* 24 Blatchf. 196, 29 Fed. 475; *Singer Mfg. Co. v. McCollock*, 24 Fed. 669; *Deck v. Whitman*, 96 Fed. 884; *Hammock v. Loan Co.* 105 U. S. 88, 26 L. ed. 1111; *Benedict v. St. Joseph etc. R. R.* 19 Fed. 176, and see *Haggart v. Wilczinski*, 143 Fed. 22.

¹⁸*Allis v. Northwestern, etc. Ins. Co.* 97 U. S. 144, 24 L. ed. 1008; *Connecticut, etc. Ins. Co. v. Cushman*,

further show that in foreclosure suits the Federal courts sitting in equity habitually recognize and administer the State law and measure and adjudge rights thereby. As for example in allowing attorney fees;¹⁹ in determining the effect of an assignment of mortgage or note;²⁰ in determining the sufficiency of notice of sale;¹ in adjudging the right to rents and profits pending foreclosure;² as to precedence of a judgment to a mortgage lien;³ in holding removal of machinery from mortgaged premises, released it from mortgage;⁴ in determining the order in which parcels of land sold shall be subjected to payment of the mortgage;⁵ as to the lien of a mortgage not properly acknowledged;⁶ and in determining whether a conditional deed of trust is a mortgage.⁷ State laws respecting the recording of mortgages;⁸ as well as various other state mortgage laws;⁹ and State decisions establishing a rule as to the effect of noncompliance therewith,¹⁰ and as to the validity of foreclosure sale in suit where only mortgagor's administrator is made defendant,¹¹ have all been held binding on the Federal courts. These holdings are certainly not in obedience to the mandate of Congress, since Congress makes State laws the rule of decision only in actions at law. They are necessarily, it is conceived, a recognition of the principles of the foregoing code section. State statutes giving a remedy at law upon mortgages¹² would not fall within the principle requiring a Federal court to follow the State law; nor perhaps would a statute giving a right to a deficiency decree on foreclosure.¹³ In the latter case the Supreme Court refused to apply this law to a Federal foreclosure in equity because subverting the rule that Federal equity practice is uniform throughout the States.

An examination of other cases in which parties have proceeded in equity in the Federal courts, shows them equally attentive to the mandate of the local law in measuring equitable rights properly within the local legislative control. Thus, a State law providing that a decree ordering a conveyance might stand as such conveyance on failure of party to obey the decree,

108 U. S. 60, 27 L. ed. 651, 2 Sup. Ct. Rep. 238.

¹⁹Bendey v. Townsend, 109 U. S. 668, 27 L. ed. 1066, 3 Sup. Ct. Rep. 485; Gray v. Havemeyer, 53 Fed. 179, 3 C. C. A. 497.

²⁰New York, etc. Co. v. Lombard Ins. Co. 65 Fed. 274.

¹Bacon v. Northwestern Ins. Co. 131 U. S. 265, 33 L. ed. 131, 9 Sup. Ct. Rep. 790.

²Union Mut. etc. Co. v. Union Co. 37 Fed. 292, 3 L.R.A. 93.

³Southern R. Co. v. Bouknight, 70 Fed. 446, 30 L.R.A. 826, 17 C. C. A. 181.

⁴Weill v. Thompson, 24 Fed. 15.

⁵Orvis v. Powell, 98 U. S. 177, 25 L. ed. 238.

⁶Cumberland B. & L. Assn. v. Sparks, 106 Fed. 101.

⁷Union Bank of Chicago v. Kansas City Bank, 136 U. S. 235, 34 L. ed. 345, 10 Sup. Ct. Rep. 1017.

⁸Townsend v. Todd, 91 U. S. 453, 23 L. ed. 413.

⁹Russell v. Ely, 2 Black, 578, 17 L. ed. 258; Bondurant v. Watson, 103 U. S. 288, 26 L. ed. 447; Abraham v. Casey, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88.

¹⁰Stafford Nat. Bank v. Sprague, 17 Fed. 788, 21 Blatchf. 473; United States v. Athens Armory, 2 Abb. 145, Fed. Cas. No. 14,473.

¹¹Hearfield v. Bridges, 75 Fed. 51, 21 C. C. A. 212.

¹²The Gracie May, 72 Fed. 283, 18 C. C. A. 559.

¹³Noonan v. Lee, 2 Black, 509, 17 L. ed. 278. At the next term after this decision, the 92nd equity rule

is available in aid of an equity decree of the Federal court.¹⁴ A suit in equity for cancellation of a usurious contract may be maintained in the Federal court under a State statute giving such a right, and the State rule that plaintiff need not offer to do equity overrides the established principle of equity to the contrary and must be recognized by the Federal court.¹⁵ In a suit to establish a trust in an insolvent bank's funds the State rule as to the particularity of the identification necessary, will control the Federal court in equity.¹⁶ In a suit to charge purchasers at foreclosure sale with a trust by agreement, the State statute of frauds was held by the Federal court in equity to be controlling;¹⁷ in other cases the local statute of frauds has been applied by the Federal courts sitting in equity.¹⁸ So also a local statute construed by the State courts as giving one filing a creditor's bill a lien for his costs, will be followed by the Federal court.¹⁹ In a Federal equity suit for specific performance a State decision that a deed was not in fraud of creditors has been followed.²⁰ In all these cases in which local law is administered in equity, emphasis was laid upon the fact that the subject matter in dispute was something over which the State had control and as to which its laws and decisions created rules of property.

[aa] Local laws enlarging equitable rights.

The decisions holding that the Federal courts, will administer an enlargement of equitable rights created by State law, further corroborate the doctrine of the code section. It was early decided that the Federal courts will enforce a new remedy created by State law¹ and this principle applies quite as fully to new equitable remedies.² Even though the process act adopts State procedure only in actions at law.³ Hence a State law enlarging the ordinary equitable action to quiet title and remove a cloud may be administered in a Federal equity cause;⁴ so also a law per-

was adopted, permitting deficiency decrees on foreclosure. See post, § 1093. See *White v. Ewing*, 69 Fed. 454, 16 C. C. A. 296. This principle of *Noonan v. Lee*, though recognized at circuit, has not received subsequent endorsement by the Supreme Court and seems at variance with the other cases noted above. See Book VI. U. S. Notes, p. 208 ff.

¹⁴*Langdon v. Sherwood*, 124 U. S. 82, 31 L. ed. 346, 8 Sup. Ct. Rep. 431; *Sprague Mfg. Co. v. Hoyt*, 29 Fed. 428.

¹⁵*Missouri, K. & T. Co. v. Krumseig*, 172 U. S. 359, 43 L. ed. 477, 19 Sup. Ct. Rep. 182; *Sharon v. Terry*, 36 Fed. 337, 13 Sawy. 409, 1 L.R.A. 572.

¹⁶*Independent Dist. v. Beard*, 83 Fed. 5.

¹⁷*Randall v. Howard*, 2 Black, 589, 17 L. ed. 269.

¹⁸*Buhl v. Stephens*, 84 Fed. 926; *Press Pub. Co. v. Folk*, 59 Fed. 327; *Moses v. Lawrence Co. Bank*, 149 U. S. 303, 37 L. ed. 743, 13 Sup. Ct. Rep. 900.

¹⁹*Johnston v. Straus*, 26 Fed. 69.

²⁰*Moulton v. Chafee*, 22 Fed. 28.

¹*Robinson v. Campbell*, 3 Wheat. 223, 4 L. ed. 372.

²*Clark v. Smith*, 13 Pet. 203, 10 L. ed. 123; *Broderick's Will*, 21 Wall. 520, 22 L. ed. 606; *Holland v. Challen*, 110 U. S. 24, 28 L. ed. 55, 3 Sup. Ct. Rep. 495; *Rich v. Braxton*, 158 U. S. 415, 39 L. ed. 1032, 15 Sup. Ct. Rep. 1,017; *Illinois, etc. Ins. Co. v. Newman*, 141 Fed. 449.

³Post, § 900.

⁴*Wickliffe v. Owings*, 17 How. 51, 15 L. ed. 46; *Harmer v. Gwynne*, 5 McLean, 317, Fed. Cas. No. 6,075; *Goldsmith v. Gilliland*, 22 Fed. 866, 10 Sawy. 606; *Prentice v. Duluth*, etc.

mitting suit to set aside a tax deed;⁵ a law permitting bill to remove a cloud and quiet title by one out of possession against defendants not in possession;⁶ a law permitting a stockholder or creditor of an insolvent corporation to apply for a receiver;⁷ a law providing lien for street work and directing method of its enforcement;⁹ a State law permitting parties to suit to quiet title to be brought in by publication;¹⁰ State statutes providing for partition suits;¹¹ and for interpleader;¹² the Illinois law providing for equitable proceedings under "Burnt Records Act."¹³ A State law allowing proceedings to quiet title against a tax deed;¹⁴ or suit by one in possession of land, to settle an adverse claim;¹⁵ a State law permitting a bill for discovery;¹⁶ providing for injunction against illegal taxation;¹⁷ regulating suits for specific performance.¹⁸ The fact that the State law or decisions permit a bill in equity does not necessarily mean that the Federal court will do the same. The proceeding authorized must be essentially equitable in nature and there must be an absence of any adequate remedy at law. If there is adequate remedy at law or if the remedy given by the State law is not essentially of an equitable nature, the Federal court will grant relief at law, though the State statute declare the remedy to be in equity.¹⁹ Where there is no local statute permitting bill to remove a cloud by one out of possession the Federal court cannot

Co. 58 Fed. 442, 7 C. C. A. 293; Chapman v. Brewer, 114 U. S. 171, 29 L. ed. 88, 5 Sup. Ct. Rep. 805; Bardon v. Land, etc. Co. 157 U. S. 330, 39 L. ed. 720, 15 Sup. Ct. Rep. 650; Clark v. Smith, 13 Pet. 195, 10 L. ed. 123; Holland v. Challen, 110 U. S. 24, 28 L. ed. 55, 3 Sup. Ct. Rep. 495.

⁵Rich v. Braxton, 158 U. S. 405, 39 L. ed. 1022, 15 Sup. Ct. Rep. 1017.

⁶Dick v. Foraker, 155 U. S. 415, 39 L. ed. 205, 15 Sup. Ct. Rep. 124; More v. Steinbach, 127 U. S. 84, 32 L. ed. 56, 8 Sup. Ct. Rep. 1,073; Frost v. Spitler, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129; Harding v. Guice, 80 Fed. 164, 25 C. C. A. 352; Doe v. Waterloo, etc. Co. 43 Fed. 222, 17 C. C. A. 190; Willitt v. Baker, 133 Fed. 937; Reynolds v. Crawfordsville, etc. Bank, 112 U. S. 410, 28 L. ed. 736, 5 Sup. Ct. Rep. 216; Wehrman v. Conklin, 155 U. S. 324, 39 L. ed. 172, 15 Sup. Ct. Rep. 132. See Goldsmith v. Gilliland, 22 Fed. 866, 10 Sawy. 606; United States Min. Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587.

⁷Land, etc. Trust Co. v. Asphalt Co. 127 Fed. 18 ff; Jacobs v. Mexican J. Co. 130 Fed. 589.

⁹Fitch v. Creighton, 24 How. 163, 16 L. ed. 598.

¹⁰Arndt v. Griggs, 134 U. S. 325, 33 L. ed. 921, 10 Sup. Ct. Rep. 560.

¹¹Greeley v. Lowe, 155 U. S. 75, 39 L. ed. 75, 15 Sup. Ct. Rep. 28; Aspen, etc. Co. v. Rucker, 28 Fed. 222.

¹²Wells Fargo Co. v. Miner, 25 Fed. 536.

¹³Gormley v. Clark, 134 U. S. 348, 33 L. ed. 914, 10 Sup. Ct. Rep. 557.

¹⁴Overman v. Parker, Hemp. 694, Fed. Cas. No. 10,623; Morse v. South, 80 Fed. 210.

¹⁵Bayerque v. Cohen, McAll. 117, Fed. Cas. No. 1,134; Loring v. Downer, 1 McAll. 360, Fed. Cas. No. 8,513; Prentice v. Duluth, 58 Fed. 442, 7 C. C. A. 293; Book v. Justice, etc. Co. 58 Fed. 830.

¹⁶Lorman v. Clarke, 2 McLean, 576, Fed. Cas. No. 8,516.

¹⁷Grether v. Wright, 75 Fed. 746, 23 C. C. A. 498; Humes v. Little Rock, 138 Fed. 929.

¹⁸Single v. Scott, etc. Co. 55 Fed. 556.

¹⁹Scott v. Neeley, 140 U. S. 109, 114, 35 L. ed. 360, 11 Sup. Ct. Rep. 713; Whitehead v. Shattuck, 138 U.

maintain such a bill;²⁰ nor can they maintain one unless both plaintiff and defendant are out of possession.¹ The subject is one presenting many difficulties, for though the principle is clear that gives to State and Federal suitors the same substantive rules for adjusting rights arising out of local law, the line between substantive law and procedure is not easy to draw. A State law, for instance, which enables simple contract creditors to reach and distribute assets of a debtor has been deemed an enlargement of equity rights and followed in some Federal cases,² but by others has been held inapplicable in Federal courts of equity,³ and clearly savors quite strongly of a mere rule of procedure.

[b] Local laws that constitute rules of property.

One of the most important doctrines declared by the Federal courts concerning the binding force of State law and their duty to administer it, is that, where principles of local law constitute rules of property, they will be accepted and applied by the Federal courts.⁷ This applies to a series of decisions by the highest State court not founded upon statutes quite as much as to State statutes and the decisions construing them.⁸ To have one rule of property in the Federal courts and another in the State tribunals would be contrary to the uniform spirit of our jurisprudence.⁹ The term, rules of property, means those rules governing the descent transfer and sale thereof, and rules affecting title and possession.¹⁰

S. 152, 34 L. ed. 875, 11 Sup. Ct. Rep. 276; *Alderson v. Dole*, 74 Fed. 30, 20 C. C. A. 280; *Davidson v. Calkins*, 92 Fed. 231; *Gombert v. Lyon*, 80 Fed. 305; *Buford v. Holley*, 28 Fed. 682; *United States ex rel. v. Swan*, 65 Fed. 652, 13 C. C. A. 77; *Whitehead v. Entwistle*, 27 Fed. 780; *Sanders v. Devereux*, 60 Fed. 315, 8-C. C. A. 629.

²⁰*United States v. Wilson*, 118 U. S. 89, 30 L. ed. 112, 6 Sup. Ct. Rep. 992, 993.

¹*United States Min. Co. v. Lawson*, 134 Fed. 769, 67 C. C. A. 587.

²*See Buford v. Holley*, 28 Fed. 685; *Darragh v. Wetter Mfg. Co.* 78 Fed. 13, 23 C. C. A. 609; *Wyman v. Matthews*, 53 Fed. 680; *Jones v. Mut. F. Co.* 123 Fed. 506.

³*Scott v. Nealy*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Cates v. Allen*, 149 U. S. 456, 37 L. ed. 804, 13 Sup. Ct. Rep. 883; *Morrow S. M. Co. v. New Eng. S. Co.* 60 Fed. 341, 8 C. C. A. 652; 24 L.R.A. 417; *First Nat. Bank v. Prager*, 91 Fed. 689; 34 C. C. A. 51; *Harrison v. F. L. & T. Co.* 94 Fed. 728, 36 C. C. A. 443; *Hollins v. Briarfield*

C. Co. 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; *Jacobs v. Mexican S. Co.* 130 Fed. 591; *Davidson, etc. Co. v. Parlin*, 141 Fed. 37.

⁷*Thatcher v. Powell*, 6 Wheat. 127, 5 L. ed. 221; *Henderson v. Griffin*, 5 Pet. 155, 8 L. ed. 79; *Green v. Neal*, 6 Pet. 297, 8 L. ed. 402.

⁸*Yocum v. Parker*, 134 Fed. 205, 67 C. C. A. 227; *Bucher v. Cheshire R. R.* 125 U. S. 583, 31 L. ed. 795, 8 Sup. Ct. Rep. 978; *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Gormley v. Clark*, 134 U. S. 348, 3 L. ed. 913, 10 Sup. Ct. Rep. 556; *Folsom v. Ninety-Six Twp.* 159 U. S. 625, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Andrews v. Nat. F. Works*, 76 Fed. 171, 22 C. C. A. 110, 36 L.R.A. 150; *New York Life Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229; *Hubbard v. Goin*, 137 Fed. 822, 70 C. C. A. 320.

⁹*Stewart v. Kahn*, 11 Wall. 506, 20 L. ed. 176.

¹⁰*Bucher v. Cheshire R. R. Co.* 125 U. S. 583, 31 L. ed. 795, 8 Sup. Ct. Rep. 978; *McGon v. Scales*, 9 Wall. 27, 19 L. ed. 545.

Decisions construing a local law as to assignments for benefit of creditors, become rules of property and should be followed by the Federal courts.¹¹ Of such a nature also, are decisions on local laws as to chattel mortgages, the matter being primarily one for the States to regulate as they deem best;¹² and the State decisions as to preferences by a debtor;¹³ and as to a partner's right to exemptions out of bankrupt partnership assets.¹⁴ The decisions of the State courts in applying the statute of frauds have been recognized as rules of property.¹⁵ Where the local decisions show it to be the policy of the State not to allow a vendor of personalty to remain in possession to the prejudice of his creditors the Federal courts will also follow such policy.¹⁶ The State decisions construing the local law as to fraudulent conveyances are recognized as binding rules of property.¹⁷ The local rules of evidence in Federal actions for the recovery of real property have been held binding.¹⁸ The local law as to mechanics and material men's and other liens, as construed

¹¹*Zacher v. Fidelity T. Co.* 106 Fed. 593, 45 C. C. A. 480; *Brashear v. West*, 7 Pet. 615, 8 L. ed. 802; *Sumner v. Hicks*, 2 Black 534, 17 L. ed. 356; *Allen v. Massey*, 17 Wall. 351, 21 L. ed. 542; *Talley v. Curtain*, 54 Fed. 48, 4 C. C. A. 177; *Lloyd v. Fulton*, 91 U. S. 485, 23 L. ed. 363; *Huntley v. Kingman*, 152 U. S. 534, 38 L. ed. 543, 14 Sup. Ct. Rep. 691; *Jaffray v. McGehee*, 107 U. S. 365, 27 L. ed. 497, 2 Sup. Ct. Rep. 367; *Rothschild v. Hasbrouck*, 72 Fed. 815; *Beall v. Cowan*, 75 Fed. 143, 21 C. C. A. 267; *Heydock v. Stanhope*, 1 Curt. 478, Fed. Cas. No. 6,445; *Peters v. Bain*, 133 U. S. 686, 33 L. ed. 702, 10 Sup. Ct. Rep. 354; *South Branch L. Co. v. Ott*, 142 U. S. 620, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318; *Randolph v. Quidnick Co.* 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655; *Schoolfield v. Johnson*, 5 McCrary, 552, 11 Fed. 298; *Robinson v. Belt*, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16, 18, But see *Stowe v. Belfast Sav. Bank*, 92 Fed. 99.

¹²*Etheridge v. Sperry*, 139 U. S. 276, 277, 35 L. ed. 176, 11 Sup. Ct. Rep. 565, 569; *Brown v. Grand*, etc. Co. 58 Fed. 288, 7 C. C. A. 225, 22 L.R.A. 821; *Moore v. Young*, 4 Biss. 135, Fed. Cas. No. 9,782; *Dodge v. Norlin*, 134 Fed. 363, 66 C. C. A. 425; *Cutler v. Huston*, 158 U. S. 429, 39 L. ed. 1040, 15 Sup. Ct. Rep. 868; *May v. Tenney*, 148 U. S. 64, 37 L. ed. 370, 13 Sup. Ct. Rep. 493; *Ottensburg*

v. Corner, 76 Fed. 269, 22 C. C. A. 163, 34 L.R.A. 620; *Wilson v. Perrin*, 62 Fed. 631, 11 C. C. A. 66; *Tefft v. Stern*, 73 Fed. 593, 21 C. C. A. 67.

¹³*Bamberger v. Schoolfield*, 160 U. S. 159, 40 L. ed. 378, 16 Sup. Ct. Rep. 225.

¹⁴*In re Camp*, 91 Fed. 750.

¹⁵*Brashear v. West*, 7 Pet. 615, 8 L. ed. 801; *Allen v. Massey*, 17 Wall. 351, 21 L. ed. 542; *Lloyd v. Fulton*, 91 U. S. 485, 23 L. ed. 365; *D'Wolf v. Roband*, 1 Pet. 476, 7 L. ed. 227; *Moses v. Lawrence Co. Bank*, 149 U. S. 303, 37 L. ed. 743, 13 Sup. Ct. Rep. 901.

¹⁶*Dooley v. Pease*, 180 U. S. 128, 45 L. ed. 459, 21 Sup. Ct. Rep. 329. See *In re Sheets*, etc. Co. 136 Fed. 989, following State law as to lease and conditional sale.

¹⁷*Sumner v. Hicks*, 2 Black, 534, 17 L. ed. 355; *Wallace v. Penfield*, 106 U. S. 263, 27 L. ed. 147, 1 Sup. Ct. Rep. 216; *Schreyer v. Scott*, 134 U. S. 409, 33 L. ed. 955, 10 Sup. Ct. Rep. 579; *Crawford v. Neal*, 144 U. S. 596, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Bamberger v. Schoolfield*, 160 U. S. 159, 40 L. ed. 378, 16 Sup. Ct. Rep. 227; *Peters v. Bain*, 133 U. S. 686, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; *Moulton v. Chafer*, 22 Fed. 28.

¹⁸*Remington v. Linthicum*, 14 Pet. 91, 10 L. ed. 364; *Belding v. Hebard*, 103 Fed. 532, 43 C. C. A. 296. See also *infra*, note. [n]

by the State courts will be followed.¹⁹ The uniform course of local decisions as to what constitutes fixtures is controlling.²⁰ The State law as to adverse possession of lands is binding on the Federal court.¹ The rules established by the State courts respecting grants of a State's submerged lands will be recognized and applied by the Federal courts.² The laws of the State determine the extent of title of riparian owners³ and where such right is established by repeated decisions of the State it becomes a rule of property which Federal courts follow.⁴ The right to surface waters is governed by local law.⁵ A local statute providing that a judgment in ejectment shall bar any other action between parties and privies as to the land is a rule of property to be followed by the Federal courts.⁶ Similarly if one judgment in ejectment is not conclusive in State court it is not conclusive in the Federal court.⁷ A local law as to the granting of new trial or stay of execution in ejectment is also binding upon this ground.⁸ The Federal courts also follow the local law as to allowance for improvements made in good faith.⁹ Upon the question of the enforcement of grantor's and vendor's liens the Federal courts administer the local law since the matter is one of local property rights.¹⁰

The local laws control and will be followed, as to the rights and disabilities of a married woman;¹¹ her power to render her property liable

¹⁹*Pacific, etc. Co. v. James, etc. Co.* 68 Fed. 969, 16 C. C. A. 68; *In re Grissler*, 136 Fed. 754, 69 C. C. A. 406; *Flash v. Wilkerson*, 22 Fed. 691; *Fitch v. Creighton*, 24 How. 163, 16 L. ed. 598; *Oliver v. Clark*, 106 Fed. 402, 45 C. C. A. 360.

²⁰*New York Life Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229.

¹*Leffingwell v. Warren*, 2 Black, 603, 17 L. ed. 262; *Scott v. Mineral Dev. Co.* 130 Fed. 497, 64 C. C. A. 659. See also *infra*, note. [m]

²*Lowndes v. Huntington*, 153 U. S. 19, 38 L. ed. 618, 14 Sup. Ct. Rep. 760.

³*Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 811; *Rundle v. Delaware, etc. Co.* 14 How. 94, 14 L. ed. 335.

⁴*Yates v. Milwaukee*, 10 Wall. 506, 19 L. ed. 984; *Kaukauna, etc. Co. v. Green, etc. Co.* 142 U. S. 272, 35 L. ed. 1004, 12 Sup. Ct. Rep. 177.

⁵*Walker v. New Mexico, etc. R. R.* 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421.

⁶*Miles v. Caldwell*, 2 Wall. 44, 17 L. ed. 755; *Blanchard v. Brown*, 3

Wall. 249, 250, 18 L. ed. 71, 72; *Britton v. Thornton*, 112 U. S. 535, 28 L. ed. 819, 5 Sup. Ct. Rep. 295; *Bryar v. Bryar*, 78 Fed. 659; *Turner v. Aldridge*, 1 McAll. 231, Fed. Cas. No. 14,249.

⁷*Gibson v. Lyon*, 115 U. S. 446, 29 L. ed. 442, 6 Sup. Ct. Rep. 132; *Barber v. Pittsburgh, etc. R. R.* 166 U. S. 99, 41 L. ed. 933, 17 Sup. Ct. Rep. 491.

⁸*Equator Co. v. Hall*, 106 U. S. 88, 27 L. ed. 115, 1 Sup. Ct. Rep. 130; *Small v. Mitchell*, 143 U. S. 108, 36 L. ed. 93, 12 Sup. Ct. Rep. 355; *Griswold v. Bragg*, 48 Fed. 520; *Hiller v. Shattuck*, 1 Flipp. 275, Fed. Cas. No. 6504; *Iron Silver Min. Co. v. Campbell*, 61 Fed. 933, 10 C. C. A. 172.

⁹*McClaskey v. Barr*, 62 Fed. 211.

¹⁰*Fisher v. Shropshire*, 147 U. S. 139, 37 L. ed. 109, 13 Sup. Ct. Rep. 201; *Slide, etc. Mines v. Seymour*, 153 U. S. 516, 38 L. ed. 802, 14 Sup. Ct. Rep. 842; *Minah Con. Co. v. Briscoe*, 89 Fed. 895, 32 C. C. A. 390; *Whiteley v. Central T. Co.* 76 Fed. 79, 22 C. C. A. 67, 34 L.R.A. 303.

¹¹*Lippincott v. Mitchell*, 94 U. S. 770, 24 L. ed. 315; *Bedford v. Burton*, 106 U. S. 341, 27 L. ed. 112, 1 Sup. Ct. Rep. 98.

for the husband's debts;¹² the effect of a conveyance to husband and wife jointly;¹³ and the effect of a conveyance between husband and wife.¹⁴

A divergence between Federal and State courts in the construction of local tax laws would affect property rights and embarrass titles within a State, and the Federal courts will therefore follow the State tax laws and the decisions construing the same where no infringement of Federal limitations is involved.¹⁵

Tax proceedings, assessments, sales for nonpayment, and tax deeds all bear directly upon property rights and require an observance by Federal courts of the rule that the State laws and decisions are binding.¹⁶

[c] Laws and decisions affecting land titles as rules of property.

State decisions construing State statutes which affect title to local real estate are plainly rules of property and are deemed substantially conclusive upon the Federal courts,¹ regardless of their opinion of the correctness of the decisions.² Whatever is conclusive of title to land in the State court is a rule of property, and equally conclusive in Federal courts.³ It is the peculiar province of the States to legislate as to realty within their borders.⁴ The Federal courts are bound to decide questions of title precisely as a State court should.⁵ The duty of determining unsettled questions respecting the title to real estate is local and to

¹²Cross v. Allen, 141 U. S. 538, 35 L. ed. 843, 12 Sup. Ct. Rep. 67.

¹³Myers v. Reed, 9 Sawy. 137, 17 Fed. 404.

¹⁴Cockrill v. Woodson, 70 Fed. 754; Partee v. Thomas, 11 Fed. 777.

¹⁵Provident Trust v. Massachusetts, 6 Wall. 630, 18 L. ed. 913; Hamilton Co. v. Massachusetts, 6 Wall. 641, 18 L. ed. 907; O'Brien v. Wheelock, 95 Fed. 904, 37 C. C. A. 309; Jersey, etc. Co. v. United, etc. Co. 46 Fed. 268.

¹⁶Gaines v. Stiles, 14 Pet. 328-332, 10 L. ed. 476; Raymond v. Longworth, 14 How. 78, 14 L. ed. 333; Witherspoon v. Duncan, 4 Wall. 217, 18 L. ed. 339; Bailey v. Maguire, 22 Wall. 231, 22 L. ed. 850; McMillan v. Anderson, 95 U. S. 41, 24 L. ed. 335; Merchants' Bank v. Pennsylvania, 167 U. S. 462, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Geekie v. Kirby Carpenter Co. 106 U. S. 385, 27 L. ed. 157, 1 Sup. Ct. Rep. 315; Daniels v. Case, 45 Fed. 845; Powder, etc. Co. v. Board of Commrs. 45 Fed. 325; Hodgdon v. Burleigh, 4 Fed. 111; Lamb v. Farrell, 21 Fed. 8.

¹Jackson v. Chew, 12 Wheat. 162, 6 L. ed. 583; Fisher v. Haldeman, 20

How. 194, 15 L. ed. 879; White v. Burnley, 120 How. 251, 15 L. ed. 886; Williams v. Kirkland, 13 Wall. 311, 20 L. ed. 683; Hanrick v. Patrick, 119 U. S. 170, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; Clark v. Smith, 13 Pet. 204, 10 L. ed. 123; Delmas v. Insurance Co. 14 Wall. 668, 20 L. ed. 757; Bacon v. Insurance Co. 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787; Clement v. Packer, 125 U. S. 322, 31 L. ed. 721, 8 Sup. Ct. Rep. 907; Ridings v. Johnson, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72; Halstead v. Buster, 140 U. S. 277, 35 L. ed. 485, 11 Sup. Ct. Rep. 783; League v. Egery, 24 How. 266, 267, 16 L. ed. 655; Morgan v. Curtenuss, 20 How. 3, 15 L. ed. 823; Derby v. Jacques, 1 Cliff. 438, Fed. Cas. No. 3,817; Southern P. Co. v. Western Pac. R. R. 144 Fed. 160.

²Christy v. Pridgeon, 4 Wall. 203, 18 L. ed. 322; Nessmith v. Sheldon, 4 McLean, 376, Fed. Cas. No. 10,125. ³Blanchard v. Brown, 3 Wall. 249, 18 L. ed. 69.

⁴Arndt v. Griggs, 134 U. S. 321, 33 L. ed. 918, 10 Sup. Ct. Rep. 557.

⁵Wilkinson v. Leland, 2 Pet. 656, 7 L. ed. 542.

be discharged by the State.⁶ Settled State rules of construction of deeds or wills affecting real estate are binding on Federal courts.⁷ Where certain language in a deed will or other muniment of title is held to create a certain estate by a series of State decisions, this construction binds the Federal courts.⁸ But a single State decision construing a will deed or a contract though entitled to respect, is not conclusive as a rule of decision for the Federal courts unless, of course, as *res adjudicata* between the parties or their privies.⁹ State decisions construing the local statutes of distribution and succession are binding on the Federal courts.¹⁰ The State law as to the effect of a subsequent decision upon a deed directly to a wife is a local rule of property;¹¹ so a decision as to the effect of words in a deed creating a covenant of seisin;¹² and the effect of the word "issue" in a will affecting realty.¹³ The local law as to devolution of the title to partnership realty on the death of a partner is a rule of property within this principle;¹⁴ so also the local rule that a deed reserving a vendor's lien passes no title.¹⁵ As already shown, in Federal foreclosure proceedings, the State law has been accepted as the measure of the substantive rights under a mortgage.¹⁶ And in other than foreclosure cases the State laws and decisions respecting mortgages, foreclosure and sale, are equally binding as the rule by which rights must be measured and adjudged where questions affecting them arise in the Federal courts.¹⁷ Since the State has full power to control the encumbrance or disposition of mining ground within the State even though

⁶*Lynch v. Murphy*, 161 U. S. 252, 40 L. ed. 688, 16 Sup. Ct. Rep. 523.

⁷*Jackson v. Cnew*, 12 Wheat. 167, 6 L. ed. 588; *Henderson v. Griffin*, 5 Pet. 151, 8 L. ed. 79; *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Rinehart v. Harrison*, 1 Bald. 187, Fed. Cas. No. 11,840; *Barber v. Pittsburgh*, etc. Ry. 166 U. S. 100, 41 L. ed. 933, 17 Sup. Ct. Rep. 491; *Yocum v. Parker*, 134 Fed. 205, 67 C. C. A. 227; *Roberts v. Lewis*, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945. But see *Mathews v. Springer*, 2 Abb. (U. S.) 300, Fed. Cas. No. 9,277.

⁸*Buford v. Kerr*, 90 Fed. 513, 33 C. C. A. 166; *Meade v. Beale*, Taney, 360, Fed. Cas. No. 9,371; *Schley v. Pullman* C. C. 120 U. S. 580, 30 L. ed. 791, 7 Sup. Ct. Rep. 732; *Schnelle*, etc. Co. v. Barlow, 34 Fed. 857.

⁹*Lane v. Vick*, 3 How. 464, 11 L. ed. 681; *Bancroft v. Hambly*, 94 Fed. 979, 36 C. C. A. 595; *Russell v. Southard*, 12 How. 148, 13 L. ed. 931; *Gibson v. Lyon*, 115 U. S. 439, 446, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; *Foxcroft v. Mallett*, 4 How. 379, 11 L. ed. 1008.

¹⁰*Hanrick v. Patrick*, 119 U. S.

170, 30 L. ed. 404, 7 Sup. Ct. Rep. 154; *Byers v. McAuley*, 149 U. S. 621, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Middleton v. McGrew*, 23 How. 47, 16 L. ed. 403; *Shields v. McAuley*, 37 Fed. 304; *Billings v. Aspen*, etc. Co. 51 Fed. 344, 2 C. C. A. 252.

¹¹*Cockrill v. Woodson*, 70 Fed. 753.

¹²*Schnelle*, etc. Co. v. Barlow, 34 Fed. 853.

¹³*Flora v. Anderson*, 67 Fed. 187.

¹⁴*Perin v. Megibben*, 53 Fed. 92, 3 C. C. A. 443.

¹⁵*Oliver v. Clarke*, 106 Fed. 402, 45 C. C. A. 360.

¹⁶See *supra*, note. [a]

¹⁷*Wheeler v. Sexton*, 34 Fed. 154; *Hearfield v. Bridges*, 75 Fed. 51, 21 C. C. A. 212; *Russell v. Ely*, 2 Black 578, 17 L. ed. 258; *Townsend v. Todd*, 91 U. S. 453, 23 L. ed. 413; *Bondurant v. Watson*, 103 U. S. 289, 26 L. ed. 447; *Smith*, etc. Co. v. *McGoarty*, 136 U. S. 241, 34 L. ed. 346, 10 Sup. Ct. Rep. 1017; *Burley v. Flint*, 9 Biss. 215, Fed. Cas. No. 2,168; *Stafford Nat. Bank v. Sprague*, 17 Fed. 788, 21 Blatchf. 473; *Howe v. Sanford*, etc. Tool Co. 44 Fed. 233.

owned by a foreign corporation, the local statute as to sale of mining ground, and a decision construing and applying it, bind the Federal courts.¹⁸ The State court's construction of the local statute as to recording of deeds is binding;¹⁹ also of a statute permitting a deed by an administrator;²⁰ and of a statute as to segregation surveys by a State officer.¹ State decisions settling the title to and boundaries of particular tracts or parcels of land and the effect of particular grants should be respected by the Federal courts as *res adjudicata*.²

[d] Laws and decisions respecting powers of State's political and municipal organizations, etc.

Questions of the internal constitution of the body politic of each State are peculiarly local. Hence local decisions as to the powers of a municipality,⁵ its territorial extent,⁶ its liabilities,⁷ are authoritative where no Federal right or limitation is involved. The State courts construction of law as to issue of municipal bonds is ordinarily binding.⁸ State laws and their construction are controlling as to the powers of quasi public irrigation or other companies,⁹ and their proper organization;¹⁰ and as to the powers and proceedings of a reclamation district.¹¹ The power of county supervisors to levy a special tax is determined by the local law;¹² so also the nature of the relation between a municipality and its fire depart-

¹⁸*Williams v. Gaylord*, 186 U. S. 157, 46 L. ed. 1102, 22 Sup. Ct. Rep. 798.

¹⁹*Ross v. McLung*, 6 Pet. 286, 8 L. ed. 400; *Pickett v. Foster*, 149 U. S. 530, 37 L. ed. 829, 13 Sup. Ct. Rep. 998.

²⁰*Maxwell v. Moore*, 22 How. 191, 16 L. ed. 251.

¹*Heath v. Wallace*, 138 U. S. 587, 34 L. ed. 1063, 11 Sup. Ct. Rep. 380.

²*United States v. Roselius*, 15 How. 35, 14 L. ed. 587; *Williamson v. Suydam*, 6 Wall. 736, 738, 18 L. ed. 967; *Richardson v. Louisville*, etc. R. R. 169 U. S. 132, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; *Parrish v. Ferris*, 2 Black, 608, 609, 17 L. ed. 317.

⁵*Blaylock v. Muskogee*, 117 Fed. 125, 54 C. C. A. 639; *Evansville v. Woodbury*, 60 Fed. 720, 9 C. C. A. 244; *Illinois, etc. Bank v. Arkansas City*, 76 Fed. 279, 22 C. C. A. 171, 34 L.R.A. 518; *Dupont v. Pittsburg*, 69 Fed. 14; *First Nat. Bank v. Arlington*, 16 Blatchf. 58, Fed. Cas. No. 4,806; *Claiborne Co. v. Brooks*, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489.

⁶*Forsythe v. Hammond*, 166 U. S. 519, 41 L. ed. 1100, 17 Sup. Ct. Rep. 670.

⁷*Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; *Richmond v. Smith*, 15 Wall. 438, 21 L. ed. 202; *Merrill v. Portland*, 4 Cliff. 140, Fed. Cas. No. 9,470; *Bowditch v. Boston*, 4 Cliff. 341, Fed. Cas. No. 1,719; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 730. But see *Greenwood v. Westport*, 60 Fed. 576; *Boston v. Crowley*, 38 Fed. 204.

⁸*Rich v. Town of Mentz*, 134 U. S. 644, 33 L. ed. 1080, 10 Sup. Ct. Rep. 614; *Folsom v. Township*, 59 Fed. 68; *Zane v. Hamilton Co.* 104 Fed. 63, 43 C. C. A. 412; *German Ins. Co. v. Manning*, 78 Fed. 909; *German Bank v. Franklin Co.* 128 U. S. 538, 539, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; *Wilkes Co. v. Coler*, 180 U. S. 533, 45 L. ed. 655, 21 Sup. Ct. Rep. 458. But see post, § 12. [b]

⁹*San Diego Flume Co. v. Souther*, 90 Fed. 168, 32 C. C. A. 548.

¹⁰*Miller v. Perris*, etc. Dist. 85 Fed. 701; *Tregea v. Modesto Irrig. Co.* Dist. 164 U. S. 188, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

¹¹*Reclamation Dist. v. Hagar*, 4 Fed. 366, 6 Sawy. 567.

¹²*Supervisors v. United States*, 18 Wall. 82, 21 L. ed. 775.

ments;¹³ the liability of a county for streets etc.;¹⁴ the power of county commissioners;¹⁵ the right of a county to incur indebtedness;¹⁶ the construction of a statute authorizing bonds; the necessity for notice of an election.¹⁷

State decisions respecting the existence of subordinate State tribunals and the eligibility, election, or appointment of State officers, are considered conclusive where no question under the Federal Constitution or laws is involved. As, for instance, cases respecting the composition, status, and organization of State courts;¹⁸ the constitutional existence of a board of county commissioners;¹⁹ and the powers of State courts to set aside their judgments for mistake, etc;²⁰ or of a probate court to make an order of sale.¹

[e] Local laws and decisions respecting domestic corporations, common carriers and franchises.

States legislate in a plenary way respecting the creation, powers, rights and liabilities of domestic corporations and domestic franchises generally, and the Federal courts must obviously respect and administer the State law where questions respecting these matters are in dispute before them and no Federal right or law is involved. A State law declaring corporate stock personal property is binding on the circuit court sitting therein.⁴ The State court's construction of a law declaring stockholder's liability in a domestic corporation is binding on the Federal court even though the case arises in another State.⁵ A question of corporate powers, or ultra vires,⁶ or the forfeiture of a corporate charter⁷ is ordinarily a matter of

¹³Workman v. Mayor, etc. 63 Fed. S. 97, 32 L. ed. 630, 9 Sup. Ct. Rep. 300.

¹⁴Madden v. Lancaster Co. 65 Fed. 192, 12 C. C. A. 566.

¹⁵Pauly, etc. Co. v. Board of Comrs. 68 Fed. 172, 15 C. C. A. 351.

¹⁶Office, etc. Co. v. Elbert, 73 Fed. 326; Braun v. Board of Comrs. 66 Fed. 479.

¹⁷Post v. County of Pulaski, 47 Fed. 285.

¹⁸Freeport Water Co. v. Freeport, 180 U. S. 601, 45 L. 689, 21 Sup. Ct. Rep. 493; Meriweather v. Muhlenberg Court, 120 U. S. 357, 30 L. ed. 653, 7 Sup. Ct. Rep. 563; In re Manning, 139 U. S. 504, 507, 35 L. ed. 265, 11 Sup. Ct. Rep. 625; New York v. Barker, 179 U. S. 286, 45 L. ed. 194, 21 Sup. Ct. Rep. 121.

¹⁹Norton v. Shelby Co. 118 U. S. 440, 441, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; Willis v. Board of Commissioners, 86 Fed. 874, 30 C. C. A. 445.

²⁰Garrison v. New York, 21 Wall. 203, 22 L. ed. 612.

¹Arrowsmith v. Gleason, 129 U. see, 131 U. S. clviii. 24 L. ed. 368.

⁴Jellenik v. Huron, Cop. Min. Co. 177 U. S. 13, 44 L. ed. 651, 20 Sup. Ct. Rep. 563.

⁵Flash v. Conn, 109 U. S. 379, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Park Bank v. Runsen, 158 U. S. 342, 39 L. ed. 1008, 15 Sup. Ct. Rep. 891; Allen v. Fairbanks, 45 Fed. 447; Rhodes v. Nat. Bank, 66 Fed. 518, 13 C. C. A. 612, 34 L.R.A. 742; Field v. Haines, 28 Fed. 920; National P. Bank v. Peavey, 64 Fed. 923; Whitman v. Nat. Bank, 83 Fed. 291, 28 C. C. A. 404; Rice Co. v. Libbey, 85 Fed. 823.

⁶Smith v. Kernochen, 7 How. 219, 12 L. ed. 675; Sioux City R. R. v. Trust Co. 82 Fed. 129, 27 C. C. A. 73; Hazard v. Vermont, etc. R. R. 17 Fed. 755; Southern Ry. v. North C. R. R. 81 Fed. 602; Hawes v. Contra Costa Water Co. 5 Sawy. 289, Fed. Cas. No. 6,235; Laredo Trust Co. v. Stevenson, 66 Fed. 636, 13 C. C. A. 661.

⁷Nonconnah Turnpike v. Tennessee, 131 U. S. clviii. 24 L. ed. 368.

State law on which the State decision is final. State decisions upholding an exclusive ferry franchise have been held a binding rule of property.⁸ A State decision that the law under which a corporation organized is a general law, binds the Federal court;⁹ so also a decision declaring a railroad duly incorporated and existing.¹⁰ A state decision construing a charter granted by the crown prior to the Revolution is very persuasive and will be deemed conclusive where extensive improvements have been made under it.¹¹ A State decision construing the law reserving the right to alter or repeal a charter will be followed.¹² A State decision as to what constitutes a doing of business by a corporation is conclusive.¹³ When State decisions sustain an unrecorded pledge of corporate stock the Federal court will do likewise.¹⁴ While ordinarily the relation of a corporation and its stockholders is controlled by principles of general law in the absence of a statute, the relations of a stockholder to a building and loan company are governed by local law and decisions.¹⁵ The question whether corporate stock is to be deemed fully paid has been held to be one of general commercial law.¹⁶ But the local decisions as to the nature and powers of domestic corporations are not controlling as to the powers of a corporation created by Congress and for national purposes.¹⁷ The duties and liabilities of common carriers may usually be prescribed by the State in which they operate and when so prescribed control the decisions of the Federal courts. Thus the Federal courts have recognized and enforced the local law of Massachusetts denying liability of a carrier for injury to one wrongfully traveling on Sunday;¹⁸ a local law as to flagmen at crossings or contributory negligence;¹⁹ a State statute permitting carriers by contract to exempt themselves from liability.²⁰ The State law as to the right of a railroad to lay tracks in city streets is binding¹ and State decisions thereon will be followed.² But the law of liability to servants for injuries and liability on contracts of carriage has been declared to be a matter of general jurisprudence where there are merely local decisions

⁸Conway v. Taylor, 1 Black, 629, 17 L. ed. 191.

⁹Hammond v. Hastings, 134 U. S. 404, 33 L. ed. 960, 10 Sup. Ct. Rep. 727.

¹⁰Secombe v. Railroad Co. 23 Wall. 117, 23 L. ed. 67.

¹¹Martin v. Waddell, 16 Pet. 417, 418, 10 L. ed. 997.

¹²New York v. Cook, 148 U. S. 411, 37 L. ed. 503, 13 Sup. Ct. Rep. 649.

¹³Erie R. R. v. Pennsylvania, 21 Wall. 497, 22 L. ed. 598.

¹⁴Masury v. Arkansas Bank, 87 Fed. 382.

¹⁵Coltrane v. Blake, 113 Fed. 785, 51 C. C. A. 457.

¹⁶Clark v. Bever, 139 U. S. 117, 35 L. ed. 97, 11 Sup. Ct. Rep. 475.

¹⁷Roberts v. Northern Pac. R. R. 158 U. S. 24, 39 L. ed. 873, 15 Sup. Ct. Rep. 756.

¹⁸Butcher v. Cheshire R. R. 125 U. S. 584, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

¹⁹Grand Trunk Ry. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 685. See Rogers v. Cin. etc. R. R. 136 Fed. 574, 69 C. C. A. 321, following law permitting recovery notwithstanding contributory negligence.

²⁰Chicago, etc. Ry. v. Solan, 169 U. S. 136, 42 L. ed. 688, 18 Sup. Ct. Rep. 298; Central Georgia Ry. v. Kavanaugh, 92 Fed. 58, 34 C. C. A. 203; Northern Pac. R. R. v. Hogan, 63 Fed. 105, 11 C. C. A. 51; Northern Pac. R. R. v. Mase, 63 Fed. 115, 11 C. C. A. 63.

¹Barney v. Keokuk, 4 Dill. 598, Fed. Cas. No. 1,032.

²Van Bokelen v. Brooklyn R. R. 5 Blatchf. 379, Fed. Cas. No. 16,830.

and no local statute.³ The question of a lessor railroad's liability for lessee's negligence has also been held one of general law.⁴

[ee] State laws creating or abolishing rights and liabilities.

There can be no doubt but that where a State acting as to matters within its law making powers, creates new rights or liabilities or alters or enlarges existing ones, the Federal courts are bound to respect and administer them whether in equity admiralty or at law.⁷ As is elsewhere stated, the States may create new rights which, if of an essentially equitable nature, will be enforced by the Federal courts in equity even though the modes of procedure in Federal equity cases are distinct from the State practice and not subject to State regulation or control.⁸ The same is true in admiralty.⁹ Obviously it is equally true in common law cases that new or changed rights or liabilities within the State's law making power, must be administered by the Federal courts; and as to such cases the principle is further supported by the legislation of Congress making State laws the rules of decision. The cases coming within the principle here under discussion are those involving matters of substantive right rather than modes of procedure or relief. Of such a nature for instance are the authorities in which State laws creating a stockholder's liability and other forms of individual liability for corporate debts have been administered by the Federal courts and the construction put upon them by the State courts followed.¹⁰ And where the State law requires certain prerequisites to suit, such steps must also be taken where suit is in the Federal court.¹¹ A State law as construed by a State court, penalizing the refusal of insurance companies to pay losses under certain circumstances, will be enforced by the Federal court.¹² The Federal court sitting in another State will enforce a State law creating a liability of directors for false reports, if such law is not penal within

³See *infra*, note.[t]

⁴*Yeates v. Illinois, etc. Ry.* 137 Fed. 943.

⁷*Reynolds v. Crawfordsville Bank*, 112 U. S. 410, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Ex parte McNeil*, 13 Wall. 243, 20 L. ed. 624; *Railway Co. v. Whitton*, 13 Wall. 286, 20 L. ed. 571; *Pritchard v. Norton*, 106 U. S. 129, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Jeter v. Howard*, 22 How. 364, 16 L. ed. 345; *Cowley v. Northern Pac.* 159 U. S. 583, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; *Chicot Co. v. Sherwood*, 148 U. S. 529, 37 L. ed. 547, 13 Sup. Ct. Rep. 695; *Indianapolis, etc. Co. v. Amer. etc. Co.* 53 Fed. 970; *Farmers' L. & T. Co. v. Toledo, etc. Co.* 67 Fed. 73; *Harrison v. Remington P. Co.* 140 Fed. 385.

⁸See *supra*, note.[b]

⁹See § 4, note.

¹⁰*Mills v. Scott*, 99 U. S. 29, 25 L. ed. 294; *Flash v. Conn.* 109 U. S. 378, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Chase v. Curtis*, 113 U. S. 458, 28 L. ed. 1040, 5 Sup. Ct. Rep. 556; *National Bank v. Franklyn*, 120 U. S. 756, 30 L. ed. 829, 7 Sup. Ct. Rep. 762; *National Bank v. Peavey*, 64 Fed. 923; *Rice v. Libbey*, 85 Fed. 823; *Hotchkiss, etc. Co. v. Union Nat. Bank*, 68 Fed. 79, 15 C. C. A. 264; *Whitman v. National Bank*, 83 Fed. 291, 28 C. C. A. 404; *State Nat. Bank v. Sayward*, 91 Fed. 448, 33 C. C. A. 564; *Andrews v. National, etc. Works*, 76 Fed. 171, 22 C. C. A. 110, 36 L.R.A. 139.

¹¹*Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74.

¹²*Iowa, etc. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

the principle of international law under which courts elsewhere refuse to execute a local penal statute.¹³ Liens created by State law will be recognized and are enforceable in the Federal courts,¹⁴ which will proceed in equity in cases where the remedy is there more complete.¹⁵ Where State judgments are made liens on real estate, Federal judgments in the State will be given the same effect;¹⁶ and the State court's construction of the statute so providing binds the Federal courts.¹⁷ Where a statutory suit to set aside a judgment is removed to the Federal court, the latter follows the State law regulating such proceedings.¹⁸ The Federal court may enforce a summary remedy given to creditors of a levee district;¹⁹ nor does the fact that a proceeding authorized by a State is special or summary, prevent its removal to the Federal court.²⁰ A statutory action against heirs for a decedent's debts may be maintained in the Federal courts.¹ So where a State law confers a right to sue the State the decision of the State court upholding that right will be followed by the Federal courts.² When the State law substitutes the action of trespass for common law ejectment or abolishes the old fiction in ejectment, the Federal courts should follow this practice when the process act so provides.³ The fact that the Federal court cannot proceed in the statutory mode is immaterial and should not deprive a suitor of a right which the State law creates.⁴ Where State law prescribes the procedure for determining adverse claims to a railroad right of way, the Federal court will follow that procedure.⁵ A State law as to nature of *qui tam* actions controls the local Federal court.⁶ In numerous cases the Federal courts have enforced State laws giving a right of action for death;⁷ and have entertained suit on liabilities thus created, when sitting in another State.⁸ They have also recognized State decisions based upon

¹³Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1129, 13 Sup. Ct. Rep. 224.

¹⁴Fitch v. Creighton, 24 How. 163, 16 L. ed. 598; Flash v. Wilkerson, 22 Fed. 691; Pacific, etc. Co. v. James, etc. Co. 68 Fed. 969, 16 C. C. A. 68.

¹⁵De La Vergne, etc. Co. v. Montgomery Co. 46 Fed. 830.

¹⁶Ward v. Chamberlain, 2 Black, 445, 17 L. ed. 326; Dartmouth Sav. Bank v. Bates, 44 Fed. 547.

¹⁷Savings, etc. Co. v. Bear V. I. Co. 89 Fed. 38.

¹⁸Cowley v. Northern P. R. R. 159 U. S. 583, 40 L. ed. 267, 16 Sup. Ct. Rep. 131.

¹⁹Stansell v. Levee Bd. 13 Fed. 851.

²⁰Parker v. Overman, 18 How. 140, 15 L. ed. 319.

¹Goshorn v. Alexander, 2 Bond, 162, Fed. Cas. No. 5,630.

²Curran v. Arkansas, 15 How. 309, 14 L. ed. 705.

³Sears v. Eastburn, 10 How. 189, 13 L. ed. 381.

⁴Bank of Hamilton v. Dudley, 2 Pet. 526, 7 L. ed. 496.

⁵Central P. R. R. v. Dyer, 1 Sawy. 649, Fed. Cas. No. 2,552.

⁶State v. Grand Trunk Ry. 3 Fed. 889.

⁷Railway Co. v. Whitton, 13 Wall. 286, 20 L. ed. 571; Holmes v. Oregon, etc. Ry. 5 Fed. 84, 6 Sawy. 262; Brisenden v. Chamberlain, 53 Fed. 309; Van Doren v. Pennsylvania R. R. 93 Fed. 264, 35 C. C. A. 282; Texas & P. Ry. v. Humble, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526. See Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, following State decisions as to measure of damages.

⁸Dimmick v. Railroad, 103 U. S. 11, 26 L. ed. 439; Texas etc. Ry. v. Cox, 145 U. S. 604, 36 L. ed. 833, 12 Sup. Ct. Rep. 908; Railway Co. v. Babcock, 154 U. S. 198, 30 L. ed. 961, 14 Sup.

such statutes, giving a right to exemplary damages;⁹ or a right of recovery notwithstanding contributory negligence.¹⁰ A State law giving an illegitimate child a remedy on failure of parent to provide, will be enforced by the Federal court.¹¹ A State law requiring plaintiff in personal injury suits to submit to a surgical examination will be enforced in the Federal courts.¹² Under the old process act the abolition of the writ of right in Massachusetts did not abolish the writ as a form of process in the Federal courts;¹³ but the old common law rule that judgment on writ of entry is not a bar to such a suit was necessarily abolished since that involved a substantive rule of property and not merely a mode of procedure.¹⁴ Attachment is a statutory remedy and local decisions construing the attachment laws are binding.¹⁵ Where the State law permits an attorney fee to be recovered as damages in suit on an attachment bond, it must be allowed as damages by the Federal court where a suit on a State court attachment bond is removed to the Federal court.¹⁶

[f] Other matters of a local nature.

There are also other laws of a local nature, and other matters strictly intraterritorial, as to which the State's power of legislation is plenary, in respect to which the Federal courts should recognize and administer the local jurisprudence.¹⁷ Thus the marriage laws are of a local character and the State court's construction thereof is controlling.¹⁸ In deciding upon the rights, status and liabilities of husband and wife, the Federal courts look to the law of their domicile; and to the law of the State where property lies, in determining their rights therein.¹⁹ The right to the custody of infants is determined by State law and decisions;²⁰

Ct. Rep. 981; *Barron S. S. Co. v. Tullock v. Mulvane*, 184 U. S. 497, Kane, 170 U. S. 112, 42 L. ed. 969, 46 L. ed. 657, 22 Sup. Ct. Rep. 372. 18 Sup. Ct. Rep. 530; *Stewart v. Baltimore etc. Ry.* 168 U. S. 448, 42 L. ed. 539, 18 Sup. Ct. Rep. 106.

⁹*Louisville, etc. R. R. v. Lansford*, 102 Fed. 62, 42 C. C. A. 160.

¹⁰*Rogers v. Cincinnati etc. R. R.* 136 Fed. 574, 69 C. C. A. 321.

¹¹*In re Foley*, 76 Fed. 396.

¹²*Camden, etc. R. R. v. Stetson*, 104 Fed. 651, 44 C. C. A. 107.

¹³*Horner v. Brown*, 16 How. 363, 14 L. ed. 970.

¹⁴*See Derby v. Jacques*, 1 Cliff. 439, Fed. Cas. No. 3,817.

¹⁵*Rice v. Adler*, 71 Fed. 151, 18 C. C. A. 15.

¹⁶*Fidelity etc. Co. v. Bucki*, 189 U. S. 135, 47 L. ed. 744, 23 Sup. Ct. Rep. 582. But a State should not allow attorney fees in suit on a Federal injunction bond where the Federal equity practice does not permit it.

¹⁷A number of cases merely declare the rule that State laws and decisions of a local character are binding on the Federal courts: *Olcott v. Supervisors*, 16 Wall. 689, 21 L. ed. 382; *Allen v. Massey*, 17 Wall. 354, 21 L. ed. 542; *Bowditch v. Boston*, 101 U. S. 19, 25 L. ed. 980; *Gibson v. Lyons*, 115 U. S. 446, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; *Gardner v. Michigan Cent.* 150 U. S. 357, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Lowndes v. Huntington*, 153 U. S. 18, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; *Avery v. Popper*, 179 U. S. 315, 45 L. ed. 207, 21 Sup. Ct. Rep. 97, 98.

¹⁸*Meister v. Moore*, 96 U. S. 82, 24 L. ed. 826.

¹⁹*Cheely v. Clayton*, 110 U. S. 709, 28 L. ed. 301, 4 Sup. Ct. Rep. 332.

²⁰*In re Burrus*, 136 U. S. 624, 34 L. ed. 512. *In re Barry*, 42 Fed. 132.

also the status of a slave.¹ The measure of damages on an attachment bond given in the State court, provided by the State law, must be applied by the Federal court when suit on such bond is removed thereto.²

As already shown, State tax laws and the decisions construing them often affect titles to property and hence are conclusive as rules of property.³ The authorities also show that the Federal courts will in other cases follow the State court's construction of local tax laws where no Federal questions are involved;⁴ and will accept the State court's decision that a tax law is sufficient under the State constitution;⁵ or a State decision as to property exempt from State taxation, though slow to pronounce an exemption in advance of such decision.⁶

[ff] Rule where local law rests simply in judicial decisions.

In the absence of any controlling local statute, the Federal courts as coordinate State tribunals may, within certain limits, exercise their own judgment, as to what the local law is,¹⁰ and frequent divergencies of view between Federal and State courts have resulted. Prior State decisions are no more binding upon them than upon the State supreme court.¹¹ It is observed, however, that the Federal cases of this type do not disregard the State decisions upon an assertion of a right to disregard the local law. It is still the local law that they administer and merely the judicial interpretation thereof in the State tribunals that they question. They recognize the fact that decisions by the highest State court are good evidence of the local law;¹² and decisions by a Supreme Court commission are in the same category.¹³ They assume that the State decision is deliberate and after thorough consideration;¹⁴ and lean towards the same view in case of doubt.¹⁵ They endeavor to avoid any unseemly conflict.¹⁶ A series or course of State decisions establishing a local rule of property will be

¹*Dred Scott v. Sanford*, 19 How. 452, 15 L. ed. 783.

²*Fidelity, etc. Co. v. Bucki Co.* 189 U. S. 135, 47 L. ed. 745, 23 Sup. Ct. Rep. 582.

³See *supra*, note.[b]

⁴In *re Tyler*, 149 U. S. 187, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Lewis v. Monson*, 151 U. S. 549, 38 L. ed. 265, 14 Sup. Ct. Rep. 424; *Commercial Bank v. Chambers*, 182 U. S. 560, 45 L. ed. 1229, 21 Sup. Ct. Rep. 863.

⁵*Osborne v. Florida*, 164 U. S. 654, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Merchants Bk. v. Pennsylvania*, 167 U. S. 463, 42 L. ed. 237, 17 Sup. Ct. Rep. 830.

⁶*Ford v. Delta & P. L. Co.* 164 U. S. 675, 41 L. ed. 590, 17 Sup. Ct. Rep. 230, 235; *New Orleans v. Stemfel*, 175 U. S. 316, 44 L. ed. 174, 20 Sup. Ct. Rep. 112.

¹⁰*Burgess v. Seligman*, 107 U. S. 33, 27 L. ed. 359, 2 Sup. Ct. Rep. 10;

East Ala. Ry. v. Doe, 114 U. S. 353, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; *Casserleigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212.

¹¹See post, § 12, note.[b]

¹²*Swift v. Tyson*, 16 Pet. 18, 10 L. ed. 865; In *re Barry*, 42 Fed. 132; In *re Burrus*, 136 U. S. 624, note, 34 L. ed. 512, note; *Wade v. Travis Co.* 174 U. S. 508, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715.

¹³*Ankinney v. Hannon*, 147 U. S. 126, 37 L. ed. 105. But see *Montgomery v. McDermott*, 103 Fed. 801, 43 C. C. A. 348.

¹⁴*Cross v. Allen*, 141 U. S. 539, 35 L. ed. 843, 12 Sup. Ct. Rep. 67.

¹⁵*Clark v. Bever*, 139 U. S. 117, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Daly v. James*, 8 Wheat. 535, 5 L. ed. 670; *Yazoo, etc. R. R. v. Adams*, 181 U. S. 583, 45 L. ed. 1012, 21 Sup. Ct. Rep. 729.

¹⁶*Pleasant Twp. v. Aetna Ins. Co.*

followed by the Federal courts as completely as a local statute would be followed.¹⁷ The same is true of State decisions establishing the common law or public policy of a State.¹⁸ It is in the absence of State decision, or where there is but one or, if more, where they are conflicting, or change the rule, that the divergence of view arises.

[g] Repeated State decisions respecting local common law and public policy.

Repeated decisions of the highest State court come to be recognized as authoritative and binding expositions of the common law of a State and of its laws and customs of a local character,¹ especially when affecting land titles.² It has been said however that the Supreme Court does not feel bound by a State court's application of common law rules to the determination of private rights.³ It is also decided that a single State decision construing a State's common law is not conclusive.⁴ Where a question arises as to public policy of a state, respecting acts done or contracts made the Supreme Court has declared the State decisions to be binding where the contract or matter is wholly within the State's legislative control and no Federal question or principle of general commercial jurisprudence is involved.⁵ Where the State law shows it to be the policy of the State not to permit a vendor of personalty to remain in possession to the prejudice of his creditors the Federal courts will recognize and adopt such policy.⁶ A State's declared policy as to admitting life insurance companies to do business must be respected by the Federal courts.⁷ Where a territorial legislature has adopted the common law, the Supreme Court will be bound thereby.⁸

[h] — in absence of State decision.

In the absence of State decision the Federal courts are of course bound to decide questions of State law and also of the meaning and construction of State statutes and constitutional provisions for them-

138 U. S. 73, 34 L. ed. 864, 11 Sup. Ct. Rep. 215.

¹⁷See supra, note.[b]

¹⁸See infra, note.[g]

¹Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 365; 2 Sup. Ct. Rep. 10; Bucher v. Railroad, 125 U. S. 583, 31 L. ed. 795, 8 Sup. Ct. Rep. 978; Bondurant v. Watson, 103 U. S. 289, 26 L. ed. 450.

²Beauregard v. New Orleans, 18 How. 502, 15 L. ed. 469, and see supra. In re Zug, 16 Nat. Bk. Reg. 280, 30 Fed. Cas. 948; Malcomson v. Wappo Mills, 85 Fed. 908.

³Chicago v. Robbins, 2 Black, 428, 17 L. ed. 298.

⁴Foxcroft v. Mallett, 4 How. 379, 11 L. ed. 1008; Union P. Ry. v. Yates, 79 Fed. 589, 25 C. C. A. 103, 40 L.R.A.

553; Murray v. Chicago, etc. Ry. 92 Fed. 871, 35 C. C. A. 62. See also infra, note. [i]

⁵See Hartford Ins. Co. v. Chicago, etc. R. R. 175 U. S. 108, 44 L. ed. 84, 20 Sup. Ct. Rep. 37 and cases there cited. Vidal v. Giard, etc. 2 How. 198, 11 L. ed. 233; Detroit v. Osborne, 135 U. S. 498, 499, 34 L. ed. 262, 10 Sup. Ct. Rep. 1013; Parker v. Moore, 115 Fed. 799, 53 C. C. A. 369.

⁶Dooley v. Pease, 180 U. S. 128, 45 L. ed. 459, 21 Sup. Ct. Rep. 329.

⁷McClain v. Provident, etc. Ins. Co. 110 Fed. 80, 49 C. C. A. 31.

⁸Walker v. New Mexico etc. R. R. 165 U. S. 604, 41 L. ed. 837, 17 Sup. Ct. Rep. 421.

selves.¹⁰ But a subsequent State decision opposed to the earlier Federal one, will usually be accepted and followed by the Federal court,¹¹ especially where title to realty is affected by the rule,¹² or the construction of a local statute.¹³ In such cases where the State decision intervenes between the judgment rendered at circuit and the decision of an appeal therefrom, the State decision will ordinarily be followed by the appellate court,¹⁴ though the supreme court has refused to recognize such an intervening State decision contrary to its convictions, and to the injury of a nonresident creditor.¹⁵ Nor will the Supreme Court accept such subsequent State decision where contract rights have vested under their contrary holding.¹⁶ In any event a subsequent State decision does not render the Federal judgment erroneous on its face.¹⁷ The Federal court has refused to suspend its decision until the determination of a similar suit in the State court,¹⁸ and has refused to examine allegations that the State case in which decision was rendered was not a genuine one.¹⁹ If contract rights have vested prior to any construction of a law by either State or Federal court, the Federal courts assert a right to ex-

¹⁰*O'Brien v. Wheelock*, 95 Fed. 904, 37 C. C. A. 309; *Coates v. Muse*, 1 Brock. 537, Fed. Cas. No. 2,916; *Groves v. Slaughter*, 15 Pet. 499, 10 L. ed. 800; *Burgess v. Seligman*, 107 U. S. 34, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Folsom v. Ninety-six*, etc. 159 U. S. 625, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Breed v. Glasgow Ins. Co.* 71 Fed. 909; *Knight v. Shelton*, 134 Fed. 423.

¹¹*Green v. Neal*, 6 Pet. 299, 300, 8 L. ed. 402; *New Orleans W. Wks. Co. v. Southern*, etc. Co. 36 Fed. 833; *Andrews v. National P. & F. Wks.* 76 Fed. 166, 22 C. C. A. 110, 36 L.R.A. 139; *Fairfield v. Gallatin Co.* 100 U. S. 52, 25 L. ed. 544; *Western U. T. Co. v. Poe*, 64 Fed. 11. See post, § 12, note. [a]

¹²*Suydam v. Williamson*, 24 How. 433, 16 L. ed. 742.

¹³*Moores v. National Bk.* 104 U. S. 629, 26 L. ed. 870; *McCall v. Hancock*, 10 Fed. 9, 20 Blatchf. 344; *Kibbe v. Ditto*, 93 U. S. 680, 23 L. ed. 1005.

¹⁴*Atlantic*, etc. R. R. v. *Hopkins*, 94 U. S. 11, 24 L. ed. 48; *United States v. Morrison*, 4 Pet. 137, 7 L. ed. 804; *Moores v. National Bk.* 104 U. S. 629, 26 L. ed. 870. See *Stutsman Co. v. Wallace*, 142 U. S. 306, 35 L. ed. 1022, 12 Sup. Ct. Rep. 231, following a State decision though case appealed before State's admis-

sion. See *Knight v. Shelton*, 134 Fed. 423; *Mitchell Co. v. Matthues*, 134 Fed. 493, and *Sioux Falls v. Farmers L. & T. Co.* 136 Fed. 721, 69 C. C. A. 373, following State decision while Federal cause pending.

¹⁵*Pease v. Peck*, 18 How. 598, 599, 15 L. ed. 520; *Roberts v. Bolles*, 101 U. S. 129, 25 L. ed. 880. And see *Stryker v. Board of Comrs.* 77 Fed. 583, 23 C. C. A. 286.

¹⁶*City*, etc. Co. v. *Ottumwa*, 120 Fed. 309; *Rowan v. Runnels*, 5 How. 139, 12 L. ed. 85; *Julian v. Central T. Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Burgess v. Seligman*, 107 U. S. 33, 34, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Foot v. Johnson Co.* 5 Dill. 285, Fed. Cas. No. 4,912; *King v. Dundee*, etc. Co. 11 Sawy. 666, 28 Fed. 33. See infra, note. [k]

¹⁷*Hoffman v. Knox*, 50 Fed. 491, 1 C. C. A. 535.

¹⁸*Loring v. Marsh*, 2 Cliff. 319, Fed. Cas. No. 8,514; *Roberts v. Northern Pac. R. R.* 158 U. S. 26, 39 L. ed. 873, 15 Sup. Ct. 756. See *Knight v. Shelton*, 134 Fed. 423, following State decision rendered while Federal case pending.

¹⁹*Sioux Falls v. Farmers L. & T. Co.* 136 Fed. 721, 69 C. C. A. 373.

ercise an independent judgment as to the meaning of such laws regardless of an intervening State decision.²⁰

[i]—single and conflicting decisions.

The Federal courts have frequently refused to follow a single State decision not founded upon a statute, and not a rule of property,¹ especially where seemingly made under a misapprehension,² or where the reasons assigned are not satisfactory;³ or where obtained by collusion.⁴ They do not consider themselves bound by the decision of an inferior State court,⁵ nor where the question was not directly decided.⁶ In cases of conflict between the State decisions construing local laws they have asserted a right to decide for themselves;⁷ so also where a doctrine is criticized by a later State case.⁸ In one case it is declared that the Supreme Court will not follow mere oscillations in the course of settlement of questions in the State courts.⁹ Where the decision of a Supreme court commission conflicts with one of the court proper, the Federal court

²⁰Louisville T. Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Bartholomew v. Austin, 85 Fed. 359, 29 C. C. A. 568; Jones v. Hotel Co. 86 Fed. 375, 30 C. C. A. 108; Speer v. Board, 88 Fed. 749, 32 C. C. A. 101; Clapp v. Cooe Co. 104 Fed. 473, 45 C. C. A. 579; Southern Pine Co. v. Hall, 105 Fed. 84, 44 C. C. A. 363; United, etc. Co. v. Harris, 113 Fed. 27; Great, etc. Hotel Co. v. Jones, 116 Fed. 793, 54 C. C. A. 165; Brunswick, etc. Co. v. Nat. Bank, 112 Fed. 812.

¹Lane v. Vick, 3 How. 476, 11 L. ed. 687; Gibson v. Lyon, 115 U. S. 446, 29 L. ed. 442, 6 Sup. Ct. Rep. 132; Barber v. Pittsburgh, etc. R. R. 166 U. S. 99, 41 L. ed. 933, 17 Sup. Ct. Rep. 491; Murray v. Chicago, etc. R. R. 92 Fed. 871, 35 C. C. A. 62; Ryan v. Staples, 76 Fed. 727, 23 C. C. A. Fed. 100; Chisholm v. Caines, 67 Fed. 294; Bancroft v. Hambly, 94 Fed. 979, 36 C. C. A. 595; Union P. Ry. v. Yates, 79 Fed. 589, 25 C. C. A. 103, 40 L.R.A. 553.

²Preston v. Bowmar, 6 Wheat. 583, 5 L. ed. 336; Lauriat v. Stratton, 6 Sawy. 347, 11 Fed. 114; Keokuk, etc. Ry. v. County Court, 41 Fed. 314.

³Levy v. Stewart, 11 Wall. 255, 20 L. ed. 86; Coler v. Board of Comrs. 89 Fed. 257; United, etc. Co. v. Harris, 113 Fed. 27; Smith v. Atl. Ins. Co. 22 Fed. Cas. 425.

⁴Andes v. Ely, 158 U. S. 318, 39 L.

ed. 996, 15 Sup. Ct. Rep. 954. But see Sioux Falls v. Farmers L. & T. Co. 136 Fed. 721, 69 C. C. A. 373.

⁵Beals v. Hale, 4 How. 54, 11 L. ed. 873; Patapsco, etc. Co. v. Morrison, 2 Woods, 404; Fed. Cas. No. 10,792. See Mitchell Co. v. Matthews, 134 Fed. 493, following decision by single judge.

⁶Carroll v. Carroll, 16 How. 275, 14 L. ed. 936; St. Louis, etc. R. A. v. Terre Haute, etc. R. R. 145 U. S. 403, 404, 36 L. ed. 748, 12 Sup. Ct. Rep. 953; Keokuk, etc. R. R. v. County Court, 41 Fed. 306; Myrick v. Heard, 31 Fed. 243; Matz v. Chicago, etc. Co. 85 Fed. 183; Stowe v. Sav. Bank, 92 Fed. 90; Wiemer v. Louisville W. Co. 130 Fed. 251. But see Phelps v. Harris, 101 U. S. 382, 383, 25 L. ed. 855.

⁷Ohio, etc. Trust Co. v. Debolt, 16 How. 431, 14 L. ed. 997; San Antonio v. Mahaffy, 96 U. S. 315, 24 L. ed. 816; Chisholm v. Caines, 67 Fed. 294; Morris v. United States, 174 U. S. 240, 43 L. ed. 946, 19 Sup. Ct. Rep. 649; Southern P. Co. v. Orton, 32 Fed. 477; Wilson v. Lumber Co. 67 Fed. 682. But see New Orleans, etc. Co. v. Southern, etc. Co. 36 Fed. 834.

⁸Brunswick, etc. Co. v. Nat. Bank, 112 Fed. 812.

⁹Gelpcke v. Dubuque, 1 Wall. 205, 17 L. ed. 520.

will follow the latter.¹⁰ Where the State law is unsettled the circuit court may properly follow the Federal Supreme Court.¹¹

[j] — State decisions changing the local rule.

The general doctrine of the cases is that the Federal courts will adopt a change in a local rule of property made by the State decisions.¹² In other words they will generally follow the latest decision;¹³ but will sometimes refuse to accept the latest of conflicting decisions where the question does not really seem settled;¹⁴ or a late decision at variance with a long line of earlier decisions.¹⁵

[k] — change in local decisions impairing vested contract rights.

Although a judicial decision is not a law within the obligation clause of the constitution;¹ yet where a contract when made is valid under the existing judicial construction of the State laws, the Federal courts will not become parties to its impairment by following a subsequent change in such judicial construction.² In other words the Federal courts will not accept and follow a change in the State judicial interpretation of the local law to the injury of contract rights that have vested under the earlier construction.³ The most frequent application of this rule has been in the case of municipal bonds sold to bona fide purchasers under State decisions sustaining their validity, which were departed from in subsequent decisions.⁴ The rule has been applied even though at the time of sale of bonds there were no state decisions, and adverse rulings have been

¹⁰Montgomery v. McDermott, 103 Fed. 801, 43 C. C. A. 348.

¹¹Ober v. Gallagher, 93 U. S. 207, 23 L. ed. 829.

¹²Green v. Neal, 6 Pet. 299, 300, 8 L. ed. 402; Fairfield v. Gallatin Co. 100 U. S. 52, 54, 25 L. ed. 546, 547; Western U. Co. v. Poe, 64 Fed. 13.

¹³United States v. Morrison, 4 Pet. 124, 7 L. ed. 804; Wade v. Travers Co. 174 J. S. 508, 43 L. ed. 1060, 19 Sup. Ct. Rep. 718; King v. Wilson, 1 Dill. 567, Fed. Cas. No. 7,810; Mitchell v. Lippincott, 2 Woods, 473, Fed. Cas. No. 9,665; Smith v. Shriver, 3 Wall. Jr. 228, Fed. Cas. No. 13,108. But see Nelson v. Madison, 3 Biss. 253, Fed. Cas. No. 10,110.

¹⁴Myrick v. Heard, 31 Fed. 243.

¹⁵Wilson v. Ward L. Co. 67 Fed. 681; Forsyth v. Hammond, 71 Fed. 454, 18 C. C. A. 178.

¹University v. People, 99 U. S. 320, 25 L. ed. 387.

²Ohio, etc. Co. v. Debolt, 16 How. 432, 14 L. ed. 997; Gelpeke v. Dubuque, 1 Wall. 205, 206, 17 L. ed. 520; Havemeyer v. Iowa Co. 3 Wall. 303, 18 L. ed. 38; Taylor v. Ypsilanti, 105 U. S. 72, 26 L. ed. 1008; Louisiana

v. Pilsbury, 105 U. S. 294, 26 L. ed. 1090; Los Angeles v. Los Angeles Water Co. 177 U. S. 375, 44 L. ed. 894, 20 Sup. Ct. Rep. 736; Supervisors v. United States, 18 Wall. 82, 21 L. ed. 771.

³Anderson v. Santa Anna, 116 U. S. 361, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; Morgan v. Curtenius, 20 How. 3, 15 L. ed. 823; Lee Co. v. Rogers, 7 Wall. 183, 19 L. ed. 160; Mitchell v. Burlington, 4 Wall. 275, 18 L. ed. 350; Louisville, etc. Ry. v. Gaines, 2 Flipp. 630, 3 Fed. 274; Jones v. Hotel Co. 86 Fed. 372; Wicomico Co. Comrs. v. Bancroft, 135 Fed. 977, 70 C. C. A. 287; Rollins v. Lake Co. 34 Fed. 846; Bartholomew v. Austin, 85 Fed. 366, 29 C. C. A. 568; Clark v. Bever, 139 U. S. 117, 35 L. ed. 97, 11 Sup. Ct. Rep. 475; Vermont, etc. Co. v. Dygert, 89 Fed. 124; Westinghouse A. B. Co. v. Kansas, etc. Ry. 137 Fed. 26, (C. C. A.); Farmers L. & T. Co. v. Sioux Falls, 131 Fed. 890; Caesar v. Capell, 83 Fed. 427; McCall v. Hancock, 10 Fed. 9, 20 Blatchf. 344.

⁴See note to Gelpeke v. Dubuque, in Book VI., U. S. Notes, p. 303; City of Lamson, 9 Wall. 486, 19

ignored where made after the rights of parties had become fixed.⁵ Other cases have gone still further and upheld municipal bonds though the State decisions were numerous and uniform the other way, on the ground that the question of their validity was one of general commercial law as to which the Federal courts might ignore State decisions.⁶ But later State decisions sustaining the validity of bond issues will be followed by Federal courts rather than early adverse decisions.⁷ The principle of the foregoing cases cannot however, be applied by the Supreme Court on error to a State court since the only matter there reviewable is the denial of a Federal right and a State decision reversing earlier cases or misconstruing a contract is not a law impairing its obligation.⁸ Nor should this principle be applied where it would result in conflicting rules respecting land titles within a State; as for example by following early State cases upholding a wife's right to mortgage her separate estate for a husband's debts rather than later State cases, contra.⁹

[1] Matters within national legislative power—remedies and procedure.

The line of distinction between laws Congress may and may not pass under its power to organize and equip the Federal courts for the trial of causes, has never been clearly drawn.¹¹ However difficult to define, it is as certain that the power has its limitations, as it is that it exists. It cannot safely be said that only mere matters of procedure as distinguished from substantive rights, are within this power of Congress, for the

L. ed. 725; *Olcott v. Supervisors*, 16 Wall. 693, 21 L. ed. 382; *Commissioners, etc. v. Thayer*, 94 U. S. 642, 24 L. ed. 135; *Louisiana v. Pillsbury*, 105 U. S. 295, 26 L. ed. 1096; *Township of Elmwood v. Marcy*, 92 U. S. 294, 23 L. ed. 910; *Douglas v. Pike Co.* 101 U. S. 688, 25 L. ed. 968; *Thompson v. Perriere*, 103 U. S. 818, 26 L. ed. 612; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. ed. 786, 7 Sup. Ct. Rep. 736; *Knox Co. v. Ninth Nat. Bank*, 147 U. S. 99, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Loeb v. Columbia, etc. Trustees*, 179 U. S. 492, 493, 45 L. ed. 291, 21 Sup. Ct. Rep. 174; *Wilkes Co. v. Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458, see S. C. 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; *Foot v. Johnson Co.* 5 Dill. 284, Fed. Cas. No. 4,912; *McCall v. Hancock*, 20 Blatchf. 346, 10 Fed. 9; *Union Bank v. Board of Comrs.* 90 Fed. 9; *Speer v. Board of Comrs.* 88 Fed. 760, 32 C. C. A. 101; *Franklin Co. v. Gardner Sav. Ins.* 119 Fed. 38, 55 C. C. A. 614; *Rees v. Olmstead*, 135 Fed. 296, 68 C. C. A. 50.

⁵*Block v. Commissioners*, 99 U. S. 699, 25 L. ed. 491; *Pleasant Twp.*

v. Aetna, etc. Ins. Co. 138 U. S. 73, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; *Barnum v. Okolona*, 148 U. S. 397, 37 L. ed. 495, 13 Sup. Ct. Rep. 638; *Columbia Av. etc. Co. v. Dawson*, 130 Fed. 152, following a contrary Federal case; *Northwestern Sav. Bank v. Centreville*, 143 Fed. 81.

⁶*Township of Pine Grove v. Talcott*, 19 Wall. 678, 22 L. ed. 233. In that case there was a sort of legislative recognition of the validity of the bonds. See also *Olcott v. Supervisors*, 16 Wall. 690, 21 L. ed. 382; *Pana v. Bowler*, 107 U. S. 541, 27 L. ed. 424, 2 Sup. Ct. Rep. 704.

⁷*Wade v. Travis Co.* 174 U. S. 509, 43 L. ed. 1065, 19 Sup. Ct. Rep. 719; *King v. Wilson*, 1 Dill. 558, 568, Fed. Cas. No. 7,810.

⁸*Central Land Co. v. Laidley*, 159 U. S. 111, 112, 40 L. ed. 94, 95, 16 Sup. Ct. Rep. 82; *Bacon v. Texas*, 163 U. S. 221, 222, 41 L. ed. 137, 138, 16 Sup. Ct. Rep. 1029; *Turner v. Wilkes Co.* 173 U. S. 463, 43 L. ed. 768, 19 Sup. Ct. Rep. 465.

⁹*Mitchell v. Lippincott*, 2 Woods. 470, Fed. Cas. No. 9,665.

¹¹See post, § 799.

modes prescribed for the vindication of rights often practically determine their legal existence. Under its power to regulate the modes of proceeding in Federal courts, Congress may prescribe the rules of evidence, the time for bringing actions, the forms of remedies, and the modes of enforcing judgments therein, and may declare what property shall be subject to levy on execution from the Federal courts. Upon some of these matters Congress has legislated by prescribing a uniform Federal law. Upon others it has declared that the Federal courts shall in common law causes be governed by the rule of the State where sitting. In this latter class of cases the State law is therefore administered, not because it is binding upon Federal courts *proprio vigore*, but because Congress has declared that it shall be observed and followed. In such cases therefore the question when a rule of the local courts must be administered and applied is merely a question of the proper meaning and construction of the acts of Congress and does not involve the fundamental principle which in other cases requires a recognition of the local law.

In the matter of forms of proceeding and remedies, for instance, Congress has declared that the local law shall be followed by Federal courts in common law causes.¹² But the Federal courts very properly disregard a change in the local law on the subject where the practice act has adopted the State procedure in force at a prior time;¹³ or a State law forbidding mandamus in aid of judgments, where the Federal practice act otherwise requires.¹⁴ Other cases have administered a new State statutory remedy;¹⁵ or followed the local statute and decisions as to procedure because the Federal statute so required;¹⁶ or disregarded it upon the same theory;¹⁷ or refused to accept the State decisions interpreting the local practice acts;¹⁸ or refused to be bound by local decisions respecting collateral attack upon judgments.¹⁹

As the Federal equity practice is not assimilated to that of the States, the rights of parties under a Federal injunction bond are governed by Federal law; hence in suit thereon in a State court the latter cannot allow attorney's fee as damages contrary to the Federal practice.²⁰ But on the other hand, where suit is brought in the Federal court on a State court attachment bond, the State law is the rule of decision, and the Federal court cannot disallow an attorney's fee as damages where allowable

¹²See post, § 900.

¹³Homer v. Brown, 16 How. 363, 14 L. ed. 970.

¹⁴United States v. Capdovielle, 118 Fed. 809, 55 C. C. A. 421.

¹⁵Campbellsville, etc. Co. v. Hubbert, 112 Fed. 718, 50 C. C. A. 435.

¹⁶Atlantic & P. R. R. v. Hopkins, 94 U. S. 11, 24 L. ed. 48.

¹⁷Butz v. Muscatine, 8 Wall. 582, 19 L. ed. 490, 494.

¹⁸Amis v. Smith, 16 Pet. 313, 10

L. ed. 973; Doll v. Equitable L. A. Soc. 138 Fed. 705. See King v. Davis, 137 Fed. 198, refusing to follow State decisions as to presumptions in aid of defective substituted service.

¹⁹Phoenix B. Co. v. Castleberry, 131 Fed. 175, 65 C. C. A. 481.

²⁰Tullock v. Mulvane, 184 U. S. 514, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Missouri, etc. R. R. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

under the State practice.²¹ In each case the question what law governs, is determined by ascertaining whether the State or the nation has power to prescribe the rule.

[m] Matters within legislative powers of Congress—limitation of actions.

Statutes of limitation are concerned rather with the mode of enforcing rights than with their existence; with procedure rather than with substantive rules of law. But whether they always affect merely the remedy and not the right,¹ it seems plain that under its power to prescribe the procedure of Federal courts, Congress would have an undoubted right to prescribe the time within which suitors may apply to Federal courts for relief.² Hence the Federal cases declaring when State statutes of limitation and the decisions thereunder shall be held binding upon them involve merely a question of the proper meaning and construction of the act of Congress making the State laws, rules of decision.³ Under that act the local statutes of limitation and the decisions thereunder are rules of decision in actions at common law. The cases have very uniformly⁴ recognized the propriety of regarding the local acts of limitation as rules of property; and such statutes and the local decisions thereunder are deemed binding.⁵ This is especially true in cases, in equity as well as at law, involving the question of title to land by adverse possession.⁶ The

²¹*Fidelity & D. Co. v. L. Bucki*, etc. Co. 189 U. S. 135, 47 L. ed. 744, 23 Sup. Ct. Rep. 582.

¹See *Michigan Ins. Bank v. Eldred*, 130 U. S. 696, 32 L. ed. 1081, 9 Sup. Ct. Rep. 696, declaring that statutes of limitation of personal actions are laws affecting remedies only, and not rights.

²See *Amy v. Dubuque*, 98 U. S. 471, 25 L. ed. 229. Post, § 799.

³See *Michigan Ins. Bank v. Eldred*, 130 U. S. 696, 32 L. ed. 1081, 9 Sup. Ct. Rep. 691.

⁴*Campbell v. Haverill*, 155 U. S. 614, 39 L. ed. 282, 15 Sup. Ct. Rep. 219.

⁵*Daire v. Briggs*, 97 U. S. 637, 24 L. ed. 1089; *Hanger v. Abbott*, 6 Wall. 537, 18 L. ed. 942; *Porterfield v. Clark*, 2 How. 125, 11 L. ed. 185; *Andraea v. Redfield*, 98 U. S. 235, 25 L. ed. 162; *Amy v. Dubuque*, 98 U. S. 471, 25 L. ed. 229; *Shelby v. Guy*, 11 Wheat. 367, 6 L. ed. 497; *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402; *Barrett v. Holmes*, 102 U. S. 655, 26 L. ed. 292; *Balkan v. Woodstock Iron Co.* 154 U. S. 189, 38 L. ed. 957, 14 Sup. Ct. Rep. 1014 and cases cited. *Great W. T. Co. v. Purdy*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep.

814; *Texas, etc. Ry. v. Smith*, 159 U. S. 71, 40 L. ed. 77, 15 Sup. Ct. Rep. 994; *Bauserman v. Blunt*, 147 U. S. 652, 37 L. ed. 318, 13 Sup. Ct. Rep. 466; *Michigan Ins. Bank v. Eldred*, 130 U. S. 696, 32 L. ed. 1081, 9 Sup. Ct. Rep. 691; *Metcalf v. Watertown*, 153 U. S. 673, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; *Boyle v. Arledge, Hemp*, 622, Fed. Cas. No. 1,758; *French v. Edwards*, 4 Sawy. 129, Fed. Cas. No. 5,097; *Tioga, etc. R. R. v. Blossburg, etc. R. R.* 20 Wall. 150, 22 L. ed. 337; *Black v. Elkhorn M. Co.* 47 Fed. 603; *Elder v. McClaskey*, 70 Fed. 538, 17 C. C. A. 251; *Butler v. Poole*, 44 Fed. 586; *Brown v. Hiatt*, 1 Dill. 377, Fed. Cas. No. 2,011; *Burleigh v. Rochester*, 5 Fed. 673; *Bullion, etc. Bank v. Hegler*, 93 Fed. 892. But see *Rollins v. Lake Co.* 34 Fed. 846.

⁶*Elmendorf v. Taylor*, 10 Wheat. 176, 6 L. ed. 289; *Peyton v. Stith*, 5 Pet. 485, 8 L. ed. 203; *Porterfield v. Clark*, 2 How. 125, 11 L. ed. 185; *Miller v. McIntyre*, 6 Pet. 66, 8 L. ed. 322; *Boone v. Chiles*, 10 Pet. 221, 9 L. ed. 404; *Leffingwell v. Warren*, 2 Black, 603, 17 L. ed. 261; *St. Paul, etc. Co. v. Sage*, 49 Fed. 320, 1 C. C. A. 256;

period prescribed by a State law for presentation of claims against an estate, is also a rule for Federal courts, which will refuse to entertain a suit by a nonresident creditor against an administrator after such period has elapsed;⁷ or to set off an outlawed claim by the estate, in a suit for a legacy.⁸

The States may, under this section, declare the period of limitation for suits or Federal judgments, so long as they do not discriminate against them by prescribing a shorter period for judgments of the local Federal courts than for their own domestic State judgments.⁹ The period of limitation on causes of action created by Congress and enforceable only in Federal courts, is governed by the local statute unless Congress otherwise prescribe, and unless the State deliberately attempt to discriminate unreasonably against their enforcement;¹⁰ as, for example, an action for infringement of copyright;¹¹ or of a patent ¹² or to enforce stockholders' liability in a national bank.¹³

But decisions of state courts respecting the time when the statute begins to run, where resting upon general principles and not on any positive statute, have been disregarded.¹⁴ It has been similarly held that the Federal courts may disregard local decisions, not based upon statute, declaring that the statute of limitations was not suspended by the civil war.¹⁵ A State decision that all actions to enforce a statutory liability were specialities, has been disregarded.¹⁶ The question whether the Federal court in equity will administer a State statute of limitations presents somewhat different considerations. Such statutes can scarcely be said to create substantive rights which the Federal court must respect, but to be concerned rather with the mode of their enforcement. In passing statutes of limitation the States merely exercise their undoubted right to determine the time within which suits may be brought in their own courts, and as Congress must possess the same power over the bringing of actions in Federal courts,¹⁷ it follows that by merely adopting the State practice and making the State laws rules of decision in actions at law the Federal courts are left free from the compulsion of such laws in

Hoge v. Magnes, 85 Fed. 357, 29 C. A. 564; Barrett v. Holmes, 102 U. S. 651, 26 L. ed. 291; Scott v. Mineral Dev. Co. 130 Fed. 497, 64 C. C. A. 659. But see Nelson v. Madison, 3 Biss. 253, Fed. Cas. No. 10,110.

⁷Security T. Co. v. Black, etc. Bk. 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52.

⁸Wilson v. Smith, 117 Fed. 707.

⁹Metcalf v. Watertown, 153 U. S. 671, 38 L. ed. 862, 14 Sup. Ct. Rep. 947. See Phelps v. O'Brien Co. 2 Dill. 519, Fed. Cas. No. 11,078.

¹⁰Campbell v. Haverill, 155 U. S. 614, 39 L. ed. 282, 15 Sup. Ct. Rep. 219.

¹¹Brady v. Daly, 175 U. S. 158, 44 L. ed. 113, 20 Sup. Ct. Rep. 66.

¹²Campbell v. Mayor, 81 Fed. 183, Rich v. Ricketts, 7 Blatchf. 231, Fed. Cas. No. 11,762. See Brickill v. Baltimore, 52 Fed. 739.

¹³Thompson v. German Ins. Co. 76 Fed. 893; Butler v. Poole, 44 Fed. 586.

¹⁴Murray v. Chicago, etc. Ry. 92 Fed. 871, 35 C. C. A. 62; Brigham Co. v. Gross, 107 Fed. 769.

¹⁵Hanger v. Abbott, 6 Wall. 534, 18 L. ed. 941; Levy v. Stewart, 11 Wall. 244, 20 L. ed. 86; Brown v. Hiatt, 1 Dill. 377, Fed. Cas. No. 2,011.

¹⁶Brunswick T. Co. v. National Bank, 88 Fed. 611.

¹⁷See Amy v. Dubuque, 98 U. S. 471, 25 L. ed. 229.

equity. But as equity often follows the rule as to limitation of actions at law, there are cases in which the Federal courts in equity have followed such local statutes, especially where constituting rules of property affecting local land titles or where the complainant has been guilty of great laches.¹⁸ On the other hand, as there are circumstances under which the application of such a statute would be inequitable, as for example, in barring actions for concealed fraud, other Federal equity cases have refused to be bound by local statutes of limitation.¹⁹

[n] Matters within legislative power of Congress—decisions respecting the law of evidence.

Congress has undoubtedly power to prescribe the rules of evidence that shall prevail in Federal courts. In trials at common law it has declared that the local rules of evidence shall prevail.¹ Under this enactment the decisions construing local statutes relating to evidence or declaring the local common law of evidence have been deemed binding in common law causes;² although some cases have asserted a right to disregard them.³ Upon questions of title especially, the Federal court should receive the same evidence as the State court.⁴ The rule of the state courts as to the admissibility of the house journal to show that a bill had passed, has

¹⁸Elmendorf v. Taylor, 10 Wheat. 176, 6 L. ed. 296; Lewis v. Marshall, 5 Pet. 470, 8 L. ed. 195; Taylor v. Benham, 5 How. 263, 12 L. ed. 145; Phillipi v. Phillipi, 115 U. S. 159, 29 L. ed. 340, 5 Sup. Ct. Rep. 1185; Boone Co. v. Burlington, etc. R. R. 139 U. S. 692, 35 L. ed. 319, 11 Sup. Ct. Rep. 687; Lansdale v. Smith, 106 U. S. 392, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Harpending v. Reformed Church, 16 Pet. 493, 10 L. ed. 1043; Speidel v. Henrici, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 612; Amory v. Lawrence, 3 Cliff. 531, Fed. Cas. No. 336; Higgins, etc. Co. v. Snow, 113 Fed. 433, 51 C. C. A. 267; United States v. Beebe, 17 Fed. 40; 4 McCrary 12; Rice v. Martin, 8 Fed. 480, 7 Sawy. 337; Norris v. Haggin, 28 Fed. 278; Robinson v. Hook, 4 Mason, 151, Fed. Cas. No. 11,956; Scott v. Evans, 1 McLean, 489, Fed. Cas. No. 12,529; Fussell v. Hughes, 8 Fed. 396; Cockrill v. Butler, 78 Fed. 686; Taylor v. Holmes, 14 Fed. 511; Miles v. Vivian, 79 Fed. 853, 25 C. C. A. 208; See cases collected Book II., U. S. Notes, p. 401ff.

¹⁹Kirby v. Lake Shore, etc. Ry. 120 U. S. 138, 30 L. ed. 573, 7 Sup. Ct.

Rep. 434; Johnston v. Roe, 1 Fed. 695, 1 McCrary 162; Orendorf v. Budlong, 12 Fed. 26; Murray v. Chicago, etc. R. R. 62 Fed. 29. See also Brunswick, etc. Co. v. National Bank, 88 Fed. 611, holding State decision not binding. Van Vleet v. Sledge, 45 Fed. 752, denying relief for laches.

¹See post, § 12.

²Connecticut, etc. Ins. Co. v. Union etc. Co. 112 U. S. 255, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; Remington v. Linthicum, 14 Pet. 91, 10 L. ed. 364; Bucher v. Cheshire R. R. 125 U. S. 583, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231; Stewart v. Morris, 89 Fed. 290, 32 C. C. A. 203; Union P. Ry. v. Reed, 80 Fed. 239, 25 C. C. A. 389; Lonergan v. Mississippi Co. 5 Fed. 778, 2 McCrary 451; Albro v. Manhattan, etc. Ins. Co. 119 Fed. 629; Belding v. Hebard, 103 Fed. 532, 43 C. C. A. 296; Parker v. Moore, 111 Fed. 470.

³See Union Pac. Ry. v. Yates, 79 Fed. 589, 25 C. C. A. 103; Shea v. Leisy, 85 Fed. 245.

⁴Hinde v. Vattier, 5 Pet. 401, 8 L. ed. 170; Remington v. Linthicum, 14 Pet. 91, 10 L. ed. 364.

been followed.⁵ The local statute as to privileged communications has been followed and applied;⁶ so also the local rule as to expert testimony in forgery cases.⁷ In proceedings before the Court of Claims it has been held that in the absence of provision by Congress, common law rules shall be applied.⁸ But the local law does not apply where in conflict with an act of Congress respecting the admission of evidence in Federal courts.⁹ Hence where Congress has provided the mode of proof in common law trials, laws conflicting therewith as respects the taking of depositions¹⁰ or examination of witnesses or parties in advance of trial¹¹ will not be followed.

[o] Matters within legislative power of Congress—exemption laws.

Under the statute making State laws the rule of decision in Federal courts, local homestead and exemption laws will be followed by the Federal courts in the absence of legislation by Congress prescribing different rules respecting exemption of property from execution under Federal judgments.¹⁴ The question whether the interest of a cestui que trust, or other equitable estate, is liable for debts of owner or beneficiary is one of local law.¹⁵

[p] Other matters within national legislative powers.

Some of the cases asserting the existence of a general commercial law which Federal courts may administer in disregard of the local jurisprudence, are concerned with matters which might very well be legislated upon by Congress.¹⁷ The admiralty law and the Federal criminal law also clearly present matters properly within the law making powers of

⁵Comstock v. Tracey, 46 Fed. 170, Chicago, etc. Ry. v. Smyth, 103 Fed. 376.

⁶Connecticut, etc. Co. v. Union, etc. Co. 112 U. S. 254, 28 L. ed. 708; 5 Sup. Ct. Rep. 119; Dreier v. Ins. Co. 24 Fed. 672; Butler v. Fayerweather, 91 Fed. 460, 33 C. C. A. 625; Mutual Ben. etc. Ins. Co. v. Robison, 58 Fed. 731, 7 C. C. A. 444, 22 L.R.A. 331.

⁷Richardson v. Green, 61 Fed. 432, 9 C. C. A. 565.

⁸Moore v. United States, 91 U. S. 270, 23 L. ed. 346.

⁹Whitford v. Clark Co. 119 U. S. 525, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; Ex parte Fisk, 113 U. S. 719, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

¹⁰Turner v. Shackman, 27 Fed. 184, Shellabarger v. Oliver, 64 Fed. 307; United States v. Fifty Boxes, 92 Fed. 603.

¹¹Ex parte Fisk, 113 U. S. 719, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Union Pac. R. R. v. Botsford, 141 U. S. 257,

35 L. ed. 739, 11 Sup. Ct. Rep. 1003; Pierce v. Union P. Ry. Co. 47 Fed. 709; Tabor v. Indianapolis, etc. Co. 66 Fed. 423; Despeaux v. Pennsylvania R. R. 81 Fed. 897; National, etc. Co. v. Leland, 94 Fed. 503, 37 C. C. A. 372.

¹⁴Nichols v. Levy, 5 Wall. 433, 18 L. ed. 596; Fink v. O'Neil, 106 U. S. 279, 27 L. ed. 196, 1 Sup. Ct. Rep. 325; Spindle v. Shreve, 111 U. S. 542, 28 L. ed. 512, 4 Sup. Ct. Rep. 522; Green v. Root, 62 Fed. 194; First Nat. Bank v. Glass, 79 Fed. 708, 25 C. C. A. 151; Thompson v. McConnell, 107 Fed. 36, 46 C. C. A. 124; Manufacturers etc. Bank v. Bayless, 16 Fed. Cas. 664; Mason v. Beebee, 44 Fed. 558.

¹⁵Potter v. Couch, 141 U. S. 317, 35 L. ed. 732, 11 Sup. Ct. Rep. 1011; In re Bandouiner, 96 Fed. 541; Raynolds v. Hanna, 55 Fed. 795.

¹⁷See infra, note. [tt]

the nation.¹⁸ It is probable also that the rules of private international law, or the principles underlying the so called doctrine of conflict of laws might be prescribed for the Federal courts by Congress. Or if not within the power of Congress they may belong to that class of cases of which suits by States in the Supreme Court are an illustration, in which questions of international law are or may be involved, as to which no legislative body would have power to declare the rule of decision, and in which the courts must have recourse to accepted principles of the law of nations.¹⁹

It is obvious that there are many matters of national concern outside the law making power of the States, as to which Congress has not legislated or as to which its legislation is not full and exhaustive. There are yet other matters as to which even Congress has no power to legislate. In such cases the Federal courts may be called upon to administer the law maritime,²⁰ or public or private international law,¹ or to affirm principles of municipal law which may, aptly enough, be termed the common law of the United States.²

[q] Questions of conflict of laws.

In cases involving what is often termed the doctrine of conflict of laws, it would seem that the Federal courts may be at liberty to ignore the local rule. As for instance in determining whether the law of the forum or of the place of contract is to be applied in construing and testing contracts involving intangible rights and not fixed and tangible property; or in determining whether by comity, a right of action given by another sovereignty shall be enforced. Over such matters of controversy the State has not plenary legislative power, and can do no more than declare the principle that shall control in its own courts. The question what law shall be applied or whether comity requires the recognition of a right given by foreign laws, is one of private international law. In admiralty cases and in suits by States in the Supreme Court, the Federal courts are often called upon to administer a species of international law,⁴ and there is a peculiar appropriateness in conceding to them an independent judgment in such cases. The Federal courts have in numerous cases laid down principles for determining the law that shall govern the obligation, validity, or construction of a contract without referring to or assuming to be bound by the doctrines of the State courts on the subject.⁵ They have held the contract of a Federal officer's bondsmen to be governed by common law rules though the officer reside in Louisiana and the bond be sued

¹⁸See post, § 11.

¹⁹See post, § 11, note. [f]

²⁰See post, § 11, note. [a]

¹See infra, note; [q] post, § 11, note.[f]

²See post, § 13.

⁴See post, § 11.

⁵Robinson v. Campbell, 3 Wheat. 219, 4 L. ed. 372; De Wolf v. Johnson, 10 Wheat. 383, 6 L. ed. 343; 469.

Boyle v. Zacharie, 6 Pet. 644, 8 L. ed. 527; Andrews v. Pond, 13 Pet. 78, 10 L. ed. 61; Bank of Augusta v. Earle, 13 Pet. 589, 10 L. ed. 274; Osborn v. Nicholson, 13 Wall. 656, 20 L. ed. 689; Railroad v. Pennsylvania, 15 Wall. 326, 21 L. ed. 179; Liverpool Steam Co. v. Phenix Ins. Co. 129 U. S. 447, 32 L. ed. 788, 9 Sup. Ct. Rep.

upon in the Federal court in that State, regardless of the doctrines of Louisiana courts on the subject of conflict of laws.⁶ The precise question whether Federal courts will deem themselves to be bound by the rulings of the State courts declaring when the *lex loci* and when the *lex fori* governs, seems to have been seldom raised. At circuit some cases have followed the doctrine of the local courts.⁷ Some of the cases asserting a right to disregard the local rule in deciding questions under the law merchant⁸ might very logically be justified under this principle. Thus the leading case on that doctrine⁹ involved an interstate bill of exchange. It might very properly be questioned whether the parties were bound by the law of the forum or the law with reference to which they might be deemed to have contracted. If the latter, then a local rule at variance with generally accepted principles of the law merchant might be disregarded—not however, upon the theory of the existence of a national land law on the subject, but on the theory that the law of the place of contract governed and presumably accorded with generally accepted rules.

Upon the question of comity involved in the enforcement of a right of action for tort given by the law of the place where the tort was committed, a right to disregard the local rule has been asserted.¹⁰ The question has been declared to be one of general law,¹¹ although the Federal court will be influenced by the rule established by the local decisions and will probably not enforce a right created by foreign law contrary to the established public policy of the State wherein the court is sitting.¹² In deciding whether a right or liability founded upon local law is penal within the principle that courts elsewhere will not enforce a local penal statute, the Federal courts apply accepted principles of international law rather than of local jurisprudence,¹³ and are not controlled by a decision of the State giving such right, that the statute is or is not of a penal character.¹⁴

[r] Matters of general jurisprudence and commercial law.

The Federal courts assert a right in certain cases, to disregard the local decisions in the State where they are sitting and administer general principles of jurisprudence or of commercial law. These cases do not merely reject the interpretation of the local law by the State courts, but deny

⁶Cox v. United States, 6 Pet. 203, 8 L. ed. 359; Duncan v. United States, 7 Pet. 435, 8 L. ed. 739.

⁷Parker v. Moore, 115 Fed. 799, 53 C. C. A. 369; McClain v. Provident Assur. Soc. 110 Fed. 80, 49 C. C. A. 31. See, United, etc. Co. v. Harris, 113 Fed. 27; and Manship v. New South etc. Co. 110 Fed. 845; testing the validity of a mortgage by the law of the place where contract was made and not of the place where the land lay.

⁸See *infra*, note. [s]

⁹Swift v. Tyson, 16 Pet. 18, 10 L. ed. 865.

¹⁰Greaves v. Neal, 57 Fed. 816; Evey v. Mexican C. Ry. 81 Fed. 309. 26 C. C. A. 407, 38 L.R.A. 387.

¹¹Texas & P. Ry. v. Cox, 145 U. S. 605, 36 L. ed. 829, 12 Sup. Ct. Rep. 908, 909.

¹²See Walworth v. Harris, 129 U. S. 364, 32 L. ed. 712, 9 Sup. Ct. Rep. 340; Chicago, etc. R. R. v. Sturm, 174 U. S. 718, 43 L. ed. 1147, 19 Sup. Ct. Rep. 800.

¹³Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1129, 13 Sup. Ct. Rep. 224.

¹⁴Marshall v. Wabash R. R. 46 Fed. 271.

that the local law is the proper rule for their decision.¹⁵ It is difficult to find a rational foundation for this doctrine so far as it applies to matters of controversy not committed to the legislative control of Congress. Federal powers are limited to those expressly granted and their necessary incidents. It cannot be that the national courts have any more power than has Congress to ignore those limitations and assume the existence of a national law as to other than national matters,¹⁶ and which Congress would have no power to ordain. If they may declare national rules of law to govern the conduct of the citizen in one species of cases outside the law making powers of the nation's legislature, why not in all cases. It is plain that the Federal courts cannot assume a jurisdiction which Congress would have no power to confer. How then can they assume to administer a national law which Congress would have no power to enact. Their obligation to administer and apply the local law rests upon more fundamental grounds than are offered by considerations of propriety or even the mandate of Congress. Indeed this doctrine of the Federal courts would seem essentially an exercise of tyrannical power since they thereby set up rules of law which in the nature of things cannot spring from any authorized law making agency of the people, either State or Federal. It is true that great names may be cited in favor of the doctrine and that it has been again and again declared; yet as stated by Mr. Justice Field, "there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the States."¹⁷ It is true that jurisdiction of controversies between citizens of different States was conferred on Federal courts to secure to alien or nonresident suitors an unbiased tribunal. Yet the object was to secure uniformity and fairness in the administration of State laws, and not to introduce conflicting and divergent rules of decision to the embarrassment of litigants and the destruction of that certainty which it is one of the prime purposes of all codes of law to promote and insure. Perhaps the earliest assertion of the doctrine is by Mr. Justice Story. The act of Congress making State laws the rules of decision, he declared, should be limited to laws strictly local and to rights and titles to things having a permanent locality. It does not, he said, extend to contracts and other

¹⁵Hough v. Railway, 100 U. S. 226, L. Co. v. Blanks, 133 Fed. 479, 66 C. 25 L. ed. 612; Myrick v. Michigan, etc. R. R. 107 U. S. 109, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Baltimore, etc. R. R. v. Baugh, 149 U. S. 370, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Olcott v. Supervisors, 16 Wall. 690, 21 L. ed. 382; Boyce v. Tabb, 18 Wall. 548, 21 L. ed. 757; Township of Pine Grove v. Talcott, 19 Wall. 678, 22 L. ed. 227; Washburn, etc. Co. v. Reliance, etc. Ins. Co. 179 U. S. 15, 45 L. ed. 58, 21 Sup. Ct. Rep. 1; Swift v. Tyson, 16 Pet. 18, 10 L. ed. 865; Hollingsworth v. Parish, 4 Woods, 284, 17 Fed. 112; Three States

L. Co. v. Blanks, 133 Fed. 479, 66 C. 25 L. ed. 612; Myrick v. Michigan, etc. R. R. 107 U. S. 109, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Baltimore, etc. R. R. v. Baugh, 149 U. S. 370, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Olcott v. Supervisors, 16 Wall. 690, 21 L. ed. 382; Boyce v. Tabb, 18 Wall. 548, 21 L. ed. 757; Township of Pine Grove v. Talcott, 19 Wall. 678, 22 L. ed. 227; Washburn, etc. Co. v. Reliance, etc. Ins. Co. 179 U. S. 15, 45 L. ed. 58, 21 Sup. Ct. Rep. 1; Swift v. Tyson, 16 Pet. 18, 10 L. ed. 865; Hollingsworth v. Parish, 4 Woods, 284, 17 Fed. 112; Three States

¹⁶In admiralty causes the courts assume the existence of a national or rather international system of law, but this assumption is found also in the Constitution itself. Moreover Congress has power to enact admiralty rules. See post, § 11.

¹⁷Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, 927. See also opinion of Caldwell, J. in Hartford F. I. Co. v. Chicago, etc. R. R. 70 Fed. 208, 17 C. C. A. 62, 30 L.R.A. 193.

instruments of a commercial nature.¹⁸ The existence of this legislation by Congress seems to have forestalled deeper investigation of the question either by that eminent jurist or by his successors, a consequence that cannot but be deplored. In that case which arose in New York, he refused to apply the rule of the New York courts that one holding commercial paper as collateral security for a pre-existing debt was not a bona fide holder so as to take free from prior equities.¹⁹

[s]—decisions respecting law merchant, municipal bonds, insurance policies, and corporate stock.

The influence of Mr. Justice Story's decision in the leading case has been particularly marked in controversies involving the law of negotiable instruments. Questions arising under the law merchant have since very generally been declared to be matters of general jurisprudence in which local decisions might be disregarded;¹ or at least to be cases in which the Federal courts feel less bound than in others by State decisions.² Commercial law, it is said, is not peculiar to one State or dependent upon local authority, but arises out of the usages of the commercial world.³ A question as to the power of a factor to pledge property in his possession has been declared to be controlled by the law merchant under the principle laid down by Judge Story.⁴ But it has been held that the question whether the contract rate of interest governs after maturity of commercial paper, is one of local law.⁵

In the case of bonds it is held that the local law governs as to whether interest shall be payable on coupons after maturity.⁶ But it has been frequently declared that general principles of commercial law and not the local laws controlled at least some of the questions involved in determining the validity of municipal bonds.⁷

¹⁸Swift v. Tyson, 16 Pet. 18, 19, 10 L. ed. 865. See reference to this case, supra, note. [q]

¹⁹See reference to this case, supra, note. [q]

¹Swift v. Tyson, 16 Pet. 18, 10 L. ed. 865; Miller v. Austin, 13 How. 228, 14 L. ed. 119; Oates v. National Bank, 100 U. S. 246, 25 L. ed. 580; Watson v. Tarpley, 18 How. 520, 15 L. ed. 511; Rhinps v. Harding, 70 Fed. 471, 17 C. C. A. 203, 30 L.R.A. 515; First Nat. Bank v. Lock, etc. Co. 24 Fed. 226; Railroad Co. v. National Bank, 102 U. S. 29, 26 L. ed. 67; Edgefield v. Farmers, etc. Co. 52 Fed. 103, 2 C. C. A. 637, 18 L.R.A. 203; Jewett v. Hone, 1 Woods, 532, Fed. Cas. No. 7,311; United States Bank v. Lyman, 1 Blatchf. 307, Fed. Cas. No. 924; Boyce v. Babb, 18 Wall. 548, 21 L. ed. 757; Van Vleet v. Sledge, 45 Fed. 749; Ex parte

Heidelberg, 2 Low. 530, Fed. Cas. No. 6,322; Smith v. Babcock, 2 Wood. & M. 246, Fed. Cas. No. 13,009; Essex Co. Bank v. Bank of Montreal, 7 Biss. 190, Fed. Cas. No. 4,532; Bank of Saginaw v. Title & T. Co. 105 Fed. 491.

²Smith v. Alabama, 124 U. S. 478, 31 L. ed. 508, 8 Sup. Ct. Rep. 564.

³Railroad Co. v. National Bank, 102 U. S. 31, 32, 26 L. ed. 61.

⁴Bragg v. Meyer, McAll. 411, Fed. Cas. No. 1801.

⁵Holden v. Trust Co. 100 U. S. 74, 25 L. ed. 567; Ohio v. Frank, 103 U. S. 698, 26 L. ed. 531; Massachusetts, etc. Assn. v. Miles, 137 U. S. 691, 34 L. ed. 835, 11 Sup. Ct. Rep. 235.

⁶United States v. North Carolina, 136 U. S. 218, 34 L. ed. 339, 10 Sup. Ct. Rep. 923; Bolles v. Amboy, 45 Fed. 169.

⁷Supervisors v. Schenck, 5 Wall.

The same principles have been applied in the construction of insurance policies, and local rules of construction and decision have been disregarded;⁸ though it is elsewhere said that the statutes and established public policy and common law of a State are controlling even in such cases.⁹ Elsewhere question when corporate stock shall be deemed fully paid has been declared to be one of general law;¹⁰ though most questions pertaining to corporate rights, powers and liabilities are governed by the laws of the respective States.¹¹

[t] — decisions respecting law of negligence and of carriers' liability.

Many questions respecting common carriers have been held to involve principles of general commercial law on which local decisions are not authority.¹² As for instance questions respecting their general liability;¹³ questions as to the nature and construction of their contract of carriage;¹⁴ questions of policy involved in permitting them to stipulate against liability for negligence¹⁵ the extent of their liability to employees for injuries arising from fault of the master or negligence of a fellow servant;¹⁶ of their liability for the torts of their em-

785, 18 L. ed. 560; *Taylor v. Ypsilanti*, 105 U. S. 70, 26 L. ed. 1011; *Olcott v. Supervisors*, 16 Wall. 690; 21 L. ed. 382; *Township of Pine Groves v. Talcott*, 19 Wall. 678, 22 L. ed. 227; *Township of New Buffalo v. Cambria*, 105 U. S. 73, 26 L. ed. 1024; *Pana v. Bowler*, 107 U. S. 541, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; *Pleasant Twp. v. Aetna Ins. Co.* 138 U. S. 73, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; *Folsom v. Township Ninety-six*, 159 U. S. 625, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Independent School Dist. v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L.R.A. 364.

⁸*Carpenter v. Providence, etc. Ins. Co.* 16 Pet. 511, 10 L. ed. 1044; *Washburn, etc. Co. v. Reliance, etc. Ins. Co.* 179 U. S. 15, 45 L. ed. 58, 21 Sup. Ct. Rep. 1; *Sias v. Roger, etc. Ins. Co.* 8 Fed. 188; *Sheerer v. Life Ins. Co.* 20 Fed. 889; *Manhattan, L. I. Co. v. Broughton*, 109 U. S. 126, 27 L. ed. 880, 3 Sup. Ct. Rep. 101; *Henning v. United States Ins. Co.* 2 Dill, 36, Fed. Cas. No. 6,366; *Spinks v. Mutual, etc. Assn.* 137 Fed. 171. But see *Polk v. Mut. L. F., etc. Assn.* 137 Fed. 273.

⁹*McClain v. Provident, etc. Ins. Co.* 110 Fed. 80, 49 C. C. A. 31.

¹⁰*Clark v. Bever*, 139 U. S. 117, 35 L. ed. 97, 11 Sup. Ct. Rep. 475.

¹¹See *supra*, note. [e]

¹²*Liverpool Steam Co. v. Phenix*, Fed. Proc.—7.

Ins. Co. 129 U. S. 443, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

¹⁴*Ibid.*

¹⁵*Myrick v. Mich. Cent. R. R.* 107 U. S. 109, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Pennsylvania R. R. v. Jones*, 155 U. S. 339, 39 L. ed. 178, 15 Sup. Ct. Rep. 138.

¹⁶*Railroad Co. v. Lockwood*, 17 Wall. 368, 21 L. ed. 627; *Eells v. St. Louis, etc. Ry.* 52 Fed. 905. But see *Hartford, F. I. Co. v. Chicago, etc. Ry.* 175 U. S. 100, 108, 44 L. ed. 84, 20 Sup. Ct. Rep. 33.

¹⁷*Felton v. Bullard*, 94 Fed. 784, 37 C. C. A. 1; *Elliot v. Felton*, 119 Fed. 270, 56 C. C. A. 74; *New York, etc. R. R. v. O'Leary*, 93 Fed. 740, 35 C. C. A. 562; *Murray v. Chicago, etc. R. R.* 92 Fed. 871, 35 C. C. A. 62; *Wright v. Southern Ry.* 80 Fed. 261; *McPeck v. Central & Vt. R. R.* 79 Fed. 596, 25 C. C. A. 110; *Hough v. Railroad Co.* 100 U. S. 226, 25 L. ed. 612; *Baltimore, etc. Ry. v. Baugh*, 149 U. S. 370, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Gardner v. Michigan*, 150 U. S. 358, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Harley v. Louisville, etc. R. R.* 57 Fed. 146; *Northern Pac. R. R. v. Hambly*, 154 U. S. 360, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Borgman v. Omaha, etc. R. R.* 41 Fed. 671; *Howard v. Delaware & H. Canal Co.*

ployees;¹⁸ as also the question as to what constitutes negligence by a carrier.¹⁹ And in other cases than those involving common carriers, the law of negligence has been declared to involve principles of general commercial law as to which State decisions were not controlling;²⁰ as, for instance, whether a parent's negligence should be imputed to a child.¹ So, the question of the validity of a stipulation against liability for negligence by a telegraph company has been declared one of general commercial law.²

[tt] — decisions respecting contracts affecting interstate commerce or of a maritime nature.

Some of the foregoing authorities declaring a right to administer general principles of commercial law, plainly involve matters of controversy within the law making power of the nation and in so far as they refuse to be bound by local decisions, are not open to criticism. Such, for instance, are the cases respecting contracts of marine insurance,⁴ or for carriage by sea,⁵ or for an interstate carriage of freight or passengers;⁶ decisions respecting liability on general average;⁷ and other matters within the supervision of courts of admiralty;⁸ and questions as to the navigability of a stream.⁹

[u] — right to administer general commercial law in disregard of local statutes.

Most of the cases asserting the doctrine of a general commercial law, assume to administer it only when there is no local statute or usage, as distinguished from local decisions. This is apparently because the act of Congress makes State "laws" rules of decision and not merely State decisions.¹¹ The law of liability of master to servant for injuries, is only declared to be a matter of general law in the absence of statute;¹² sim-

40 Fed. 197, 6 L.R.A. 75; *Newport, etc. R. R. v. Howe*, 52 Fed. 366, 3 C. C. A. 121; *Miller v. B. & O. R. R.* 17 Fed. Cas. 305.

¹⁸*Lake Shore, etc. Ry. v. Prentice*, 147 U. S. 106, 37 L. ed. 101, 13 Sup. Ct. Rep. 262.

¹⁹*Lightcap v. Phila. T. Co.* 60 Fed. 215.

²⁰*Griffin v. Overman, etc. Co.* 61 Fed. 572, 9 C. C. A. 542; *Mason v. Edison Mach. Wks.* 28 Fed. 228; *Johnston v. Western U. T. Co.* 33 Fed. 364; *Western U. T. Co. v. Wood*, 57 Fed. 478, 6 C. C. A. 432, 21 L.R.A. 706.

¹*Berry v. Lake, etc. R. R.* 70 Fed. 680.

²*Johnston v. Western U. T. Co.* 33 Fed. 364, *Western U. T. Co. v. Cook*, 61 Fed. 628, 9 C. C. A. 680.

⁴*Gloucester Ins. Co. v. Younger*, 2 Curt. 338, Fed. Cas. No. 5,487; *Wash-*

burn, etc. Co. v. Reliance, etc. Ins. Co. 179 U. S. 15, 45 L. ed. 58, 21 Sup. Ct. Rep. 1.

⁵*Liverpool, etc. Co. v. Phenix Ins. Co.* 129 U. S. 443, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *The Kensington*, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102.

⁶*Myrick v. Michigan, Cent. R. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Murray v. Chicago, etc. R. R.* 62 Fed. 30; *Swift v. Railroad*, 58 Fed. 858.

⁷*Mutual, etc. Ins. Co. v. Brig George, Olcott*, 101, Fed. Cas. No. 9,981.

⁸*The Montana*, 22 Blatchf. 395, 22 Fed. 727; *The J. E. Rumbell*, 148 U. S. 17, 37 L. ed. 349, 13 Sup. Ct. Rep. 502; *The Glenmavis*, 69 Fed. 477.

⁹*Chisholm v. Caines*, 67 Fed. 294.

¹¹See post, § 12.

¹²See cases supra.

ilarly the question of a carrier's liability under its contract.¹³ Hence where the State law defines an employer's or carrier's liability, the Federal court will follow it;¹⁴ so they follow a State law as to negligence as construed by the State court, though at variance with the general principles of the law of negligence habitually recognized.¹⁵ Some cases involving the law merchant have still enforced a local statute changing the rule respecting commercial paper. Thus, a local statute respecting usury has been enforced by the Federal court;¹⁶ a local statute of frauds has been applied to a guaranty on a note, made after its negotiation;¹⁷ a local statute as construed by State decisions, respecting the rate of interest on bonds after maturity, has been followed.¹⁸

But in other cases local statutes have been disregarded. A State statute forbidding suit on an unaccepted bill of exchange until its maturity, has been disregarded upon the theory that if applied to the Federal courts it unlawfully impaired their rightful jurisdiction.¹⁹ The Supreme Court has also disregarded a State law in holding a certificate of deposit a negotiable instrument.²⁰ So it has been said that the construction of provisions in a State constitution may involve principles of general jurisprudence which the Federal courts may determine for themselves regardless of the local decisions.¹

[v] Cases on error to State courts not in point.

The principles discussed above as to what law shall be administered by Federal courts in the decision of controversies, is applicable only in causes tried in the Federal court. A different question is presented in the Supreme Court when reviewing decisions on writs of error. In such cases the sole question is whether the State courts in the determination of a cause, have denied any Federal right. In all other respects the State decision is binding and the Supreme Court has no right or power to set up any other rule of decision or to decline to accept the local court's administration of the State law when involving no infringement of a Fed-

¹³Liverpool Steam Co. v. Phenix Ins. Co. 129 U. S. 443, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

¹⁴Central of Ga. Ry. v. Kavanaugh, 92 Fed. 58, 34 C. C. A. 203; Northern Pac. R. R. Co. v. Hogan, 63 Fed. 105, 11 C. C. A. 51; Western, etc. R. R. v. Robinson, 61 Fed. 604, 9 C. C. A. 646; Northern Pac. R. R. v. Mase, 63 Fed. 115, 11 C. C. A. 63.

¹⁵Bank of Sherman v. Apperson, 4 Fed. 31; Prentice v. Zane, 19 Fed. Cas. 1,273; Phipps v. Harding, 70 Fed. 472, 17 C. C. A. 203, 30 L.R.A. 513; Paine v. Central & R. R. 118 U. S.

160, 30 L. ed. 193, 6 Sup. Ct. Rep. 1019.

¹⁶Brown v. Grundy, 111 Fed. 15.

¹⁷Moses v. Nat. Bank 149 U. S. 303, 37 L. ed. 745, 13 Sup. Ct. Rep. 901.

¹⁸Cromwell v. Sac Co. 96 U. S. 62, 24 L. ed. 681; Burton v. Koshkonong, 4 Fed. 375.

¹⁹Watson v. Tarpley, 18 How. 520, 15 L. ed. 511.

²⁰Miller v. Austin, 13 How. 218, 14 L. ed. 119.

¹Township of Pine Grove v. Talcott, 19 Wall. 678, 22 L. ed. 227.

eral right.² If the State court so construes a law that it does not violate any Federal limitation, no right of review in the Supreme Court exists.³

§ 11. — in Admiralty criminal and bankruptcy cases and suits by States.

In admiralty cases the general maritime law recognized by civilized commercial nations since early times, with such modifications as Congress and the Federal courts have introduced therein, is administered.^[a] But even in admiralty cases, State laws validly creating rights of a maritime nature may be recognized and enforced.^[b] In Federal criminal cases the law administered is essentially Federal and national.^[c] There are no common law offences against the United States.^[d] In bankruptcy proceedings the bankrupt law furnishes the principle rule of decision though upon many questions recourse must be had to the local law just as in other cases.^[e] Controversies brought originally in the Supreme Court by a State, whether against another State or otherwise, may present questions which must be decided either under the local law, or the Federal law or by principles of international law.^[f]

Author's section.

[a] Admiralty causes.

Admiralty cases are as old as navigation itself and the Federal courts administer the maritime law as it has existed for ages.⁵ It partakes of an international character and treaties and decisions of the continental nations of Europe are recognized as authority by our courts.⁶ Our admiralty law is closely akin to that of England;⁷ especially in matters of prize.⁸ But our courts have proceeded upon a more enlarged view of its essential nature and objects,⁹ and have not limited its operation to the high seas and waters where the tide ebbs and flows.¹⁰ While each nation may adopt its own maritime code, the general maritime law is the basis in all, and the local modifications are largely restricted to matters affecting local citizens and property.¹¹ Congress has power to modify its

²See *Bacon v. Texas*, 163 U. S. 221, 41 L. ed. 137, 16 Sup. Ct. Rep. 1029; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 587, 17 Sup. Ct. Rep. 214, 216; *Avery v. Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94, 98; *Turner v. Wilkes Co. Comrs.* 173 U. S. 463, 43 L. ed. 769, 19 Sup. Ct. Rep. 465.
³*Tampa W. Works v. Tampa*, 199 U. S. 241, 502, 50 L. ed. 170.

⁵*American Ins. Co. v. Three Hundred bales of cotton*, 1 Pet. 545, 546, 7 L. ed. 243.

⁶*The Maggie Hammond*, 9 Wall. 452, 19 L. ed. 772.

⁷*Thirty Hogsheads of Sugar v. Boyle*, 9 Cr. 198, 3 L. ed. 701.

⁸*The Venus*, 8 Cr. 284, 3 L. ed. 553.

⁹*New England, etc. Ins. Co. v. Dunham*, 11 Wall. 24, 20 L. ed. 90.

¹⁰*The Genesee Chief v. Fitzhugh*, 12 How. 458, 459, 13 L. ed. 1058. See ante, § 2.[k]

¹¹*The Lottawanna*, 21 Wall. 558, 22 L. ed. 661.

provisions,¹² and has from time to time legislated on the subject. But the question of the limits of admiralty jurisdiction is peculiarly for the courts and neither Congress nor the States can broaden or narrow it as judicially ascertained.¹³ When both litigants before a Federal court in admiralty belong to the same foreign nation, they may have their controversy settled by the maritime law of their own country, but otherwise the maritime law of the forum prevails;¹⁴ even as against the *lex loci contractus*.¹⁵

[b] — State laws and decisions as affecting admiralty law administered.

The maritime and not the local law, governs the liability of a municipality for injury to a vessel by its fireboat.¹⁶ State decisions cannot abrogate the maritime law;¹⁷ nor are they of binding authority on the Supreme Court upon the question of the superiority of a maritime lien to a prior recorded mortgage.¹⁸ The States may not enlarge or restrict the admiralty jurisdiction.¹⁹ But the States may create rights such as liens for wages²⁰ or repairs¹ in the home port, which being recognized as essentially maritime in nature, may be enforced in the Federal court in admiralty, and according to their own rules of procedure, and the State court's construction of such a statute has been followed.² Similarly a right of action for death on a vessel, given by State law, is enforceable in admiralty.³ It has been said that the Federal courts in admiralty will enforce local police regulations in aid and furtherance of commerce.⁴ State statutory rights to double wharfage,⁵ or to tolls,⁶ to lien on contract of

¹²United States v. Bevans, 3 Wheat. 389, 4 L. ed. 404; The Lottawanna, 21 Wall. 577, 22 L. ed. 654; In re Garnett, 141 U. S. 1-18, 35 L. ed. 631, 11 Sup. Ct. Rep. 842; The Scotland, 105 U. S. 31, 32, 26 L. ed. 1001.

¹³The Lottawanna, 21 Wall. 576, 22 L. ed. 654; Butler v. Boston S. S. Co. 130 U. S. 557, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612. See also ante, §§ 5, [c] 2. [k]

¹⁴The Scotland, 105 U. S. 32, 26 L. ed. 1001; The Belgenland, 114 U. S. 369, 370, 29 L. ed. 152, 5 Sup. Ct. Rep. 860.

¹⁵Watts v. Camors, 115 U. S. 361, 29 L. ed. 406, 6 Sup. Ct. Rep. 91.

¹⁶Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212.

¹⁷Workman v. New York City, 179 U. S. 563, 45 L. ed. 321, 21 Sup. Ct. Rep. 212.

¹⁸The J. E. Rumbell, 148 U. S. 17, 37 L. ed. 345, 13 Sup. Ct. Rep. 498.

¹⁹See ante, § 5, note. [c]

²⁰Whitney v. The Mary Gratwich, 2 Sawyer, 343, Fed. Cas. No. 17,591.

¹The Steamboat Orleans v. Phoe-

bus, 11 Pet. 184, 9 L. ed. 680; Ex parte McNiel, 13 Wall. 243, 20 L. ed. 627; The Cossair, 145 U. S. 347, 36 L. ed. 732, 12 Sup. Ct. Rep. 949; The Illinois, 2 Flipp. 408, Fed. Cas. No. 7,005; Atlantic, etc. Works v. The Glide, 157 Mass. 526, 34 Am. St. Rep. 307, 33 N. E. 163; The J. E. Rumbell, 148 U. S. 17, 37 L. ed. 345, 13 Sup. Ct. Rep. 500; The Glide, 167 U. S. 612, 614, 42 L. ed. 298, 17 Sup. Ct. Rep. 932. See also post, § 15 [h]

²Udell v. The Ohio, 24 Fed. Cas. 498.

³Holmes v. Orgeon, etc. Ry. 6 Sawyer, 271, 5 Fed. 523, The Oregon, 45 Fed. 76; The Garland, 5 Fed. 927; The City of Norwalk, 55 Fed. 106, 109; Bigelow v. Nickerson, 70 Fed. 119, 17 C. C. A. 1, 30 L.R.A. 336.

⁴Steamboat New York v. Rea, 18 How. 226, 15 L. ed. 359; The Palmetto, 1 Biss. 143, Fed. Cas. No. 10,699.

⁵The Ann Ryan, 7 Ben. 25, Fed. Cas. No. 428.

⁶The St. Joseph, 21 Fed. Cas. 178.

affreightment,⁷ or to lien for pilotage,⁸ have all been enforced in admiralty.

[c] In criminal cases.

The Federal courts do not execute the penal laws of a State; nor have they any common law criminal jurisdiction,¹⁰ nor any criminal jurisdiction by virtue of the grant of jurisdiction in admiralty.¹¹ In criminal cases the law administered is entirely Federal provided and prescribed by Congress under the limitations of the Constitution.¹² The entire jurisdiction is statutory.¹³ The judge may comment on the evidence as well as instruct upon the law regardless of the practice of the State where the court is sitting.¹⁴ The law of the State as to mode of challenging juries or excepting to instructions has no applicability to a criminal case tried by the circuit court sitting therein.¹⁵ The statute adopting the State laws as rules of decision does not apply to criminal prosecutions in the Federal courts.¹⁶ The laws of evidence in Federal criminal trials are those that existed in the States when the judiciary act was adopted in 1789 and as modified by subsequent acts of Congress. Hence subsequent State laws and decisions will not be followed.¹⁷ The State law as to impaneling of grand juries has no application to Federal courts.¹⁸ In forfeiting a bail bond the Federal court need not observe the remedies provided by the State law.¹⁹ Certain suits by a State of a penal character may, however, be removed to the Federal court and form an exception to the rule that the Federal courts will not execute State penal laws.²⁰ In such cases the law administered is local law except as it may be found repugnant to the laws of the United States.

⁷The J. F. Warner, 22 Fed. 345.

⁸McDonald v. Priolean, 44 Fed. 770. See Wisconsin v. Pelican Ins. Co. 127 U. S. 299, 32 L. ed. 246, 8 Sup. Ct. Rep. 1374; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

¹⁰See infra, note.[d]

¹¹Butler v. Steamship Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Manchester v. Massachusetts, 139 U. S. 240, 262, 35 L. ed. 159, 11 Sup. Ct. Rep. 564.

¹²United States v. Reid, 12 How. 363, 13 L. ed. 1023.

¹³Jones v. United States, 137 U. S. 211, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Manchester v. Massachusetts, 139 U. S. 262, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

¹⁴Starr v. United States, 153 U. S. 625, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; Allis v. United States, 155 U. S. 124, 39 L. ed. 91, 15 Sup. Ct. Rep. 36; Simmons v. United States,

142 U. S. 148, 35 L. ed. 969, 12 Sup. Ct. Rep. 171.

¹⁵St. Clair v. United States, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002, 1010.

¹⁶United States v. Reid, 12 How. 363, 13 L. ed. 1023.

¹⁷United States v. Reid, 12 How. 363, 13 L. ed. 1023; Logan v. United States, 144 U. S. 301, 36 L. ed. 442, 12 Sup. Ct. Rep. 629; United States v. Hall, 53 Fed. 353; United States v. Shepard, 1 Abb. (U. S.) 436, Fed. Cas. No. 16,273; United States v. Coppersmith, 2 Flipp. 554, 4 Fed. 205; United States v. Brown, 1 Sawy. 538, Fed. Cas. No. 14,671; United States v. Baugh, 4 Hughes, 511, 1 Fed. 788.

¹⁸United States v. Ambrose, 3 Fed. 285.

¹⁹United States v. Insley, 54 Fed. 223, 4 C. C. A. 296.

²⁰See post, §§ 137, 138.

[d] Common law offenses against the United States.

It has been frequently declared that the courts created by Congress to exercise the Federal judicial power have no power to declare any act to be a crime against the Federal government because it is such by common law principles, where Congress has not declared it criminal and authorized its punishment in such courts.¹ And though the first decision of the matter was by the court without the benefit of argument by counsel and its correctness was afterwards questioned,² numerous cases have since affirmed the principle that there are no common law offenses against the United States, and an act must come within some penal law of Congress to be punished therein as a crime.³

[e] Bankruptcy cases.

Federal courts are of course not bound by State laws or decisions conflicting with the provisions by the bankrupt law;⁵ nor by State decisions construing its meaning.⁶ Yet many questions particularly questions of property rights arising in the course of bankruptcy proceedings must be determined by the local State law. The Federal court is just as much bound as in other cases already discussed⁷ to apply the local law to the decision of matters of controversy arising in such proceedings, when such matters are within the control of the local law making power. The State law as to exempt property, as construed by the State court, has been followed.⁸ Local decisions have been recognized and applied in determining what were distributable assets in bankruptcy.⁹ The local statute of limitations has been followed,¹⁰ and local lien laws.¹¹ The local rule as to

¹United States v. Worrall, 2 Dall. 384, 1 L. ed. 426; United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259.

²United States v. Coolidge, 1 Wheat. 415, 4 L. ed. 124.

³United States v. Britton, 108 U. S. 206, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; Benson v. McMahon, 127 U. S. 466, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; Jones v. United States, 137 U. S. 211, 34 L. ed. 695, 11 Sup. Ct. Rep. 83; United States v. Eaton, 144 U. S. 687, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; United States v. Wilson, 3 Blatchf. 438, Fed. Cas. No. 16,731; United States v. Plumer, 3 Cliff. 55, Fed. Cas. No. 16,056; United States v. New Bedford Bridge, 1 Wood. & M. 438, Fed. Cas. No. 15,867; United States v. Rogers, 46 Fed. 3; United States v. Benson, 70 Fed. 594, 17 C. C. A. 293; Forward v. Adams, 7 Wend. 207; Campbell v. United States, 4 Fed. Cas. 1202; Mullers Case, 17 Fed. Cas. 976; In re Dana, 68 Fed. 899; In re Iasigi, 79 Fed. 752; United States v. Boyer, 85 Fed.

436, In re Kelly, 71 Fed. 546; United States v. Lewis, 36 Fed. 450, 13 Sawy. 532; United States v. Boyer, 85 Fed. 436.

⁵In re Plotke, 104 Fed. 964, 44 C. C. A. 232. See John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422, following Federal decisions as to right to preference.

⁶Williams v. Heard, 140 U. S. 536, 35 L. ed. 550, 11 Sup. Ct. Rep. 885.

⁷See ante, § 10.

⁸In re Wyllie, 2 Hughes, 461, Fed. Cas. No. 18,112; Richardson v. Woodward, 104 Fed. 873, 44 C. C. A. 235; In re Stone, 116 Fed. 35; In re Beauchamp, 101 Fed. 106.

⁹In re Zug, 30 Fed. Cas. 948, 16 Nat. Bank Reg. 280.

¹⁰In re Noesen, 6 Biss. 442, 12 N. Bank Reg. 426, Fed. Cas. No. 10,288; In re Eldridge, 2 Hughes, 257, 12 N. Bk. Reg. 540, Fed. Cas. No. 4,331; In re Cornwall, 9 Blatchf. 127, 6 N. Bank Reg. 318, Fed. Cas. No. 3,250.

¹¹In re Grissler, 136 Fed. 754, 63 C. C. A. 406.

rights and liabilities on commercial paper has been followed notwithstanding that the Federal courts assume to disregard local decisions on questions of commercial law.¹²

[f] Suits to which a State is party in Supreme Court.

The Constitution extends the Federal jurisdiction to controversies between States and by States against foreign States, citizens, or aliens, and vests original jurisdiction in the Supreme Court.¹⁴ It does not however, declare the law applicable in the decision of such controversies. In such cases the Supreme Court is a sort of international tribunal and administers not only local and national law but also a species of international law,¹⁵ where the rights to be measured and adjudged are not within the legislative control of any State or of Congress. In such cases, while State cases and decisions would have no binding force they might be very material evidence as recognition by the litigants of the validity of general principles of law. And when both recognized the soundness of certain principles of general jurisprudence which if applied would control the decision of the controversy, plainly such would be the law administered by the Supreme Court unless repugnant to the fundamental law of the nation. It has been decided that the Supreme Court will not administer the penal laws of a State in a suit by it against citizens of other States, because under accepted principles of general jurisprudence, such laws can have no extra-territorial effect.¹⁶

§ 12. — State laws as rules of decision.

The laws of the several States,^{[a]-[e]} except where the Constitution, treaties, or statutes of the United States otherwise require or provide,^[f] shall be regarded as rules of decision in trials at common law,^{[g]-[i]} in courts of the United States, in cases where they apply.^[j]

R. S. § 721, U. S. Comp. Stat. 1901, p. 581.

[a] The section in general.

This section (originally the 34th section of the judiciary act of 1789) furnishes a rule to guide the court in the formation of its judgment.¹ It declares the rules by which rights in controversy are to be measured and adjudged, and not the mode in which the court is to proceed. It has no application to the practice of the court.² But questions may arise sub-

¹²In *re Shelbourne*, 21 Fed. Cas. 1,235, contra, see *Fogg v. Stickney*, 11 Nat. Bank Reg. 168, Fed. Case No. 4,898; *Tod v. Ky. Land Co.* 57 Fed. 65.

¹⁴See ante, § 2, note; [o] post, § 35.

¹⁵*Marriatt v. Silk*, 11 Pet. 22, 23, 9 L. ed. 617; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552, 560; *Missouri v. Illi-*

nois, 200 U. S. 496, 26 Supt. Ct. Rep. 268; 50 L. ed. 572.

¹⁶*Wisconsin v. Pelican Ins. Co.* 127 U. S. 299, 32 L. ed. 246, 8 Sup. Ct. Rep. 1374. See *Huntington v. At-trill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

¹*Wayman v. Southard*, 10 Wheat. 24, 6 L. ed. 258.

²*Wayman v. Southard*, 10 Wheat.

sequently, in a suit growing out of some form or mode of proceeding or matter of practice, in which the State or Federal law, must furnish the rule of decision according as the one or the other governed such mode of proceeding.³ The legislature, making the state laws the rule of decision, for Federal courts, is largely declaratory of a principle that results independently of any legislation, from the nature and constitution of our government.⁴ But it is not altogether so. The local statutes of limitation and the local law as to property exempt from execution is adopted by this section. Congress was not, however, obliged to adopt them and might have legislated independently of the States.⁵ The principles of law and the cases dealing with the question when the Federal courts are bound to administer State law and make it their rule of decision, and when they may disregard it, are discussed elsewhere at length.⁶

[b] Refers to statutory laws and not judicial decisions.

In an early case it was decided that the term "laws" did not include the decisions of the local courts. Decisions, it was said, do not constitute laws but are at most evidence of what the laws are.⁸ While the technical correctness of this conclusion may not be questioned, it by no means follows that settled principles of State law as to matters within the local law making power, may be disregarded by Federal courts because resting solely in judicial decisions and not founded upon statutes. Rules of property and the settled interpretation of a State's common law or public policy, plainly disclosed in the decisions of the highest State court must be recognized and followed by the Federal court sitting within a State.⁹ In all cases where it is the duty of the Federal courts to apply the local law they are as much bound by that law when evidenced by judicial decisions as by statutory enactments. Yet as decisions are merely evidence of the local law the Federal courts may exercise an independent judgment as to the satisfactory nature of such evidence. Hence where there is no settled course of State decisions, or they are conflicting, or obviously unsound, or not by the highest court, the Federal courts are no more bound by preceding adjudications than is the highest court of the State when it is sitting.¹⁰ The fact that the statute does not make State court decisions of binding authority has been deemed to justify the doctrine that the Federal courts may administer general principles of jurisprudence or commercial law in certain cases.¹¹ Unconstitutional State statutes are not laws or rules of decision within this section.¹²

26, 6 L. ed. 259; *Bank of United States v. Halstead*, 10 Wheat. 62, 6 L. ed. 267.

³*Wayman v. Southard*, 10 Wheat. 25, 6 L. ed. 258, 259. Compare *Tullock v. Mulvane*, 184 U. S. 514, 46 L. ed. 657, 22 Sup. Ct. Rep. 372, and *Fidelity, etc. Co. v. Buck Co.* 189 U. S. 135, 23 Sup. Ct. Rep. 582, 47 L. ed. 744.

⁴See ante, § 10, note.[a]

⁵See ante, § 10, notes [l] [m] [o].

⁶See ante, §§ 10, 11.

⁸*Swift v. Tyson*, 16 Pet. 8, 10 L. ed. 865; *Ex parte Wadell*, 28 Fed. Cas. 1312.

⁹See ante, § 10, notes, [ff] [k]

¹⁰See ante, § 10, notes.[h]-[k]

¹¹See ante, § 10, note.[r]

¹²*Poindexter v. Greenhorn*, 114 U. S. 303, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962.

[c] Questions as to the existence or applicability of State statutes.

Upon the question whether a given statute, as construed by the State court is in fact applicable to a contract, the Federal court will exercise an independent judgment.¹⁴ Ordinarily the decision of the highest State court as to the existence of a State constitution,¹⁵ or whether a local statute has been duly enacted will be deemed binding by the Federal courts.¹⁶ The decision of the State court as to what are the State laws, is binding upon the Federal courts.¹⁷ But the Federal courts have refused to be bound by a State decision declaring the terms of a statute as enacted, to be different from the printed laws;¹⁸ or a decision pronouncing an act void for insufficiency of title where the question was as to the exact wording of the title of the law as enacted.¹⁹ In other cases, however, the local rules as to admitting the legislative records to prove an enrolled act not duly passed, has been followed.²⁰ If the State courts have held constitutional provisions as to the enactment of statutes mandatory, the Federal courts will do likewise in determining whether a statute has been duly enacted.¹ The decision of a State court that a statute was not repealed by a later enactment, is binding.² A State decision as to the time a constitutional amendment took effect will be followed.³

[d] State court's construction of local statutes is controlling.

It has long been settled that the Federal courts will adhere to the construction placed upon State laws by the highest State courts.⁵ The fixed and received construction of a State statute is deemed to constitute a part of such statutes.⁶ It belongs to the State courts to construe their

¹⁴Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212; Ottumwa v. City, etc. Co. 119 Fed. 315, 56 C. C. A. 219, 59 L.R.A. 604.

¹⁵Luther v. Borden, 7 How. 1, 40, 12 L. ed. 581.

¹⁶Duncan v. McCall, 139 U. S. 461, 35 L. ed. 224, 11 Sup. Ct. Rep. 577; Crowther v. Fidelity, etc. Co. 85 Fed. 41, 29 C. C. A. 1. See Knight v. Shelton, 134 Fed. 423.

¹⁷Leavenworth Co. v. Barnes, 94 U. S. 71, 24 L. ed. 63; Post v. Supervisors, 105 U. S. 669, 26 L. ed. 1204.

¹⁸South Ottawa v. Perkins, 94 U. S. 267, 24 L. ed. 157, 158.

¹⁹Beatrice v. Edminson, 117 Fed. 427, 54 C. C. A. 601.

²⁰Comstock v. Tracey, 46 Fed. 170, Chicago, etc. R. R. v. Smyth, 103 Fed. 376.

¹Wilkes Co. v. Coler, 180 U. S. 533, 45 L. ed. 655, 21 Sup. Ct. Rep. 458.

²Peik v. Northwestern R. R. 94 U. S. 164, 24 L. ed. 97.

³Wade v. Walnut, 105 U. S. 2, 26 L. ed. 1027.

⁵Brown v. Van Braam, 3 Dall. 346, 1 L. ed. 629; McKen v. Delaney, 5 Cranch, 32, 3 L. ed. 25; Polk v. Wendal, 9 Cranch, 98, 3 L. ed. 665; Elmendorf v. Taylor, 10 Wheat. 159, 6 L. ed. 289; Lent v. Tillson, 140 U. S. 328, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Roberts v. Lewis, 153 U. S. 377, 38 L. ed. 747, 14 Sup. Ct. Rep. 945; Adams Exp. Co. v. Ohio Auditor, 165 U. S. 219, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Forsyth v. Hammond, 166 U. S. 518, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665. Numerous other cases may be found by consulting the annotation of the above cases in the U. S. notes.

⁶Green v. Neal, 6 Pet. 297, 8 L. ed. 402; Piqua Bank v. Knoop, 16 How. 391, 14 L. ed. 977; Walker v. Harbor Comrs. 17 Wall. 651, 21 L. ed. 744; Lelfingwell v. Warren, 2 Black. 599, 17 L. ed. 261; Bucher v. Cheshire R. R. 125 U. S. 583, 31 L. ed. 795, 8 Sup. Ct. Rep. 977. For other cases in point see annotation of foregoing in U. S. notes.

own laws and the laws when thus expounded bind the Federal courts.⁷ A construction of State laws established by long usage will be deemed equally as binding as though based on judicial decisions.⁸ The Texas court's construction of the Mexican colonization law made part of the local law of Texas after its independence will be followed.⁹ In construing the Louisiana Code, the works of civil law writers have been given a persuasive force.¹⁰ In construing a treaty settling boundary lines within the State, the local court's construction has been adopted where not repugnant to the treaty.¹¹ Where a State law has not received a construction by the State courts, the Federal courts are compelled to form an independent judgment as to its meaning.¹² But a subsequent State decision construing a statute contrary to a Federal decision at circuit will be followed.¹³ If a State decision does not present a clear case of construction of a State statute, but only asserts general principles, it is not necessarily binding;¹⁴ nor is the Federal court bound by a statement in an individual concurring opinion;¹⁵ nor by decision of an inferior State court.¹⁶ The Supreme Court need not follow the latest of conflicting decisions especially where contract rights have vested under the earlier construction of a local statute.¹⁷ They will only apply a change in the State court's construction of a statute, prospectively, just as though it were an amendment.¹⁸ Where the same statute is enacted by different States, which, however, differently construct the meaning of its provisions, the Federal courts regard them as different laws and follow the construction adopted in the State where they are sitting.¹⁹ If not as yet construed by the local courts they are not bound by a construction of a similar statute elsewhere,²⁰ or if in other jurisdictions, different constructions have been adopted, they may choose between them.¹ By a parity of reasoning the Supreme Court and the courts

⁷Smith v. Kernochen, 7 How. 219, 12 L. ed. 666.

⁸Carroll v. Safford, 3 How. 460, 11 L. ed. 671.

⁹Christy v. Pidgeon, 4 Wall. 204, 18 L. ed. 322.

¹⁰Groves v. Sentell, 153 U. S. 478, 38 L. ed. 785, 14 Sup. Ct. Rep. 898.

¹¹Lattimer v. Poteet, 14 Pet. 18, 10 L. ed. 328.

¹²Sioux City R. R. v. Trust Co. of North America, 173 U. S. 107, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; Knight v. Shelton, 134 Fed. 423. See cases cited ante, § 10, note [h].

¹³Kibbe v. Ditto, 93 U. S. 680, 23 L. ed. 1005.

¹⁴Town of Venice v. Murdock, 92 U. S. 501, 23 L. ed. 583; Brunswick T. Co. v. National Bk. 88 Fed. 611.

¹⁵Central R. R. v. Wright, 164 U. S. 333, 41 L. ed. 454, 17 Sup. Ct. Rep. 80.

¹⁶Beals v. Hale, 4 How. 54, 11 L. ed. 873.

¹⁷Douglass v. Pike Co. 101 U. S. 686, 25 L. ed. 968. See also ante, § 10, note [k].

¹⁸Douglass v. Pike Co. 101 U. S. 686, 25 L. ed. 968; Green v. Comrs. 109 U. S. 105, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; Knox v. Ninth Nat. Bk. 147 U. S. 99, 37 L. ed. 96, 13 Sup. Ct. Rep. 270.

¹⁹Louisiana v. Pillsbury, 105 U. S. 294, 26 L. ed. 1090; May v. Tenney, 148 U. S. 64, 37 L. ed. 368, 13 Sup. Ct. Rep. 491; Whitney v. Fox, 163 U. S. 647, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713.

²⁰Texas, etc. Ry. v. Humble, 181 U. S. 66, 45 L. ed. 751, 21 Sup. Ct. Rep. 526.

¹Coulan v. Doull, 133 U. S. 233, 33 L. ed. 596, 10 Sup. Ct. Rep. 253.

of the District of Columbia hold themselves bound by the construction placed upon Maryland statutes in force in the District, by the Maryland courts prior to the cession of the District,² and subsequent Maryland cases are deemed persuasive though not controlling.³ Similarly the Federal Supreme Court inclines to adopt the highest territorial court's construction of a local statute as to parties.⁴ Local decisions can of course, have no controlling force in construing Federal statutes.⁵

[e] State court's construction of local constitution.

The construction of a State constitution by the highest State court is similarly binding.⁷ Hence if the State courts declare a law valid or invalid under the State constitution this conclusion must be accepted by the Federal courts,⁸ though the case in which it was rendered was a prepared case not involving any genuine controversy;⁹ and though the decision was by a divided court;¹⁰ and even although similar words in the interstate commerce law have received a different construction.¹¹ The construction of a State's constitution and laws by the State court is received by the Federal courts as a part of such law.¹² State decisions on the State constitution will be given persuasive force by Federal courts when dealing with similar provisions of the Federal constitution.¹³ Where possible, the Federal courts will avoid passing upon the validity of a State law under the State constitution in advance of a State decision thereon.¹⁴ As is elsewhere stated, the Federal courts will follow earlier

²Alexandria Canal Co. v. Swarm, 5 How. 83, 12 L. ed. 60.

³Wallingsford v. Allen, 10 Pet. 593, 9 L. ed. 542; Miller v. Herbert, 5 How. 81, 12 L. ed. 55; Phillips v. Negley, 117 U. S. 678, 29 L. ed. 1013, 6 Sup. Ct. Rep. 901.

⁴Sweeney v. Lomme, 22 Wall. 213, 22 L. ed. 727.

⁵Calhoun, etc. Co. v. Ajax Co. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885.

⁷Elmwood v. Marcy, 92 U. S. 294, 23 L. ed. 710; Louisville, etc. Ry. v. Mississippi, 133 U. S. 591, 33 L. ed. 784, 10 Sup. Ct. Rep. 348; Henry Co. v. Nicolay, 95 U. S. 625, 24 L. ed. 394; Railroad Co. v. Schutte, 103 U. S. 139, 26 L. ed. 327; Wade v. Walnut, 105 U. S. 2, 26 L. ed. 1027; Gilman v. Sheboygan, 2 Black, 518, 17 L. ed. 305.

⁸Bank of Hamilton v. Dudley, 2 Pet. 524, 7 L. ed. 496; Gut v. State, 9 Wall. 36, 19 L. ed. 573; Robinson v. Fair, 128 U. S. 86, 32 L. ed. 415, 9 Sup. Ct. Rep. 30; Lincoln Co. v. Luning, 133 U. S. 532, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; Merchants Bk. v. Pennsylvania, 167 U. S. 463, 42

L. ed. 237, 17 Sup. Ct. Rep. 830; Miller v. Armour, 145 U. S. 423, 36

L. ed. 759, 12 Sup. Ct. Rep. 884; Giozza v. Tiernan, 148 U. S. 661, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; McCain v. Des Moines, 174 U. S. 177, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; Mason v. Missouri, 179 U. S. 334, 45 L. ed. 219, 21 Sup. Ct. Rep. 125; Orr v. Gilman, 183 U. S. 283, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Hughes v. Planz, 138 Fed. 980.

⁹Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 219, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

¹⁰Williams v. Eggleston, 170 U. S. 311, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

¹¹Louisville, etc. R. R. v. Kentucky, 183 U. S. 507, 46 L. ed. 298, 22 Sup. Ct. Rep. 95.

¹²Webster v. Cooper, 14 How. 505, 14 L. ed. 510; Southern Pac. R. R. v. Orton, 32 Fed. 478.

¹³Spencer v. Merchant, 125 U. S. 352, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

¹⁴Pelton v. National Bk. 101 U. S. 144, 25 L. ed. 901; Wiley v. Sinkler, 179 U. S. 66, 45 L. ed. 89, 21 Sup.

State cases construing the State constitution and upholding the validity of statutes under which contract rights had vested, rather than later ones declaring them invalid.¹⁵ In one case it has been declared that the construction of a State constitution may involve general principles of jurisprudence as to which the holdings of the State court need not be followed.¹⁶ The Supreme Court will follow the decision of a State court denying the legislature's power to validate a municipality's stock subscription to a railroad.¹⁷

[f] Local law not followed where Federal constitution, treaties or statutes control.

The constitution makes the Federal constitution treaties and laws supreme¹⁸ and the Federal courts are never bound to administer local law where in conflict with the Federal Constitution or with any lawful exercise of the law making power of the nation.²⁰ This is so plain that in few cases has any question arisen. All State laws and decisions conflicting with the law of the nation must be disregarded.¹ They are not rules of decision where the constitution, treaties or statutes of the United States otherwise provide.² A State decision that a revenue stamp is not necessary to render a document admissible in evidence, is not binding.³ State decisions as to whether a State law impairs the obligation of a contract are not binding.⁴ State decisions which if followed in the construction of a local law would impair a contract by destroying the remedy, are not binding.⁵ The Federal courts are not bound to accept the local tribunal's opinion that a statutory tax proceeding is not a suit, where the question is as to its removability to the Federal court under the act of Congress.⁶ The Federal courts are not bound to accept a State court's decision that the probate in due form of the property of a man in fact alive, is valid, where it is of opinion that such proceeding is a deprivation of property without due process of law under the Federal constitution.⁷ Nor will they accept a State ruling that private property may be taken for public use without making compensation therefor.⁸ A State

Ct. Rep. 17; *Hills v. Exchange Bk.* 105 U. S. 319, 26 L. ed. 1052; *Western U. T. Co. v. Poe*, 61 Fed. 469; *Western U. T. Co. v. Poe*, 64 Fed. 11. See ante, § 10, note.^[h]

¹⁵*Elmwood v. Marcy*, 92 U. S. 289, 23 L. ed. 710; *Anderson v. Santa Anna*, 116 U. S. 364, 29 L. ed. 636, 6 Sup. Ct. Rep. 417. And see ante, § 10, note.^[i]

¹⁶*Township of Pine Grove v. Tallcott*, 19 Wall. 678, 22 L. ed. 227.

¹⁷*Elmwood v. Marcy*, 92 U. S. 292, 23 L. ed. 710.

¹⁸Post, § 14.

²⁰See ante, § 10, notes. [l] [p]

¹*Amis v. Smith*, 16 Pet. 314, 10 L. ed. 973.

²*Connecticut L. I. Co. v. Schaefer*, 94 U. S. 458, 24 L. ed. 251.

³*Sackett v. McCaffrey*, 131 Fed. 219, 65 C. C. A. 205.

⁴*Dundee, etc. Co. v. School Dist.* 19 Fed. 365. Nor are they binding on writ of error to a State court. See infra, note.^[h]

⁵*Butz v. City of Muscatine*, 8 Wall. 583, 19 L. ed. 494.

⁶*Upshur Co. v. Rich*, 135 U. S. 477, 34 L. ed. 196, 10 Sup. Ct. Rep. 654.

⁷*Lavin v. Emigrant, etc. Bank*, 1 Fed. 652, 18 Blatchf. 1.

⁸*Hollingsworth v. Parish of Tensas*, 17 Fed. 112, 4 Woods 280.

decision that a national soldiers' home is not within the exclusive jurisdiction of the Federal government is not conclusive.⁹ Where the local laws of evidence conflict with laws prescribed by Congress, they are not followed. The Federal law as to privileged communications,¹⁰ or modes of proof,¹¹ or the competency of witnesses,¹² control, as against conflicting State laws. In bankruptcy proceedings the Federal law furnishes the rule of decision as to all matters therein provided.¹³ Most if not all questions arising in admiralty and Federal criminal causes are determined without regard to any State laws.¹⁴

[g] In trials at common law.

The section excludes both admiralty and equity causes. In the former the law administered is chiefly the ancient maritime law as modified by Congress and the courts.¹⁶ In equity cases the absence of any provision making the local law the rule of decision has in some cases been deemed to indicate that the Federal courts may declare a law of their own. But the authorities have in general, not failed to recognize the binding force of the local laws as to all matters within the law making power of the State.¹⁷

[h] State court's construction of State law binding on error to State court.

The above enactment of Congress applies only to cases tried in the Federal courts. On error from the Supreme Court to the highest State court the sole question is whether the latter's proceedings in a cause have denied any Federal right. All other questions are concluded by the State court's decision. The question is not the correctness of the State court's interpretation and administration of its local jurisprudence, but whether, as administered, any Federal right is infringed. Hence the soundness of the State court's interpretation of its law is assumed.¹⁸ If the question is as to the validity of a State law under the Federal constitution, the construction placed thereon by the State court is binding and the question is, does the law as so construed violate Federal limitations.¹⁹ If the

⁹In re Kelly, 71 Fed. 549.

¹⁰Connecticut, etc. Ins. Co. v. Schaefer, 94 U. S. 458, 24 L. ed. 251.

¹¹McLennan v. Kansas City Ry. 22 Fed. 199; Sage v. Tauszky, 21 Fed. Cas. 146.

¹²Rice v. Martin, 8 Fed. 478, 7 Sawy. 337; Stephens v. Bernays, 42 Fed. 490.

¹³See ante, § 11, note. [e]

¹⁴See ante, § 11.

¹⁶See ante, § 11.

¹⁷See ante, § 10, notes. [a] [b]

¹⁸West, etc. Co. v. Dix, 6 How. 535, 12 L. ed. 535; Palmer v. McMahon, 133 U. S. 665, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; Bacon v. Taxes, 163 U. S. 219, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Castillo v. McConico,

168 U. S. 680, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Turner v. Board of Commissioners of Wilkes Co. 173 U. S. 463, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; Taylor v. Beckham, 178 U. S. 574, 44 L. ed. 1199, 20 Sup. Ct. Rep. 890, 1009.

¹⁹Stryker v. Goodnow, 123 U. S. 536, 31 L. ed. 194, 8 Sup. Ct. Rep. 207; Montana, etc. Co. v. St. Louis Co. 152 U. S. 165, 38 L. ed. 398, 14 Sup. Ct. Rep. 506; Chicago, etc. R. R. v. Minnesota, 134 U. S. 456, 33 L. ed. 980, 10 Sup. Ct. Rep. 702; Baltimore T. Co. v. Baltimore, etc. R. R. 151 U. S. 138, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Tullis v. Lake, etc. R. R. 175 U. S. 353, 44 L. ed. 195, 20 Sup. Ct. Rep. 138; Missouri, etc. R.

State court holds a portion of a law void but declares the rest severable and enforceable, this conclusion binds the Supreme Court.²⁰ If the State court declares that two provisions of a law must be read together this is binding on the Supreme Court.¹ If the construction of the State court renders the State law constitutional, the Supreme Court will follow it;² and if it renders it unconstitutional it is binding although the construction seems unwarranted, and the law must be declared invalid.³ On error to a State court the Supreme Court must accept the State court's decision that a law or ordinance is valid under the State constitution.⁴

[i] But not its legal effect under the Federal constitution. ..

But while the Supreme Court is thus concluded as to the meaning of a State law and the circumstances to which it is applicable, the question whether as thus construed and applied, its legal effect is to violate any Federal limitation, is before the Supreme Court for fullest investigation uncontrolled by any conclusions of the State court in that or other cases. Where a law⁶ is claimed to impair the obligation of a contract, the Supreme Court decides for itself, both as to the alleged impairment and as to the existence of the alleged contract.⁷ Hence a State court's opinion that a second grant of a bridge franchise does not impair the first, is not binding;⁸ nor its opinion as to whether an apportionment of viaduct expenses among different railroads violated their prior contract rights.⁹ A State court's opinion that the repeal of a lottery franchise violates the Federal constitution is of even less force.¹⁰ In determining the existence

R. v. Nebraska, 164 U. S. 414, 41 L. ed. 494, 17 Sup. Ct. Rep. 130; St. Louis, etc. R. R. v. Paul, 173 U. S. 408, 43 L. ed. 748, 19 Sup. Ct. Rep. 419; W. W. Cargill Co. v. Minnesota, 180 U. S. 466, 45 L. ed. 626, 21 Sup. Ct. Rep. 428; Morley v. Lake, etc. Ky. 146 U. S. 166, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 154, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

²⁰Tullis v. Lake, etc. R. R. 175 U. S. 353, 44 L. ed. 195, 20 Sup. Ct. Rep. 138.

¹First Nat. Bank v. Chehalis Co. 166 U. S. 444, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629.

²Noble v. Mitchell, 164 U. S. 372, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Chesapeake, etc. Ry. v. Kentucky, 179 U. S. 395, 45 L. ed. 247, 21 Sup. Ct. Rep. 101.

³Wabash, etc. R. R. v. Illinois, 118 U. S. 565, 30 L. ed. 244, 7 Sup. Ct. Rep. 7.

⁴Crowley v. Christensen, 137 U. S. 92, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Brown v. New Jersey, 175 U. S. 174, 44 L. ed. 119, 20 Sup. Ct. Rep.

77; Chicago, etc. R. R. v. Nebraska, 170 U. S. 77, 42 L. ed. 948, 18 Sup. Ct. Rep. 513. See post, § 38.1

⁶There is no jurisdiction on writ of error if the impairment was by anything else than a law. New Orleans W. W. v. La. Sugar Co. 125 U. S. 36, 31 L. ed. 614, 8 Sup. Ct. Rep. 741.

⁷Life Ins. Co. v. Debolt, 16 How. 432, 14 L. ed. 1004; Bryan v. Board of Education, 151 U. S. 650, 38 L. ed. 302, 14 Sup. Ct. Rep. 469; Citizens Sav. Bank v. Owensboro, 173 U. S. 648, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; Hall v. Wisconsin, 103 U. S. 8, 26 L. ed. 304; Bridge Prop'rs. v. Hoboken Co. 1 Wall. 145, 17 L. ed. 576. If the State court's construction of a State statute establishes the contract it will be followed: Powers v. Detroit, etc. R. R. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556.

⁸Wright v. Nagle, 101 U. S. 793, 25 L. ed. 921.

⁹Chicago, etc. R. R. v. Nebraska, 170 U. S. 68, 42 L. ed. 952, 18 Sup. Ct. Rep. 517.

¹⁰Douglas v. Kentucky, 168 U. S.

of an alleged contract, a State court's opinion, however frequently expressed, that a contract does not exist because of want of power of the legislature to make it;¹¹ or because it is contrary to public policy and void;¹² or because a corporate charter was granted subject to the reserve right to alter and amend;¹³ or because the statute under which it is claimed to arise has been otherwise construed by the State courts,¹⁴ is not binding and the Supreme Court decides the question for itself. The principle which requires the Supreme Court to disregard State decisions in deciding whether the legal effect of State action violates the Federal constitution, is not confined to cases arising under the obligation clause, Where it is claimed that a probate court's sale of a living person's property deprives that person of property without due process of law, the fact that the State court upholds the power of the local probate court to adjudge a person dead and then sell his property, is not conclusive.¹⁵ Where a municipal ordinance as to licensing of laundries is attacked under the fourteenth amendment as conferring an arbitrary power to deny certain classes of persons a right to conduct a lawful business, the State court's opinion that such is not its legal effect, is not binding.¹⁶ Neither is the Supreme Court bound by the State court's opinion that a given statute is in the nature of a police regulation.¹⁷ In cases of this sort the State court decisions have undoubtedly a persuasive force. The Supreme Court will often adopt the same view,¹⁸ and will not overrule a State decision unless clearly wrong.¹⁹ It has been said such State decisions are even conclusive where so firmly established as to constitute a rule of property;²⁰ but this cannot be accepted as meaning that the Supreme Court

501, 42 L. ed. 557, 18 Sup. Ct. Rep. 38 L. ed. 901, 14 Sup. Ct. Rep. 1112.
203.

¹¹Northwestern Univ. v. People, 99 U. S. 321, 25 L. ed. 389; Jefferson Branch Bank v. Skelly, 1 Black, 443, 17 L. ed. 173; Mobile, etc. R. R. v. Tennessee, 153 U. S. 492, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

¹²Delmas v. Insurance Co. 14 Wall. 668, 20 L. ed. 759.

¹³Louisville Gas Co. v. Citizens Co. 115 U. S. 697, 29 L. ed. 515, 6 Sup. Ct. Rep. 271; Mobile, etc. R. R. v. Tennessee, 153 U. S. 495, 38 L. ed. 796, 14 Sup. Ct. Rep. 971.

¹⁴Louisville, etc. R. R. v. Palmes, 109 U. S. 257, 27 L. ed. 926, 2 Sup. Ct. Rep. 201; McGahey v. Virginia, 135 U. S. 667, 34 L. ed. 305, 10 Sup. Ct. Rep. 974; McCullough v. Virginia, 172 U. S. 109, 43 L. ed. 384, 19 Sup. Ct. Rep. 136; Bienville Water Co. v. Mobile, 186 U. S. 220, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820.

¹⁵Scott v. McNeal, 154 U. S. 45,

¹⁶Yick Wo v. Hopkins, 118 U. S. 366, 30 L. ed. 220, 6 Sup. Ct. Rep. 1069.

¹⁷Atchison, etc. R. R. v. Matthews, 174 U. S. 100, 43 L. ed. 911, 19 Sup. Ct. Rep. 611.

¹⁸Memphis Gas Co. v. Shelby Co. 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; Hoadley v. San Francisco, 124 U. S. 645, 31 L. ed. 556, 8 Sup. Ct. Rep. 662; Vicksburg, etc. R. R. v. Dennis, 116 U. S. 667, 29 L. ed. 771, 6 Sup. Ct. Rep. 626.

¹⁹Railroad Cos. v. Gaines, 97 U. S. 709, 24 L. ed. 1094; Freeport W. Co. v. Freeport, 180 U. S. 595, 45 L. ed. 687, 21 Sup. Ct. Rep. 493; Board of Liquidation v. Louisiana, 179 U. S. 638, 45 L. ed. 354, 21 Sup. Ct. Rep. 263; Wilson v. Standefer, 184 U. S. 412, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; Yazoo, etc. R. R. v. Adams, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729.

²⁰Louisville, etc. R. R. v. Palmes, 109 U. S. 257, 27 L. ed. 926, 3 Sup.

cannot in such cases exercise its independent judgment. If the State decision sustains the applicability of a statute to a corporation and, with that assumption, a contract appears on the face of the statute, such State decision will be followed.²¹

[j] In cases where they apply.

This clause seems to give the Federal courts a discretion¹ somewhat similar to that created by the act adopting the State practice in common law cases "as near as may be."² The State law requiring on the death of a defendant, presentation of a claim against his estate, does not apply to a suit by the government against a surety on an official bond.³ A State statute of limitations unreasonably discriminating against Federal causes of action might be disregarded under this clause.⁴

§ 13. — is there a Federal common law.

There is no common law of the United States, in the sense of a national unwritten customary law resting merely in judicial decisions, as to those matters of controversy that are committed to the law making power of the individual States.⁷ The restriction of Federal powers to those granted and their necessary incidents, and the reservation of all others by the States and by the people, effectually forbids it.^[a] As to matters of national concern, however, and committed to the law-making power of the nation, there is some room for the growth of an unwritten Federal law resting in the decisions of the Federal courts, subject, however, to this limitation, viz., that the courts may not usurp legislative powers vested by the Constitution in Congress. Since by our system of government, power to make laws is in the legislative department, it is for Congress, and not the courts, to regulate commerce, define offenses against the United States and otherwise prescribe the rules of conduct that must govern the citizen in his relation to the national government. The Federal courts have not the latitude of action nor the quasi legislative power possessed by the courts of England in interpreting and declaring the common law. While therefore, they may, and have, resorted to the common law of our ancestors for principles of construction and interpretation, and

Ct. Rep. 201; *Shelby Co. v. Union Bank*, 161 U. S. 151, 40 L. ed. 652, 16 Sup. Ct. Rep. 558.

²¹*Powers v. Detroit, etc. R. R.* 201 U. S. 543, 50 L. ed. 860.

¹*Campbell v. City of Haverill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 219.

Fed. Proc.—8.

²See post, § 900.

³*Pond v. United States*, 111 Fed. 989, 49 C. C. A. 582.

⁴*Campbell v. City of Haverill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 219.

⁷ante, § 10.

generally in shedding light upon the fundamental law which they must construe, and the statutory law which they must interpret and apply,^[b] it is plainly not competent for them to assume legislative or quasi legislative powers constitutionally committed to Congress. Subject to this limitation, however, there exists a legitimate field for the development of a national law resting in judicial decisions supplementing and elaborating the written law and consisting in the main rather of legal principles than of rules of conduct.^{[c]-[d]} Aside from matters within the law-making power of the States or of the nation, there are other matters of controversy which the constitution makes cognizable in the Federal courts. In such cases it would seem that the Federal courts may resort to established principles of law drawn from the common law or the civil law or from international law, or the law maritime, recognized and accepted as sound by both litigant parties, and in so doing develop a body of law of a judicial nature and essentially national in character.^[e]

Author's section.

[a] No general common law of the United States.

While it is well settled that our ancestors brought with them upon their immigration, so much of the common law as was suited to their new environment,⁸ it is equally well settled that this adoption of the common law was by each colony separately and not by the settlers collectively. It was a common law of the colonies and of the several States, and not of the aggregate federation that existed at the time of the adoption of the Federal Constitution.⁹ The Federal Constitution does not recognize and adopt the common law in the same way that it adopts the law maritime.¹⁰ The references therein to law and equity are not a recognition of the existence of a Federal common law as a standard for the measurement of rights in controversy but merely a recognition of the existence of two distinct modes of proceeding for the ascertainment of rights.¹¹ And as the Federal government has merely certain granted powers, there can be no basis for the assertion that the common law of England exists as part of the law of the nation supported by the nation's mandate and to be respected, administered and enforced by its officers uniformly throughout the land. It has frequently been declared that there is

⁸Pawlet v. Clark, 9 Cranch, 333, 3 Rep. 569; Bucher v. Cheshire, R. R. L. ed. 735; Van Ness v. Pacard, 2 Pet. 125 U. S. 584, 31 L. ed. 795, 8 Sup. 144, 7 L. ed. 374; Patterson v. Winn, Ct. Rep. 974.

⁹Pet. 241, 8 L. ed. 108; United States v. Reid, 12 How. 363, 13 L. ed. 1023.

¹⁰See ante, § 11.
¹¹Gatton v. Chicago, etc. Ry. 95 Iowa, 127, 63 N. W. 594, 28 L.R.A. L. ed. 1055; Smith v. Alabama, 124 U. S. 478, 31 L. ed. 508, 8 Sup. Ct. 62 Fed. 28.

no common law of the United States;¹² although the proposition has been disputed;¹³ and the cases in which the Supreme Court has held that the court of claims, must, in the absence of statute, be governed by common law rules of evidence, have been cited as proof that there is a Federal common law.¹⁴ Hence, although bribing a Federal officer or libeling the president, or other act involving a Federal officer or the Federal government would be an offense by principles of the common law, it is not punishable as a crime unless Congress so provides, because there are no common law crimes against the Federal government.¹⁵ Though there may be a right of copyright at common law, there is none in the United States, the right is statutory, created by the act of Congress of 1790.¹⁶

[b] Application of common law principles to interpretation of statutory or fundamental law.

Though there is no Federal common law in this general sense, it is nevertheless true that the Federal courts have in numerous cases turned to the common law for the meaning of words¹ and of phrases, for distinctions between law and equity, for principles of construction,² for the ascertainment of some domestic or political status with which the Constitution or some statute deals, and for various other judicial purposes. The propriety of this is obvious. Our law idiom comes largely from the common law, and its meaning is best understood by reference thereto. The

¹²Wheaton v. Peters, 8 Pet. 658, 659, 8 L. ed. 1055; Kendall v. United States, 12 Pet. 621, 9 L. ed. 1219; Pennsylvania v. Bridge Co. 13 How. 563, 14 L. ed. 268; Parkersburg, etc. Co. v. Parkersburg, 107 U. S. 700, 27 L. ed. 588, 2 Sup. Ct. Rep. 732; Bucher v. Cheshire R. R. 125 U. S. 583, 31 L. ed. 799, 8 Sup. Ct. Rep. 974; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 Sup. Ct. Rep. 569; Western U. T. Co. v. Call Pub. Co. 181 U. S. 101, 45 L. ed. 770, 21 Sup. Ct. Rep. 561; United States v. Worrall, 2 Dall. 384, 1 L. ed. 426, Fed. Cas. No. 16,766; United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259; United States v. Coolidge, 1 Wheat. 415, 4 L. ed. 124; Mullers Case, 17 Fed. Cas. 976; Lorman v. Clarke, 2 McLean, 572, Fed. Cas. No. 8,516; United States v. Railroad Bridge, 6 McLean, 517, Fed. Cas. No. 16,114; United States v. New Bedford Bridge, 1 Wood. & M. 447, Fed. Cas. No. 15,867; In re Barry, 42 Fed. 119; Swift v. Philadelphia & R. R. 58 Fed. 868; Same v. Same, 64 Fed. 60; Newport News Co. v. Howe, 52 Fed. 366, 3 C. C. A. 121; Phipps v. Harding, 70 Fed. 475, 17 C. C. A. 203, 30 L.R.A.

513; Gatton v. Chicago, etc. Ry. 95 Iowa, 133, 63 N. W. 596, 28 L.R.A. 556; People v. Folsom, 5 Cal. 374; United States v. Garlinghouse, 4 Ben. 205, Fed. Cas. No. 15,189.

¹³Duponceau Jurisdiction of Federal Courts, 85-90; Murray v. Railroad, 62 Fed. 24. See also 1 Kent's Commentaries, 311, 322; North American Review, July, 1825.

¹⁴Moore v. United States, 91 U. S. 270, 23 L. ed. 346; United States v. Clark, 96 U. S. 37, 24 L. ed. 696. See Murray v. Railroad, 62 Fed. 39. But the common law was adopted by Congress for the District of Columbia in 1801. Van Ness v. Hyatt, 13 Pet. 298, 10 L. ed. 168.

¹⁵See ante, § 11, note. [d]

¹⁶Wheaton v. Peters, 8 Pet. 661, 8 L. ed. 1081.

¹Pettibone v. United States, 148 U. S. 203, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; United States v. Wong Kim Ark, 169 U. S. 654, 42 L. ed. 893, 18 Sup. Ct. Rep. 459.

²E. g. the common law rule that the sovereign is not bound by a statute unless particularly named: Dollar Sav. Bank v. United States, 19 Wall. 239, 22 L. ed. 80.

framers of the Constitution and the members of the legislature are very properly deemed to be familiar with its definitions, rules, and principles, as part of our history as a people and part of our experience as citizens of the various States, and to have legislated with more or less reference to it. Indeed it has been truly said that much of our written law could not be understood without referring to it.³ The statement of Mr. Justice Matthews is therefore very plainly correct, that the code of constitutional and statutory construction which is gradually formed by the judgments of Federal courts in the application of the Constitution, laws and treaties, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.⁴

[c] As to matters within national legislative power on which Congress has not acted.

There are moreover yet other directions in which the development of a national unwritten law is proceeding. As is elsewhere shown, the Federal courts are not bound to follow State laws or decisions as to matters within the law making power of the nation.⁶ In many such cases Congress has not legislated fully or not acted at all; and it is a difficult question to determine to what extent the Federal courts may resort to and adopt common law rules in deciding such matters of controversy. Plainly they cannot assume any of the legislative powers constitutionally conferred upon Congress. Thus they cannot usurp the functions of Congress by declaring acts to be crimes against the government in the absence of statute, because criminal at common law.⁷ They cannot entertain suit against an interstate carrier for a discrimination in charges contrary to an accepted rule of the common law, in the absence of an act of Congress forbidding it, if such a decision would amount to a judicial regulation of commerce, since it is for Congress and not the Federal courts to regulate interstate commerce.⁸ It is not easy to draw the line between judicial legislation forbidden by the distribution of powers in the constitution, and the more strictly judicial function of interpretation, definition and construction, but the distinction is important in this connection. While some of the cases asserting a right to disregard the laws and decisions of the States go further than may seem warranted,⁹ it is not open to doubt that as to national matters there is a legitimate field for the development of a body of customary national law resting in judicial decisions drawn largely from the old common law, and which may with propriety be termed a national common law. Already it has been asserted

³Moore v. United States, 91 U. S. 274, 23 L. ed. 346.

⁴Smith v. Alabama, 124 U. S. 465, 31 L. ed. 588, 8 Sup. Ct. Rep. 569; United States v. Wong Kim Ark, 169 U. S. 654, 42 L. ed. 893, 18 Sup. Ct. Rep. 459.

⁶See ante, § 10.

⁷See ante, § 11 note. [d]

⁸See Gattou v. Chicago, etc. R. R.

95 Iowa, 133, 63 N. W. 596, 28 L.R.A. 556; Swift v. Railroad, 58 Fed. 868. Contra, see Murray v. Chicago, etc. R. R. 62 Fed. 24. These cases discuss the question of a Federal common law at length, but do not refer to the principle laid down by the text and which seems to the writer properly the controlling one.

⁹See ante, § 10, note. [r]

that the Federal courts may decide for themselves what constitutes a contract of carriage on an interstate shipment, and the liabilities of connecting carriers;¹⁰ whether a carrier's stipulation for exemption from liability for negligence is contrary to public policy;¹¹ whether an agreement to procure a government contract is contrary to public policy;¹² or a contract for commissions by an agent of a foreign government;¹³ or any other agreement in fraud of the Federal laws or contravening the public policy of the United States.¹⁴ The Federal courts will declare a contract in aid of rebellion, void regardless of State law.¹⁵ In short it is clear that there is a public policy of the United States declared in the decisions of the Federal courts.¹⁶ In other cases the common law rule as to survivorship of a cause of action has been applied, in the absence of act of Congress, to a *qui tam* action under the copyright law.¹⁷ The legislation of Congress respecting patents, copyrights, trade marks and trade names, naturalization and citizenship, postoffices and postroads, and various other matters, is supplemented in a variety of ways by the unwritten law developed in the decisions of the Federal courts, and drawn from common law and other sources.

[d] In admiralty cases.

Congress is not given express power to prescribe the maritime law, though it is declared to have full power to alter and modify it.¹ The constitution assumes the existence of the law maritime and the Federal courts interpret and apply it with all the latitude of power possessed by the common law courts of England in declaring rules of common law. The principle which denies them quasi legislative power in other cases already considered does not apply in admiralty matters. Plainly there is a national common law of the seas.

[e] Matters of controversy outside the law-making power of State or nation.

Suits by States in the Supreme Court may present questions not determinable by either State or Federal laws.² Suits by or against foreign ambassadors or consuls, or suits in admiralty, may also present such questions. While cases of this sort seldom arise, this jurisdiction of the Federal courts must be reckoned with as a legitimate source of unwritten Federal law resting in the decisions of the Federal Supreme Court.

¹⁰*Myrick v. Michigan C. R. R.* 107 U. S. 109, 27 L. ed. 325, 1 Sup. Ct. Rep. 425.

¹¹*Eells v. St. Louis, etc. Ry.* 52 Fed. 905.

¹²*Toole Co. v. Norris*, 2 Wall. 54, 17 L. ed. 868; *McGuire v. Corwine*, 101 U. S. 111, 25 L. ed. 901.

¹³*Oscanyan v. Arms Co.* 103 U. S. 261, 26 L. ed. 539.

¹⁴*Hannay v. Eve*, 3 Cranch, 242, 2 L. ed. 427; *Kennett v. Chambers*, 14

How. 52, 14 L. ed. 316; *Trist v. Child*, 21 Wall. 448, 22 L. ed. 623; *Prime v. Brandon, etc. Co.* 16 Blatchf. 466, Fed. Cas. No. 11,421.

¹⁵*Hanaver v. Doane*, 12 Wall. 342, 20 L. ed. 439.

¹⁶*Murray v. Railroad*, 62 Fed. 40.

¹⁷*Schreiber v. Sharpless*, 110 U. S. 80, 28 L. ed. 65, 3 Sup. Ct. Rep. 423.

¹See ante, § 11.

²See ante, § 11.

§ 14. Federal Constitution treaties and laws, supreme.

This Constitution, and the laws of the United States^[a] which shall be made in pursuance thereof; and all treaties^[b] made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby,^[c] anything in the constitution or laws of any State to the contrary notwithstanding.

U. S. Const. art. 6, cl. 2.

[a] Constitution and laws.

The object of the Constitution was to establish a government which to the extent of its powers should be supreme within its sphere of action.⁵ The constitution, treaties, and laws made by the general government on the rights, duties, and subjects specially enumerated and confided to their jurisdiction are exclusive and supreme as well by express provisions as by necessary implication.⁶ The government of the United States and that of the States are to be considered as parts of the same system.⁷ The laws of the United States are supreme only when made in pursuance of the Constitution.⁸ From the supremacy of the Constitution and laws of the United States it necessarily results that the interpretation of the laws by the highest tribunal created by the law itself, must be equally supreme over the constitutions and laws of the several States.⁹ The law of a State, though enacted in the exercise of powers not controverted, if they interfere with the laws of Congress must yield to them.¹⁰

[b] Treaties as supreme law.

A treaty is part of the supreme law of the land and is binding on the courts,¹² and binds the courts as much as an act of Congress.¹³ It binds the nation in the aggregate and all its subordinate authorities and judges

⁵Dobbins v. Comrs. of Erie Co. 16 Peters, 435, 10 L. ed. 1022; Ableman v. Booth, 21 How. 520, 16 L. ed. 175; 3 Wis. 1; Cohens v. Virginia, 6 Wheat. 264, 5 L. ed. 257; United States v. Rhodes, 1 Abb. U. S. 44; Fed. Cas. No. 16,151; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

⁶Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Farmers & M. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Farrington v. Tennessee, 95 U. S. 685, 24 L. ed. 560; Pensacola T. Co. v. West. U. Tel. Co. 96 U. S. 1, 24 L. ed. 708; Sims' Case, 7 Cush. 285; United States v. Rhodes, 1 Abb. U. S. 44, Fed. Cas. No. 16,151.

⁷Stearns v. United States, 2 Paine, 300, Fed. Cas. No. 13,341; Gilmer v. Lime Point, 18 Cal. 229.

⁸Marbury v. Madison, 1 Cranch,

137, 2 L. ed. 60; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

⁹Warner v. The Uncle Sam, 9 Cal. 697.

¹⁰Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; 17 Johns. 488; 4 Johns. Ch. 150; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; McCulloch v. Maryland, 4 Wheat. 437, 4 L. ed. 579.

¹²United States v. Schooner Reggy, 1 Cranch, 109, 110, 2 L. ed. 49; Martin v. Hunter, 1 Wheat. 370, 4 L. ed. 97; In re Sheazle, 1 Wood. & M. 72, Fed. Cas. No. 12,734; United States v. New Bedford Bridge, 1 Wood. & M. 449, Fed. Cas. No. 15,867.

¹³United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49.

of every State.¹⁴ When duly ratified it is the law of the land.¹⁵ It is supreme only when made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to subjects over which it has jurisdiction.¹⁶ It is to be regarded as equivalent to an act of Congress whenever it operates of itself, without the aid of any legislative provision.¹⁷ Federal and State judges are bound to determine the constitution or laws of any State contrary to a treaty, null and void.¹⁸ If the Supreme Court has the power to declare a treaty void, it will exercise it only in a clear case.¹⁹ A treaty in violation of the Constitution is invalid.²⁰ Treaties are subject to subsequent legislation of Congress whether for their enforcement, modification or repeal.¹ A later act of Congress may supersede a treaty, and a treaty may supersede a prior act of Congress.² ●

[c] State courts bound thereby.

Federal laws are as binding upon State courts as are the State laws.⁴ State courts are equally bound to give effect to the supreme law of the land.⁵ They have power to decide the repugnancy of a State law to the Federal Constitution,⁶ or to pass upon any other Federal question arising

¹⁴Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Marbury v. Madison, 1 Cranch, 176, 2 L. ed. 60; Worcester v. Georgia, 6 Peters, 575, 8 L. ed. 506; Calder v. Bull, 3 Dall. 386; 1 L. ed. 648; Owings v. Norwood, 5 Cranch, 348; 3 L. ed. 122; Satterlee v. Matthewson, 2 Pet. 413, 7 L. ed. 469; Ex parte Garland, 4 Wall. 399; 18 L. ed. 376; Cummings v. Missouri, 4 Wall. 329, 18 L. ed. 365; Reichart v. Phelps, 6 Wall. 166, 18 L. ed. 849; Fellows v. Denniston, 23 N. Y. 420.

¹⁵Fellows v. Blacksmith, 19 How. 366, 15 L. ed. 684; Pollard v. Kibbe, 14 Peters, 414, 10 L. ed. 520; Doe v. Branden, 16 How. 635, 14 L. ed. 1090; Rhode Island v. Massachusetts, 12 Peters, 657, 9 L. ed. 1233.

¹⁶People v. Naglee, 1 Cal. 232, 52 Am. Dec. 312; Taylor v. Morton, 2 Curt. 454, Fed. Cas. No. 13,799; Jones v. Walker, 2 Paine, 688, Fed. Cas. No. 7,507; Wilson v. Wall, 34 Ala. 288.

¹⁷Foster v. Neilson, 2 Peters, 314, 7 L. ed. 436; United States v. Arredondo, 6 Peters, 691, 8 L. ed. 547; United States v. Percheman, 7 Pet. 51, 8 L. ed. 605; United States v. Forty etc. Gallons, 93 U. S. 193, 23 L. ed. 846; Gordon v. Kerr, 1 Wash. C. C. 322, Fed. Cas. No. 5,611.

¹⁸Ware v. Hylton, 3 Dall. 199, 1

L. ed. 568; Society v. New Haven, 8 Wheat. 464, 5 L. ed. 662.

¹⁹Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568.

²⁰The Cherokee Tobacco, 11 Wall. 620, 20 L. ed. 227.

¹Head Money Cases, 112 U. S. 599, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

²The Cherokee Tobacco, 11 Wall. 621, 20 L. ed. 227; Whitney v. Robertson, 124 U. S. 194, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; Botiller v. Dominguez, 130 U. S. 247, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; Horner v. United States, 143 U. S. 578, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; Fong Yue Ting, v. United States, 149 U. S. 720, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Thomas v. Gay, 169 U. S. 270, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; Stephens v. Cherokee Nation, 174 U. S. 483, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; United States v. Lee Yen Tai, 185 U. S. 220, 46 L. ed. 878, 22 Sup. Ct. Rep. 629.

⁴Claffin v. Houseman, 93 U. S. 136, 137, 23 L. ed. 833; Farmers, etc. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196.

⁵New York v. Eno, 155 U. S. 98, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; Ex parte Whitten, 67 Fed. 231.

⁶Blythe v. Hinckley, 180 U. S. 338, 45 L. ed. 561, 21 Sup. Ct. Rep. 390.

in a case properly before them.⁷ A remedy for failure of a State court to respect any of the paramount rights derived from the national government, is afforded to litigants by the provision for a writ of error to the Supreme Court;⁸ and in criminal cases by further provisions for the writ of habeas corpus.⁹ State grand jurors and officers are as much bound to respect the supremacy of the Federal Constitution and laws, as are State courts.¹⁰ This section of the Constitution forbids State courts from freeing persons held in custody by Federal courts, or court commissioners or officers of the Federal government.¹¹

§ 15. When Federal jurisdiction is exclusive.

The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive^[a] of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.^[b]

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.^[c]

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.^{[d]-[f]}

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.^[g]

Fifth. Of all cases arising under the patent-right or copyright laws of the United States.^[h]

Sixth. Of all matters and proceedings in bankruptcy.^[i]

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.^[m]

R. S. § 711, as amended¹ Feb. 18, 1875, chap. 80, U. S. Comp. Stats. 1901, p. 577.

[a] Power to make jurisdiction exclusive.

Congress is required by the Constitution to provide a Federal tribunal

⁷Ex parte Royall, 117 U. S. 250, 16 L. ed. 169; Tarble's Case, 13 Wall. 29 L. ed. 868, 6 Sup. Ct. Rep. 739; 403, 20 L. ed. 599; Robb v. Connolly, Arkansas v. Kansas, etc. Co. 183 U. 111 U. S. 639, 28 L. ed. 547, 4 Sup. S. 190, 46 L. ed. 144, 22 Sup. Ct. Rep. Ct. Rep. 544; Ex parte Royall, 117 U. S. 250, 29 L. ed. 868, 6 Sup. Ct. 47.

⁸See post, § 38.

⁹See post, § 1670.

¹⁰Ex parte Royall, 117 U. S. 250, 40 Am. St. Rep. 384, 24 S. W. 162. 29 L. ed. 868, 6 Sup. Ct. Rep. 739.

¹¹Ableman v. Booth, 21 How. 523, striking out paragraph 8. which read

for all cases arising under the Constitution laws and treaties, for all admiralty cases, and cases involving foreign ministers and consuls.² And while the mandate of the Constitution is satisfied by vesting merely an appellate jurisdiction of all such cases in Federal courts,³ it is plainly competent for Congress, where practicable, to vest an original jurisdiction and to make it exclusive.⁴ In cases arising under the Federal Constitution and laws it is, however, not always practicable. For instance if a Federal right is claimed at any stage of the proceedings in a cause in a State court, either at the trial or on appeal, and a correct decision of the case involves a correct decision upon such Federal question, the cause then becomes a case "arising under" the Federal Constitution, treaties and laws,⁵ and Congress may then, but not sooner, make it of exclusive Federal cognizance. The cases involving the Federal law which Congress has made exclusively cognizable in Federal courts, by the above section, are all cases which arise under Federal law in a more direct and fundamental sense. In all cases not expressly or impliedly made exclusive by the Federal Constitution or laws, State courts may exercise a concurrent jurisdiction where under the State laws they may do so.⁶ They have often entertained jurisdiction of suits affecting national banks and their officers;⁷ suits against postmasters for negligence;⁸ or for trover;⁹ and against foreign consuls.¹⁰ The above section as originally adopted, contained an eighth paragraph making Federal jurisdiction exclusive, "of all suits or proceedings against ambassadors, or other public ministers or their domestics, or domestic servants, or against consuls or vice-consuls,"¹¹ but this was stricken out in 1875.¹² The Constitution gives the Supreme court exclusive jurisdiction of suits against foreign ministers and their servants but not against consuls,¹³ so that the amendment of the above section was effective merely in permitting suit elsewhere against consuls and vice consuls.¹⁴

as follows: "Eighth. Of all suits or proceedings against ambassadors, or other public ministers or their domestics, or domestic servants, or against consuls or vice consuls."

²Ante, § 2, note.

³See ante, § 2, note.[e]

⁴The *Moses Taylor*, 4 Wall. 411, 18 L. ed. 401; *Claffin v. Houseman*, 93 U. S. 136, 23 L. ed. 833; *Railway Co. v. Whitton*, 13 Wall. 288, 20 L. ed. 571.

⁵See ante, § 2, note.[f]

⁶*Claffin v. Houseman*, 93 U. S. 136, 23 L. ed. 833; *Plaquemines F. Co. v. Henderson*, 170 U. S. 516, 42 L. ed. 1126, 18 Sup. Ct. Rep. 685.

⁷*Fresno Nat. Bank v. Superior Ct.* 83 Cal. 498, 24 Pac. 159; *Continental Nat. Bank v. Folsom*, 78 Ga. 456, 3 S. E. 272; *Ordway v. Central Nat. Bk.*

47 Md. 245, 28 Am. Rep. 460; *Robinson v. National Bank*, 81 N. Y. 391, 37 Am. Rep. 513; *Brinckerhoff v. Bostwick*, 88 N. Y. 60; *Hade v. McVay*, 31 Ohio St. 236; *Paul v. McGraw*, 3 Wash. 302, 28 Pac. 533. See also post, § 24.

⁸*Raisler v. Oliver*, 97 Ala. 714, 38 Am. St. Rep. 215, 12 South. 241.

⁹*Teal v. Felton*, 12 How. 292, 13 L. ed. 990.

¹⁰*Wilcox v. Luco*, 118 Cal. 642, 62 Am. St. Rep. 306, 50 Pac. 759, 45 L.R.A. 582.

¹¹See, supra, footnote.

¹²See ante, § 2, note; [i] post, § 35.

¹³*Wilcox v. Luco*, 118 Cal. 642, 62 Am. St. Rep. 307, 50 Pac. 759, 45 L.R.A. 582; *Pooley v. Luco*, 72 Fed.

[aa] Unenumerated cases where Federal jurisdiction is exclusive.

There are other cases than those enumerated in the above section where Federal jurisdiction is exclusive. Thus the district court is by another section given exclusive jurisdiction of prize cases with one exception.¹⁴ The Constitution further declares Federal jurisdiction exclusive, of suits against ambassadors, foreign ministers and their servants, and vests the jurisdiction in the Supreme Court.¹⁵ So where Congress gives the circuit and district courts jurisdiction over suits for condemnation for public purposes,¹⁶ this jurisdiction is properly exclusive though special and limited.¹⁷ Moreover if a Federal statute creates a new Federal right and provides for its enforcement in the Federal court, such remedy is in its nature exclusive though not expressly so declared and the State court has no jurisdiction; e. g., the remedy given for discrimination in charges under the interstate commerce act.¹⁸ Where State courts have not been empowered to adjudicate inchoate titles to land involving foreign grants and treaty rights, their decrees are invalid.¹⁹ An exclusive jurisdiction in the Federal court may also develop out of a situation in which there originally existed a right to proceed in both State and Federal courts. Thus the prior filing of a suit in the Federal court gives it such a prior right to proceed that proceedings in the State court in the same matter will be stayed if not abated. Similarly the taking of property into custody by a Federal court will exclude any action in a State court tending to embarrass or disturb that possession.²⁰

[b] Crimes and offenses against United States.

The same act may be an offense against both State and Federal laws.¹ But this section does not prevent the State court taking jurisdiction of and punishing the act done as an offense against the State;² nor a territory from punishing an act also punishable under Federal law.³ So long as the act done is within the punishing power of both State and nation the fact that the State courts may not take jurisdiction of the crime as denounced by the Federal law does not prevent their punishing it under the

¹⁴See post, § 201. The Thompson, 3 Wall. 162, 18 L. ed. 55.

¹⁵See post, § 35.

¹⁶See post, § 150.

¹⁷United States v. Eisenbeis, 112 Fed. 190, 50 C. C. A. 179.

¹⁸Sheldon v. Wabash, etc. R. R. 105 Fed. 785; Copp v. Louisville, etc. R. R. 43 La. Ann. 513, 26 Am. St. Rep. 199, 9 South. 441, 12 L. R. A. 726.

¹⁹Hickey v. Stewart, 3 How. 763, 11 L. ed. 814; Burgess v. Gray, 16 How. 62, 14 L. ed. 839.

²⁰See post, § 16.

¹United States v. Marigold, 9 How. 569, 13 L. ed. 257; Fox v. Ohio, 5 How. 433, 12 L. ed. 213; Moore v. Illinois, 14 How. 19, 14 L. ed. 306;

Ex parte Siebold, 100 U. S. 390, 25 L. ed. 724; United States v. Wells, 28 Fed. Cas. No. 523; State v. Kirkpatrick, 32 Ark. 121; People v. Welch, 141 N. Y. 276, 38 Am. St. Rep. 800, 36 N. E. 331, 24 L.R.A. 121.

²Cross v. North Carolina, 132 U. S. 139, 33 L. ed. 290, 10 Sup. Ct. Rep. 49; Crossley v. California, 168 U. S. 641, 42 L. ed. 610; 18 Sup. Ct. Rep. 242.

³Territory v. Coleman, 1 Or. 192, 75 Am. Dec. 555; State v. Norman, 16 Utah, 465, 52 Pac. 989; Smith v. United States, 1 Wash. Terr. 270; In re Murphy, 5 Wyo. 305, 40 Pac. 400.

State law.⁴ Counterfeiting may be an offense against both State and nation.⁵ So also may many acts committed by officers of national banks;⁶ or acts committed at an election though for Federal officers;⁷ or acts committed in harboring fugitive slaves.⁸ In a sense there are two distinct crimes involved in such cases;⁹ and an acquittal or conviction of one does not bar trial for the other on the ground of former jeopardy.¹⁰ Of course where the State has no power to declare, or has not declared,¹¹ an act to be a crime against the State, it is punishable only in the Federal court.¹² And where the United States has no power to declare an act criminal, it is punishable only in the State court.¹³ R. S. § 5328 declaring that the jurisdiction of state courts shall not be deemed impaired by the sections in the same title making acts crimes against the United States modifies pro tanto the exclusive jurisdiction provided in the section of the revised statutes here under consideration.¹⁴

States have jurisdiction over waters within a marine league of their shores and over bays and inlets within their territory.¹⁵ They may punish crimes committed therein,¹⁶ and Congress in its criminal legislation has usually excepted offenses committed on waters within the territorial limits of a State from the terms of its enactments.¹⁷ But Congress has

⁴Cross v. North Carolina, 132 U. S. 139, 33 L. ed. 290, 10 Sup. Ct. Rep. 49; Pettibone v. United States, 148 U. S. 209, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

⁵Jett v. Commonwealth, 18 Gratt. 954; United States v. Marigold, 9 How. 569, 13 L. ed. 257; Fox v. Ohio, 5 How. 433, 12 L. ed. 213; People v. White, 34 Cal. 186; People v. McDonnell, 80 Cal. 290, 13 Am. St. Rep. 165, 22 Pac. 192; Dashing v. State, 78 Ind. 358.

⁶Cross v. North Carolina, 132 U. S. 132, 33 L. ed. 290, 10 Sup. Ct. Rep. 49; Hoke v. People, 122 Ill. 517, 13 N. E. 825; State v. Bardwell, 72 Miss. 541, 18 So. 379.

⁷Ex parte Siebold, 100 U. S. 390, 25 L. ed. 724; United States v. Cruikshank, 1 Woods, 324, Fed. Cas. No. 14,897.

⁸Moore v. Illinois, 14 How. 13, 14 L. ed. 306.

⁹United States v. Barnhart, 22 Fed. 290, 10 Sawy. 491; State v. Olesen, 26 Minn. 518, 5 N. W. 969.

¹⁰United States v. Barnhart, 22 Fed. 290, 10 Sawy. 491; State v. Sly, 4 Or. 279; United States v. Amy, 14 Md. 149, note, Quart. L. J., Fed. Cas. No. 14,445; Carter v. McClaughry, 183 U. S. 345, 46 L. ed. 236, 22 Sup. Ct. Rep. 181.

¹¹E. g. perjury in the Federal

court: Ex parte Bridges, 2 Woods, 428, Fed. Cas. No. 1,862; In re Loney, 134 U. S. 375, 33 L. ed. 951, 10 Sup. Ct. Rep. 585; State v. Kirkpatrick, 32 Ark. 121.

¹²Fox v. Ohio, 5 How. 410, 12 L. ed. 213; In re Loney, 134 U. S. 375, 33 L. ed. 951, 10 Sup. Ct. Rep. 585; Ohio v. Thomas, 173 U. S. 284, 43 L. ed. 702, 19 Sup. Ct. Rep. 456; State v. Kirkpatrick, 32 Ark. 121; People v. Kelly, 38 Cal. 150, 99 Am. Dec. 362; People v. Fonda, 62 Mich. 401, 29 N. W. 26.

¹³Harkrader v. Wadley, 172 U. S. 168, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; United States v. Fox, 95 U. S. 672, 24 L. ed. 538.

¹⁴Sexton v. California, 189 U. S. 319, 47 L. ed. 833, 23 Sup. Ct. Rep. 543; People v. Welch, 141 N. Y. 266, 277, 38 Am. St. Rep. 800, 36 N. E. 331, 24 L.R.A. 121.

¹⁵United States v. Bevans, 3 Wheat. 336, 4 L. ed. 404; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 162, 11 Sup. Ct. Rep. 559.

¹⁶Smith v. Maryland, 18 How. 76, 15 L. ed. 271; Manchester v. Massachusetts, 139 U. S. 261, 35 L. ed. 166, 11 Sup. Ct. Rep. 563; Commonwealth v. Peters, 12 Met. 387; Dunham v. Lamphere, 3 Gray, 270.

¹⁷See R. S. §§ 5339, 5346, U. S. Comp. Stats. 1901, 3627, 3630.

power to punish offenses committed within the admiralty jurisdiction though also within a State's territorial limits.¹⁸ By act of Sept. 4, 1890, C. 874,¹⁹ it exercised this power by extending the Federal criminal jurisdiction to the Great Lakes and their connecting waters.²⁰ The jurisdiction then became concurrent in State and nation as respects crimes committed within the territorial limits of one of the adjacent States.

Outside the territorial limits of the States the Federal government exercises dominion over a large extent of territory in which its jurisdiction is plenary and exclusive.¹ Some of this territory, as in the case of forts, dockyards etc., lies within the geographical limits of a State though in fact no part thereof, and exclusive Federal jurisdiction of crimes often arises from that fact.² Moreover the Constitution gives Congress power to punish piracies and felonies committed upon the high seas.³ So that the Federal government has a large criminal jurisdiction, exclusive by virtue of its dominion over the place, and not because of the nature of the offense. Chapter three of title 70 of the revised statutes is devoted to "crimes arising within the maritime and territorial jurisdiction of the United States."

[c] Suits for Federal penalties and forfeitures.

Penalties and forfeitures incurred under Federal laws arise chiefly under the national banking laws, copyright laws, customs laws, immigration laws, internal revenue laws, postal laws, and the laws respecting shipping. The jurisdiction is vested chiefly in the district court;⁵ though some jurisdiction in such cases has been conferred on the circuit court.⁶ In custom cases the district court's jurisdiction is exclusive notwithstanding the general grant of concurrent jurisdiction to the circuit court of cases arising under Federal laws or in which the United States are plaintiffs.⁷ So in suits for penalties for importing contract labor the circuit court has jurisdiction.⁸ The penalties declared by Congress for usury in loans and discounts by national banks may be recovered in either State or Federal court under the legislation of Congress, and the exclusive jurisdiction declared by the above section does not apply.⁹ There have

¹⁸United States v. New Bedford Bridge, 1 Wood. & M. 407, Fed. Cas. No. 15,867; Ex parte Ballinger, 5 Hughes, 390, 88 Fed. 783; United States v. Petersen, 64 Fed. 147; United States v. Jackalon, 1 Black, 487, 17 L. ed. 225.

¹⁹See U. S. Comp. Stats. 1901, p. 3627.

²⁰See § 27.

¹See post, §§ 25, 26.

²See post, § 26.

³Cons. art. I. § 8, cl. 10.

⁵See post, § 195. United States v. Mooney, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304.

⁶See R. S. § 629, subd. 4, 5, 7, 15, post, § 121 et passim.

⁷United States v. Mooney, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304.

⁸United States v. Mexican Ry. 40 Fed. 770; United States v. Whitcomb, etc. Co. 45 Fed. 90; Lees v. United States, 150 U. S. 479, 37 L. ed. 1151, 14 Sup. Ct. Rep. 164.

⁹R. S. § 5198, (as amended 1875) U. S. Comp. Stats. 1901, p. 3493. See Farmers, etc. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Charlotte Nat. Bank v. Morgan, 132 U. S. 145, 33 L. ed. 282, 10 Sup. Ct. Rep. 37; Bletz v. Columbia Nat. Bank, 87 Pa. St. 87, 30 Am. Rep. 343; Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455; Dow

also been other statutes of Congress under which penalties were recoverable in State courts.¹⁰

[d] Admiralty causes.

The admiralty jurisdiction made exclusive by the above section of the revised statutes, is by another section vested with some minor qualifications, in the district court.¹² The clause saving the common law remedy in cases where the common law is competent to give it, has the effect of dividing admiralty causes into those exclusively cognizable in admiralty, and those where the admiralty jurisdiction is only concurrent. The jurisdiction is exclusive where the cause of action is properly of admiralty cognizance,¹³ and where the remedy which must be pursued is one which the common law is not competent to give. This incompetency of the common law to give a remedy may result from the fact that its writs and processes cannot reach the person or persons who by common law principles are deemed liable, or it may result from the fact that the right on which a remedy is sought, is not recognized in common law jurisprudence but only by the law maritime.

[e] Suit in rem is not a competent law remedy.

It is well settled that the States may not authorize proceedings in State courts in rem against vessels or things afloat within the admiralty jurisdiction.¹⁵ This is a remedy which the common law is not competent to give. Hence all proceedings in rem of a maritime nature are exclusively cognizable in the Federal court of admiralty. The distinguishing characteristic of a suit in rem is that the vessel or thing proceeded against is itself seized and impleaded as the defendant and judged and sentenced accordingly.¹⁶ Common law process whether of attachment or execution, on the other hand, reaches the thing only through a personal defendant and disposes thereof if at all only to the extent that it is defendant's property. Consequently the fact that a State law authorizes attachment of a vessel in a suit in personam, does not make the suit in rem, within this limitation upon State powers.¹⁷

v. Irasburgh Nat. Bank, 50 Vt. 112, 28 Am. Rep. 493; Lynch v. Merchants Nat. Bank, 22 W. Va. 557, 46 Am. Rep. 523.

¹⁰Stearns v. United States, 2 Paine, 340, Fed. Cas. No. 13,341.

¹²See post, § 200.

¹³If it is not, the jurisdiction is not in admiralty at all. Thus admiralty has no jurisdiction over a vessel that is building. Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487. Nor has it jurisdiction over a tort by a vessel to a structure on land. Ex parte Phenix Ins. Co. 118 U. S. 616, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; Johnson v. Chicago Elevator Co. 119 U. S. 397, 30 L. ed. 447, 7 Sup. Ct.

Rep. 254; The Plymouth, 3 Wall. 20, 18 L. ed. 125; John Spry Co. v. Barge, 76 Mich. 328, 43 N. W. 578.

¹⁵The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; The Belfast, 7 Wall. 624, 19 L. ed. 266; The Glide, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; Knapp v. McCaffrey, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824, 829; The Edith, 11 Blatchf. 454, Fed. Cas. No. 4,283.

¹⁶The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; The Maggie Hammond, 9 Wall. 456, 19 L. ed. 772.

¹⁷Leon v. Galceran, 11 Wall. 185, 20 L. ed. 74; Johnson v. Chicago, etc. Co. 119 U. S. 388, 30 L. ed. 447,

[f] No common law remedy where right of action is only recognized by the law maritime.

It is quite as essential to a common law remedy that the right of action be one which is recognized in the common law. Hence if the right for which redress is sought is one that exists only in the law maritime, its vindication must be sought there. The right of salvage in a volunteer¹ is a right peculiar to the admiralty law. The right of jettison and general average;² and the law of limited liability of ships, are also illustrations of doctrines of admiralty foreign to the learning of the common law. The right in rem for supplies at a foreign port is not recognized by the common or municipal law, as distinguished from the law maritime, and the States may not empower their courts to take cognizance thereof.³

[g] The concurrent admiralty jurisdiction.

It follows from what has already been said that all cases where common law remedies may reach the person or persons who by common law principles are liable—and this virtually means in all cases where suits in personam are maintainable⁴—the party may proceed elsewhere than in the Federal court, if his right of action is recognized by the municipal as well as by the maritime law. He need not proceed in admiralty from the mere fact that his cause is there cognizable. The concurrent common law remedy is not taken away.⁵ The statute here under consideration does not create this common law right, but merely recognizes or saves it;⁷ and leaves the matter as it was at common law.⁸ The admiralty jurisdiction, where the right exists both by municipal and maritime law, is still exclusive, in the sense that if a party chooses the admiralty mode of enforcing it, he must resort to the Federal court. But it is merely a concurrent form of relief. This option to choose between an admiralty suit in the district court, and a suit in the State court, or in the Federal circuit court where citizenship is diverse,⁹ arises where it is possible to reach a personal defendant with process within the jurisdiction with or without auxiliary attachment, and occurs most frequently where the proceeding is in a vessel's home port. If the admiralty law give a lien in

7 Sup. Ct. Rep. 254; *Knapp v. McClaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 827; *State v. Voorhees*, 39 La. Ann. 501, 4 Am. St. Rep. 276, 2 So. 39.

¹But a State court may entertain suit regarding salvage, based on a contract. *Albany, etc. Co. v. Whitney*, 70 Pa. St. 248.

²*Rossiter v. Chester*, 1 Doug. (Mich.) 154.

³*Taylor v. Carryl*, 20 How. 598, 605, 15 L. ed. 1028; *The Isabella*, 1 Brown, 104, Fed. Cas. No. 7,100.

⁵*New Jersey, etc. Co. v. Merchants Bank*, 6 How. 390, 12 L. ed. 465; *Schoonmaker v. Gilmore*, 102 U. S.

119, 26 L. ed. 95; *Manchester v. Massachusetts*, 139 U. S. 262, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

⁶*Waring v. Clarke*, 5 How. 461, 12 L. ed. 226; *New Jersey, etc. Co. v. Merchants Bank*, 6 How. 390, 12 L. ed. 465; *Taylor v. Carryl*, 20 How. 598, 15 L. ed. 1028.

⁷*Ashbrook v. The Golden Gate*, Newb. 302, Fed. Cas. No. 574.

⁸*New Jersey, etc. Co. v. Merchants Bank*, 6 How. 390, 12 L. ed. 465.

⁹*American S. B. Co. v. Chase*, 16 Wall. 533, 21 L. ed. 369; *The Belfast*, 7 Wall. 644, 19 L. ed. 266; *Norton v. Switzer*, 93 U. S. 356, 23 L. ed. 903.

rem the party may waive this and proceed in personam in State or Federal court.¹⁰ But he cannot be compelled to forego his right to proceed in admiralty.¹¹ State courts have entertained suits in personam on a maritime bill of lading¹² or contract of transportation;¹³ on an admiralty bond;¹⁴ on a bond in a State court given for a vessel;¹⁵ for death on navigable waters from wrongful act;¹⁶ for injuries by collision;¹⁷ for seamen's wages;¹⁸ and for materials furnished vessel.¹⁹ The saving of a common law remedy does not mean a remedy existing by the common law at the time of this enactment. It has been held to include a subsequent statutory right of action for death by negligence;¹ for damages by collision;² and for damages by a burning vessel.³ But it will not include subsequent State statutes infringing upon the exclusive admiralty procedure by attempting to create a right to proceed in rem in a State court.⁴ The common law remedy does not mean a remedy in common law courts.⁵ It saves to a party the benefit of a remedy enforced by action in equity.⁶ It probably means a remedy according to municipal as distinguished from admiralty procedure, based upon a right or liability existing at common law or subsequently declared by the local law making power acting within the scope of its powers.

[h] Rights of a maritime nature created by State laws.

While the States may not impair or restrain the Federal admiralty jurisdiction,⁸ and while they may not authorize State proceedings in rem of a maritime nature,⁹ they may yet create many rights of a maritime nature, e. g. liens for repairs in the home port, liens for towage, a right of action for death due to negligence, etc. These rights may be enforced in the admiralty court.¹⁰ They must be enforced in admiralty if the pro-

¹⁰The Propellor Commerce, 1 Black, 580, 17 L. ed. 107; The Belfast, 7 Wall. 642, 19 L. ed. 266; Norton v. Switzer, 93 U. S. 356, 23 L. ed. 903; Ex parte Easton, 95 U. S. 76, 77, 24 L. ed. 373.

¹¹Moran v. Sturges, 154 U. S. 277, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

¹²Home Ins. Co. v. Northwestern P. Co. 32 Iowa, 243, 7 Am. Rep. 190.

¹³Baird v. Daly, 57 N. Y. 249, 15 Am. Rep. 493.

¹⁴Braithwaite v. Jordan, 5 N. Dak. 218, 65 N. W. 708, 31 L.R.A. 248; Conrad v. De Montcourt, 138 Mo. 322, 39 S. W. 808.

¹⁵Leon v. Galceran, 11 Wall. 190, 20 L. ed. 74.

¹⁶Chase v. American S. B. Co. 9 R. I. 433, 11 Am. Rep. 282, S. C. 16 Wall. 522, 21 L. ed. 369; Sherlock v. Alling, 93 U. S. 104, 23 L. ed. 821.

¹⁷Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. ed. 95; Brown v. Gilmore, 92 Pa. St. 46.

¹⁸Smith v. Oakes, 141 Mass. 454, 55 Am. Rep. 488, 5 N. E. 826.

¹⁹Waggoner v. St. John, 10 Heisk. 512; Davis v. Mason, 44 Ark. 555.

¹American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369; Sherlock v. Alling, 93 U. S. 104, 23 L. ed. 821.

²Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. ed. 95.

³Chappell v. Bradshaw, 128 U. S. 134, 32 L. ed. 369, 9 Sup. Ct. Rep. 40.

⁴The Hine v. Trevor, 4 Wall. 571, 572, 18 L. ed. 451.

⁵The Moses Taylor, 4 Wall. 431, 18 L. ed. 402; Moran v. Sturges, 154 U. S. 276, 38 L. ed. 987, 14 Sup. Ct. Rep. 1019.

⁶Knapp, etc. Co. v. McCaffrey, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 827.

⁸See ante, § 5, note.[c]

⁹Supra, note.[c]

¹⁰See ante, § 5, note; [c] § 11, note.[b]

ceeding is in rem.¹¹ But they may also be enforced in the State court in an ordinary common law action in personam and in the circuit court where diverse citizenship exists.

[i] Operation of State laws, civil and penal, on navigable waters within State jurisdiction.

The fact that admiralty jurisdiction is exclusive in Federal courts does not prevent State regulations operating over tide waters within a marine league from shore and over bays wholly within its territory, these being within a State's territorial jurisdiction.¹³ A State may regulate fishing rights in such domestic waters, as respects both shell fish and swimming fish, and may punish offenses against its laws there committed.¹⁴ Its regulations, however, must not interfere with regulations by Congress of commerce and navigation, nor conflict with the Federal admiralty jurisdiction or laws.¹⁵ As is elsewhere stated Congress has generally excepted offenses committed within the territorial limits of the several States from the operation of its criminal laws and left the punishment thereof to the several States.¹⁶

[j] Seizures on land or non-navigable waters.

This exclusive jurisdiction over seizures on land or on non-navigable waters is vested in the district court.¹ This clause of the section has been amended several times.² Congress has drawn a distinction between seizures made in places within the admiralty jurisdiction and seizures elsewhere. In taking cognizance of seizures of the latter class the district court sits as a court of common law and hence the right of jury trial exists;³ whereas there is no right of jury trial in admiralty seizures.⁴ As jurisdiction of admiralty seizures is made exclusive by other clauses of

¹¹The *Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; *Knapp v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 827; *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95.

¹³*United States v. Bevan*, 3 Wheat. 336, 4 L. ed. 404; *Manchester v. Massachusetts*, 139 U. S. 262, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; *People v. Tyler*, 7 Mich. 212, 74 Am. Dec. 708; *Mahler v. Transportation Co.* 35 N. Y. 357.

¹⁴*United States v. Bevan*, 3 Wheat. 336, 4 L. ed. 404; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Smith v. Maryland*, 18 How. 74, 15 L. ed. 269; *Lawton v. Steele*, 152 U. S. 138, 38 L. ed. 389, 14 Sup. Ct. Rep. 501; *The Elexena*, 53 Fed. 366; *State v. Harrub*, 95 Ala. 183, 36 Am. St. Rep. 198, 10 So. 753, 15 L.R.A. 763; *State v. Thomp-*

son, 85 Me. 192, 27 Atl. 98; *Commonwealth v. Hilton*, 174 Mass. 31, 54 N. E. 363, 45 L.R.A. 478; *The Ann*, 8 Fed. 926, 5 Hughes, 292.

¹⁵*Smith v. Maryland*, 18 How. 74, 15 L. ed. 269; *The Elexena*, 53 Fed. 366.

¹⁶See *supra*, note.[b]

¹See post, § 195.

²See 14 Stat. 111; 14 Stat. 483; 12 Stat. 319.

³*Leland v. Ship Medora*, 2 Wood. & M. 109, Fed. Cas. No. 8,237; *Morris's Cotton*, 8 Wall. 511, 19 L. ed. 482; *The Confiscation Cases*, 7 Wall. 462, 19 L. ed. 196; *United States v. Winchester*, 99 U. S. 374, 25 L. ed. 480; *The Sarah*, 8 Wheat. 394, 5 L. ed. 644; *United States v. Athens Armory*, 2 Abb. (U. S.) 138, Fed. Cas. No. 14,473.

⁴*United States v. Betsey*, 4 Cranch, 443, 2 L. ed. 673; *Whelan v. United States*, 7 Cranch, 112, 3 L. ed. 286; *The Meteor*, 17 Fed. Cas. No. 180.

the above section, it follows that Federal jurisdiction is exclusive over all seizures for violation of United States laws.⁵ Any intervention by a State court or authority which, by taking the thing seized out of the possession of the Federal officer, might obstruct the exercise of this jurisdiction, would be a violation of the above section making Federal jurisdiction exclusive.⁷ The Federal court must first determine the legality of the seizure,⁸ and pendency of the Federal proceeding is a good plea in abatement of trespass in a State court.⁹ But if the Federal court decide the seizure to have been wrongful, the aggrieved party may then proceed in the State court;¹⁰ and if the seizure was not made under the laws of the United States, proceedings may be taken in the State court against the seizing officer.¹¹

[k] Cases under patent or copyright laws.

The jurisdiction over patent and copyright cases is vested chiefly in the circuit court.¹⁴ This section makes the jurisdiction exclusive only where a case arises under the patent or copyright law. The State courts may entertain an action on an agreement for patent royalties,¹⁵ to enforce or annul a patent contract,¹⁶ to compel specific performance,¹⁷ to enjoin use of patent unwarranted by an agreement,¹⁸ or collection of State tax on patent rights;¹⁹ or to compel an accounting for use of a patent;¹ or enjoin false statements respecting patent rights;² or compel a transfer of a patent;³ or determine whether a license has in fact been given.⁴ A State court may similarly entertain suit on an agreement between author and publisher.⁵ The Court of Claims may entertain suit for compensation from the government for use of a patent.⁶ In all these and in various

⁵*Slocum v. Mayberry*, 2 Wheat. 9, 4 L. ed. 169; *Gelston v. Hoyt*, 3 Wheat. 311, 4 L. ed. 381; *Tracey v. Corse*, 58 N. Y. 149.

⁷*Slocum v. Mayberry*, 2 Wheat. 9, 4 L. ed. 171; *United States v. Cloth*, 1 Paine, 439, Fed. Cas. No. 15,150.

⁸*Gelston v. Hoyt*, 3 Wheat. 312, 4 L. ed. 398; *Ashbrook v. Golden Gate*, Newb. 299, Fed. Cas. No. 574.

⁹*Hall v. Warren*, 2 McLean, 334, Fed. Cas. No. 5,952.

¹⁰*Slocum v. Mayberry*, 2 Wheat. 10, 4 L. ed. 171; *Smith v. Averill*, 7 Blatchf. 33, Fed. Cas. No. 13,007; *Stoughton v. Mott*, 13 Vt. 182.

¹¹*Slocum v. Mayberry*, 2 Wheat. 9, 4 L. ed. 171; *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 381.

¹⁴See post, § 126.

¹⁵*Wilson v. Sandford*, 10 How. 101, 13 L. ed. 344; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 52, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; *Felix v. Carnweber*, 125 U. S. 58, 31 L. ed. 688, 8 Sup. Ct. Rep. 761; *Washburn*, etc.

Co. v. Cincinnati, etc. Co. 42 Fed. 679; *Standard etc. Co. v. Leslie*, 118 Fed. 557, 55 C. C. A. 323; *Hubbard v. Allen*, 123 Pa. St. 209, 16 Atl. 775.

¹⁶*Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 852, 17 Sup. Ct. Rep. 427.

¹⁷*Marsh v. Nichols*, 140 U. S. 344, 35 L. ed. 417, 11 Sup. Ct. Rep. 802.

¹⁸*Williams v. Star Land Co.* 35 Fed. 371; *McMullen v. Bowers*, 102 Fed. 494, 42 C. C. A. 470.

¹⁹*Holt v. Indiana Mfg. Co.* 80 Fed. 3, 25 C. C. A. 301; *S. C.* 176 U. S. 70, 44 L. ed. 376, 20 Sup. Ct. Rep. 272.

¹*Havana, etc. Co. v. Ashurst*, 148 Ill. 139, 35 N. E. 880.

²*Shoemaker v. South Bend, etc. Co.* 135 Ind. 475, 35 N. E. 282, 22 L.R.A. 333.

³*Lamson v. Martin*, 159 Mass. 559, 35 N. E. 79.

⁴*Waterman v. Shipman*, 130 N. Y. 307, 29 N. E. 113.

⁵*Silver v. Holt*, 84 Fed. 811.

⁶*United States v. Palmer*, 128 U.

other similar cases the action is not deemed to arise under the patent or copyright laws but to involve merely the ordinary law of contract, even although the defence incidentally claims that the patent is invalid.⁷ But in cases where the infringement or validity of or title to a patent or copyright is involved,⁸ questions as to the construction of patent and copyright laws necessarily occur, and such cases "arise under" them within the terms of the above statute. Suits for infringement are deemed to involve the validity of a patent and to be exclusively of Federal cognizance,⁹ unless it appears from plaintiff's own statement of his claim that the controversy really involves merely a license or agreement.¹⁰ The mere fact that the existence of a license or the construction of a contract may be involved in an infringement suit does not oust Federal jurisdiction.¹¹ There is a clear distinction between questions arising under the patent laws and cases so arising.¹² It is only the latter that are exclusively cognizable in the Federal courts. The matter is determined from plaintiff's statement of his cause of action, just as in other cases justiciable in the circuit and district courts as "arising under" Federal laws,¹³ subject, however, to the provision of the Federal statutes that where it appears at any time that Federal jurisdiction has been wrongly invoked, the court must dismiss.¹⁴

[1] Bankruptcy cases.

The bankrupt law of 1898 provides for stay of proceedings in State courts on debts which would be released by a discharge in bankruptcy if granted;¹⁵ and provides further that matters of controversy outside the proceedings in bankruptcy proper, shall be cognizable in the Federal court only if there justiciable in case there had been no bankrupt proceedings unless by consent of defendant.¹⁶ These provisions recognize principles established by the decisions under earlier bankrupt laws respecting the extent to which the State courts might retain jurisdiction over causes to which the bankrupt was party, notwithstanding the above enactment declaring Federal bankruptcy jurisdiction exclusive. This applies merely to the procedure or bankruptcy administration proper. It does not pre-

S. 269, 32 L. ed. 444, 9 Sup. Ct. Rep. 106.

⁷Pratt v. Paris Co. 168 U. S. 260, 42 L. ed. 460, 18 Sup. Ct. Rep. 64; Hyatt v. Ingalls, 124 N. Y. 102, 26 N. E. 287.

⁸Atherton, etc. Co. v. Atwood Co. 102 Fed. 951, 43 C. C. A. 72.

⁹Agawam Co. v. Jordan, 7 Wall. 593, 19 L. ed. 177; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Excelsior Pipe Co. v. Pacific B. Co. 185 U. S. 282, 46 L. ed. 911; 22 Sup. Ct. Rep. 685; Atherton Mach. Co. v. Atwood Co. 102 Fed. 949, 43 C. C. A. 72.

¹⁰White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768 (explaining earlier cases); Elgin, etc.

Co. v. Nichols, 65 Fed. 217, 12 C. C. A. 578; Young, etc. Co. v. Young, etc. Co. 72 Fed. 63; Pacific Co. v. Union, etc. Co. 80 Fed. 738.

¹¹Littlefield v. Perry, 21 Wall. 222, 22 L. ed. 577; Excelsior Pipe Co. v. Pacific B. Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681, 686.

¹²Pratt v. Coke Co. 168 U. S. 260, 42 L. ed. 460, 18 Sup. Ct. Rep. 64.

¹³See post, § 129.

¹⁴See post, § 818; Excelsior Pipe Co. v. Pacific B. Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

¹⁵See post, § 2201.

¹⁶See post, § 2200 et seq.

vent an assignee in bankruptcy appearing in a State court in an action brought prior to the bankruptcy concerning the bankrupt's lands,¹⁷ and if he so appears and there litigates his rights, he cannot thereafter in the Federal court claim an immunity from such suit;¹⁸ nor can other parties object if he does not.¹⁹ Judicial proceedings in other courts are not avoided by the institution of bankruptcy proceedings, nor is the otherwise lawful jurisdiction of a state court over a suit thereby ousted.²⁰ The section here under consideration does not prevent a State court from deciding rights of property between a bankrupt or his assignee, and third persons.¹ State attachment proceedings not annulled by the bankrupt act, may be continued.² Where foreclosure in State court has commenced prior to mortgagor's bankruptcy the State court may proceed with the suit, decreeing priority of liens and enforcing their satisfaction, and to that extent infringe the bankrupt court's jurisdiction to administer the bankrupt's estate;³ the assignee must make himself a party if he would assert his rights.⁴ Where a suit by the bankrupt is pending at the time of bankruptcy the assignee need not become party thereto, but is bound by the decree.⁵ He may, however, by leave of the bankrupt court continue such suits.⁶ The exclusive Federal bankruptcy jurisdiction does not prevent bankrupt assignees from suing in a State court.⁷ In fact under the law of 1898, the bankrupt court has no jurisdiction over independent suits by the trustee to assert a title to money or property as assets in bankruptcy unless by consent of the proposed defendant.⁸

[m] Controversies where a State is party.

This clause of the above section is identical with the declaration of the constitution and of R. S. § 687, which further vest the jurisdiction in the Supreme Court.¹⁰

§ 16. Concurrent and conflicting jurisdiction—personal actions plea of another action pending.

In a large class of cases there is a concurrent jurisdiction in Federal and State courts, and often, even where there is no concur-

¹⁷Winchester v. Heiskell, 119 U. S. 453, 30 L. ed. 462, 7 Sup. Ct. Rep. 281.

¹⁸Mays v. Fritton, 20 Wall. 414, 22 L. ed. 389; Scott v. Kelly, 22 Wall. 59, 22 L. ed. 730; Davis v. Friedlander, 104 U. S. 570, 26 L. ed. 818.

¹⁹Thatcher v. Rockwell, 105 U. S. 469, 26 L. ed. 950.

²⁰Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Brackett v. Dayton, 34 Minn. 221, 25 N. W. 349.

¹Burbank v. Bigelow, 92 U. S. 182, 23 L. ed. 542.

²Davis v. Friedlander, 104 U. S. 570, 26 L. ed. 818; Mattocks v. Farrington, 2 Heisk. 333, Fed. Cas. No. 9,298; Crowe v. Reid, 57 Ala. 287;

Gibbs v. Logan, 22 W. Va. 212; In re Ogles, 93 Fed. 437.

³Jerome v. McCarter, 94 U. S. 737, 24 L. ed. 136.

⁴Young v. Cardwell, 6 Lea, 172.

⁵Thatcher v. Rockwell, 105 U. S. 467, 26 L. ed. 949; Sullivan v. Rabb, 86 Ala. 440, 5 So. 749; Lancey v. Foss, 88 Me. 218, 33 Atl. 1072.

⁶See post, § 2202 et passim.

⁷Claffin v. Houseman, 93 U. S. 134, 23 L. ed. 837.

⁸Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. ed. 1177, 20 Sup. Ct. Rep. 1000; see post, § 2204; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. Rep. 726, 44 L. ed. 864.

¹⁰See post, § 35

rent power, there exists a possibility of conflict as a result of proceedings drawing property into the custody of one or other court; or resulting from the action of a State in taking into custody a person who claims his detention to be in violation of some Federal right. Several rules have been adopted by the courts for the purpose of avoiding conflict in such cases and to insure harmony of action. These rules distinguish broadly between actions merely personal and those in which the litigation revolves about some property actually or constructively in custody. In merely personal actions the general rule is that the court first acquiring jurisdiction is entitled to retain it to the exclusion of any other court, until its jurisdiction is exhausted.^[a] But the courts have not been liberal in their interpretation of this rule, and it is of but limited application as between Federal and State courts. In fact the plea of a prior action pending is not available unless the two cases be the same as to subject matter and relief sought,^[b] and as to parties,^[c] and in the same jurisdiction.^[d] And the authorities further declare, though it is perhaps not finally settled, that the plea is not at all available as between Federal and State courts even if sitting in the same State^[e] though proceedings in the Federal action, where subsequently instituted will often be stayed.^[f] Where the first action is dismissed it can no longer be pleaded in abatement.^[g] The common law and maritime remedies are so different that the same right of action may be sued upon concurrently in common law and admiralty courts.^[h]

Author's section.

[a] Priority gives right to retain cause until conclusion.

It has been declared in many cases that as between courts having concurrent jurisdiction, the one whose jurisdiction first attaches retains it to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted.¹ The jurisdiction thus attaching can-

¹Smith v. McIver, 9 Wheat. 535, 6 L. ed. 152; Wallace v. McConnell, 13 Pet. 151, 10 L. ed. 95; Freeman v. Howe, 24 How. 455, 16 L. ed. 749; Buck v. Colbath, 3 Wall. 345, 18 L. ed. 257; Taylor v. Taintor, 16 Wall. 370, 21 L. ed. 287; Ex parte Crouch, 112 U. S. 178, 28 L. ed. 692; 5 Sup. Ct. Rep. 96; Rio Grande R. R. v. Gomila, 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 157; Harkrader v. Wadley, 172 U. S. 164, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; Sharon v. Hill, 13 Sawy. 387, 36 Fed. 337, 1 L.R.A. 572; Rodgers v. Pitt, 96 Fed. 670 and cases cited. See Baltimore, etc. R. R. v. Wabash, R. R. 119 Fed. 678, holding rule does not apply to actions strictly in personam.

not be arrested or taken away by proceedings in any other court.² No other court of concurrent jurisdiction should entertain subsequent proceedings tending to embarrass the administration of justice in the first, either by denying the litigant a right to prosecute his claim or by issuing its process in an attempt to remove property from its custody.³ Priority in personal actions is determined by the time that parties were served with process, and not by the date of filing the two actions.⁴ The principle has a corollary in the rule that where Congress has taken jurisdiction and a matter is there pending the courts will not take it up and decide it.⁵

[b] Second suit in concurrent jurisdiction not abated unless involving same matters and for same relief.

The principle excluding action in a concurring jurisdiction is of but limited and precise application in suits in personam where there is no property in the custody of the law. It is well settled that when the plea of another or rather of a prior,⁷ action pending is set up, the case must be the same as to parties rights asserted, and relief sought.⁸ Where the relief sought is different, and the mode of proceeding different, the jurisdiction of neither is affected by the other's proceedings.⁹ The pendency of equity proceedings will not abate later proceedings at law.¹⁰ The pending case must be such that if already decided the adjudication could be

²Stout v. Lye, 103 U. S. 68, 26 L. ed. 428; In re Chetwood, 165 U. S. 460, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

³Peck v. Jenness, 7 How. 624, 12 L. ed. 841; Orton v. Smith, 18 How. 266, 15 L. ed. 393; Taylor v. Carryl, 20 How. 596, 15 L. ed. 1028; Zimmerman v. So Relle, 80 Fed. 417, 25 C. C. A. 518.

⁴Union, etc. Ins. Co. v. Chicago Univ. 10 Biss. 191, 6 Fed. 443; Morton v. Webb, 7 Vt. 123; Sullings v. Goodyear, etc. Co. 36 Mich. 313; Rodgers v. Pitt, 96 Fed. 673; Bell v. Ohio L. & T. Co. 1 Biss. 260, Fed. Cas. No. 1,260. As to actions involving property in custodia legis or proceedings in rem, see post, § 17.

⁵Astizaran v. Santa Rita M. Co. 148 U. S. 83, 37 L. ed. 376, 13 Sup. Ct. Rep. 457.

⁷The plea should show it is a prior suit. Crescent, etc. Co. v. Butchers, etc. Co. 12 Fed. 225. Pendency of a subsequent suit is not a good plea. Shoemaker v. French, Chese Dec. 267; Sharon v. Hill, 26 Fed. 337; Union, etc. Ins. Co. v. Chicago Univ. 10 Biss. 191, 6 Fed. 443; Nicholl v. Mason, 21 Wend. 341; Nichols, etc. Co. v. Marsh,

61 Mich. 509, 28 N. W. 699; Hauf v. Wilson, 31 Fed. 384; Greenwood v. Rector, Hempst. 708, Fed. Cas. No. 5,792; Wood v. Lake, 13 Wis. 84; Akerly v. Vilas, 15 Wis. 413; Campbell v. Emerson, 2 McLean, 33, Fed. Cas. No. 2,357; Humphries v. Dawson, 38 Ala. 204.

⁸Watson v. Jones, 13 Wall. 715, 20 L. ed. 666; The Haytian Republic, 154 U. S. 124, 38 L. ed. 930, 14 Sup. Ct. Rep. 992.

⁹Watson v. Jones, 13 Wall. 716, 20 L. ed. 666; Loving v. Marsh, 2 Cliff. 323, Fed. Cas. No. 8,514; Ahlhauser v. Butler, 50 Fed. 708; Dwight v. Central, etc. R. R. 9 Fed. 789, 20 Blatchf. 200; Valley Bank v. Shenandoah Bank, 109 Iowa, 43, 79 N. W. 392.

¹⁰Kittredge v. Race, 92 U. S. 121, 23 L. ed. 488; Andrews v. Smith, 19 Blatchf. 100, 5 Fed. 833; Currie v. Lewiston, 15 Fed. 377, 21 Blatchf. 236; Green v. Underwood, 86 Fed. 427, 30 C. C. A. 160; Parsons v. Greenville, etc. R. R. 1 Hughes, 279, Fed. Cas. No. 10,776; Wilcox, etc. Co. v. Phenix Ins. Co. 61 Fed. 199; Seymour v. Malcolm, etc. Co. 58 Fed. 961, 7 C. C. A. 593; Griswold v. Bacheller, 77 Fed. 857.

pleaded in bar of the second suit.¹¹ Hence before it can be said that the jurisdiction of the first court is exclusive, the nature of the remedies, the character of the relief sought, and the identity of the parties in the two suits, must first be examined. Even if the parties be the same the relief sought or the mode of proceeding may be entirely different. As where a mortgagee sues at law for judgment on his notes, in equity for foreclosure, and elsewhere by ejectment for possession of the land.¹² A creditor's suit on one judgment in a State court is no bar to a similar suit by the same plaintiff in the Federal court based on another State judgment.¹³ It has been held that a Federal judgment may be revived by suits in both State and Federal courts.¹⁴ A suit for two interest instalments is not barred by a prior suit for other instalments.¹⁵ Injunction suit against taxes for one year does not bar similar suit for subsequent taxes.¹⁶ Suit to subject individual partners' assets to debt is no bar to a suit on same debt to reach partnership assets.¹⁷ A suit in personam in a State court seeks a very different remedy from admiralty proceedings in rem, and hence can be no bar.¹⁸ A State suit to determine priority between two liens will not prevent a general creditors' bill in a Federal court to adjust all liens.¹⁹ A general creditor's suit in a State court will not prevent a suit by one not a party, in the Federal court.²⁰

[c] Not abated where parties are different.

If the parties to the two suits be different the general rule is that the plea is not available and the second suit may be maintained.¹ The suit of one set of bondholders is not a bar to suit by another set having no control over the first.² A stockholder's suit does not bar creditor's suit.³ Some cases have held that the parties, plaintiff and defendant, to the two suits must be in the same relative positions and not reversed.⁴ In

¹¹Watson v. Jones, 13 Wall. 715, 20 L. ed. 666; The Haytian Republic, 154 U. S. 124, 38 L. ed. 930, 14 Sup. Ct. Rep. 992.

¹²Buck v. Colbath, 3 Wall. 345, 346, 18 L. ed. 261.

¹³Scottish, etc. Co. v. Follansbee, 9 Biss. 482, 14 Fed. 125.

¹⁴Wonderly v. Lafayette Co. 77 Fed. 665.

¹⁵Hampton v. Barrett, 12 La. 159.

¹⁶Litchfield v. Brooklyn, 13 Misc. (N. Y.) 693, 34 N. Y. Supp. 1090.

¹⁷Logan v. Greenlaw, 12 Fed. 17.

¹⁸The Kolorama, 10 Wall. 204, 19 L. ed. 941; The Custer, 10 Wall. 215, 19 L. ed. 944; The Paul Boggs, 1 Sprague, 369, Fed. Cas. No. 10,846; The Highlander, 1 Sprague, 510, Fed. Cas. No. 6,476.

¹⁹Hay v. Alexandria, etc. Co. 1 Hughes, 168, Fed. Cas. No. 6,254.

²⁰Parsons v. Greenville, etc. R. R. 1 Hughes, 279, Fed. Cas. No. 10,776.

¹Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; Marshall v. Otto, 59 Fed. 249; Washburn, etc. Co. v. Scutt, 22 Fed. 710; Brooks v. Mills Co. 4 Dill. 524, Fed. Cas. No. 1,955; Oden v. Stubblefield, 2 Ala. 688; Merrill v. New England Ins. Co. 103 Mass. 249, 4 Am. Rep. 551; Wood v. Lake, 13 Wis. 84; Pierce v. Feagans, 39 Fed. 587; Converse v. Michigan, etc. Co. 45 Fed. 18; Knott v. Evening Post Co. 124 Fed. 356.

²Brooks v. Vermont, etc. R. R. 14 Blatchf. 465, Fed. Cas. No. 1,964.

³Loyd v. Reynolds, 29 Ind. 299.

⁴Liggett v. Glenn, 51 Fed. 389, 2 C. C. A. 286; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; In re Certain Logs, 2 Sumn. 589, Fed. Cas. No. 2,559; Barr v. Chapman, 5 Ohio, C. C. 69.

some cases this would be necessary to make the relief sought the same in both cases.⁵ An action against one obligor is not pleadable in abatement of a subsequent action against another.⁶ Action against one joint tortfeasor is no bar to another action against the other.⁷

But where a legal priority of interest or estate exists between the parties to the two suits, of such a nature that *res adjudicata* could be pleaded had the prior case gone to judgment, it would seem that the plea of prior action pending would not be impaired by a difference in parties. Thus a stockholder's suit for a corporation might be abated by plea of prior similar suit brought by the corporation;⁸ or a bankrupt assignee's suit by a prior suit of his assignor.⁹

[d] Second action in another State not abated.

It is well settled that the pendency of another action between the same parties based upon the same rights and seeking the same relief, but brought in another State, is not a good plea.¹² In this respect the States of the Union are foreign to one another.¹³ This doctrine has been rested by some authorities upon the fact that the efficacy of a judgment and of process in its behalf cannot extend into foreign jurisdictions.¹⁴ Other cases declare that it would be in derogation of sovereignty for a country to remit its suitors to another jurisdiction for the vindication of rights which they are entitled to maintain in its tribunals. A court which terminated a suit by sustaining the plea of a prior action in another State, "might learn too late that no adequate remedy can be had elsewhere. That country is undutiful and unfaithful to its citizens which sends them out of its jurisdiction to seek justice elsewhere. . . . it does not know what is practicable in a foreign jurisdiction; what the mode of trial there, the rules of evidence, the statutes of limitation; or what the kind of judgment and satisfaction."¹⁵ The same rule applies to a suit in the courts of a foreign nation.¹⁶ But a second suit in another county of the same State will be abated under this plea.¹⁷ It results from this prin-

⁵See *Stewart v. Chesapeake, etc.* Co. 4 Hughes, 41, 5 Fed. 149; *Errett v. Crane*, 21 Int. Rev. Rec. 268, Fed. Cas. No. 4,523.

⁶*Mercantile T. Co. v. Lamoille, etc.* R. R. 16 Blatchf. 324, Fed. Cas. No. 9,432; *Utica, etc. Co. v. Otis*, 37 Hun, 301; *Oneida Bank v. Bonney*, 101 N. Y. 173, 4 N. E. 332.

⁷*State v. Boyce*, 72 Md. 142, 20 Am. St. Rep. 459, 19 Atl. 366, 7 L.R.A. 272.

⁸*Memphis City v. Dean*, 8 Wall. 64, 19 L. ed. 326.

⁹*Radford v. Folsom*, 14 Fed. 97, 4 McCrary 527.

¹²*Renner v. Marshal*, 1 Wheat. 217, 4 L. ed. 74; *Insurance Co. v. Brune*, 96 U. S. 593, 24 L. ed. 737; *Briggs v. Stroud*, 58 Fed. 720; *Stanton v.*

Embrey, 93 U. S. 548, 23 L. ed. 983; *McJilton v. Love*, 13 Ill. 494, 54 Am. Dec. 449; *Lockwood v. Nye*, 2 Swan, (Tenn.) 515, 58 Am. Dec. 73; *Grider v. Apperson*, 32 Ark. 332; *Merritt v. American S. B. Co.* 79 Fed. 228, 24 C. C. A. 530; *Cole v. Flitcraft*, 47 Md. 312.

¹³*Smith v. Lathrop*, 44 Pa. St. 326, 84 Am. Dec. 448.

¹⁴See *Cox v. Mitchell*, 7 Com. B. N. S. 55.

¹⁵*Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 437.

¹⁶*Wood v. Gamble*, 11 Cush. (Mass.) 8, 59 Am. Dec. 135; *Lowry v. Hall*, 2 Watts & S. 129, 37 Am. Dec. 495.

¹⁷*Claywell v. Sudderth*, 77 N. C. 287.

ciple that a second action brought in another State and not concerning property in the custody of the first court will not be enjoined.¹⁸

[e] Rule as between State and Federal courts in same State.

Another important limitation upon the availability of the plea of prior action pending, grows out of the doctrine that the State and Federal courts within the same State are deemed foreign to one another;¹⁹ hence that a plea of prior action pending in a State court will not abate a second suit in the Federal court.²⁰ State court cases have similarly declared that a pending Federal suit will work no abatement of a suit in the State court.¹ In a number of cases the doctrine has been criticized and denied,² though all the late authorities at circuit regard it as no longer open to question. In many of those asserting the doctrine the plea was open to other objections. In some the other actions pending was not a prior action³ or was between other parties,⁴ or for a different remedy, or sought a different relief.⁵ In others the prior Federal or State action was in

¹⁸*Insurance Co. v. Brune*, 96 U. S. 593, 24 L. ed. 737.

¹⁹*Wadleigh v. Veazie*, 3 Sumn. 165, Fed. Cas. No. 17,031; *Latham v. Chafee*, 7 Fed. 520; *Lynch v. Hartford*, etc. Ins. Co. 17 Fed. 627; *Wood v. Lake*, 13 Wis. 84; *Hampton v. Barrett*, 12 La. 159. Contra, see *Brooks v. Mills Co.* 4 Dill. 524, Fed. Cas. No. 1,955; *Earl v. Raymond*, 4 McLean, 233, Fed. Cas. No. 4,243; *Radford v. Folsom*, 14 Fed. 97, 4 McCrary 527; *Pierce v. Feagans*, 39 Fed. 587; *Coe v. Aiken*, 50 Fed. 640; *Marshall v. Otto*, 59 Fed. 249; *Smith v. Atlantic*, etc. Co. 22 N. H. 21.

²⁰*Piquignot v. Railroad*, 16 How. 105, 14 L. ed. 864; *Cook v. Burnley*, 11 Wall. 659, 20 L. ed. 30; *Gordon v. Gilfoil*, 99 U. S. 178, 25 L. ed. 383; *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983; *Wadleigh v. Veazie*, 3 Sumn. 165, Fed. Cas. No. 17,031; *Loring v. Marsh*, 2 Cliff. 311, Fed. Cas. No. 8,514; *Union*, etc. Co. v. *Chicago Union*, 10 Biss. 191, 6 Fed. 443; *White v. Whitman*, 1 Curt. 494, Fed. Cas. No. 17,561; *Latham v. Chafee*, 7 Fed. 520; *North Muskegon v. Clark*, 62 Fed. 694, 10 C. C. A. 591; *Short v. Hepburn*, 75 Fed. 113, 21 C. C. A. 252; *Green v. Underwood*, 86 Fed. 429, 30 C. C. A. 162; *First Nat. Bank v. Duel Co.* 74 Fed. 375; *Bunker Hill*, etc. Co. v. *Shoshone M. Co.* 109 Fed. 508, 47 C. C. A. 200; *Robinson v. Suburban Brick Co.* 127 Fed. 807, 62 C. C. A. 484; *Ryall v. Greenhood*,

60 Fed. 786; *O'Callaghan v. O'Brien*, 116 Fed. 934; *Boatmen's Bank v. Fritzler*, 135 Fed. 350, 68 C. C. A. 288; *Barnsdale v. Waltenmeyer*, 142 Fed. 415.

¹*Mix v. Creditors*, 39 La. Ann. 626, 2 So. 393; *State v. Railroad Co.* 42 La. Ann. 18, 7 So. 86; *Bourgeois v. Jacobs*, 45 La. Ann. 1314, 14 So. 70; *Kilpatrick v. Kansas*, etc. R. R. 38 Neb. 641, 41 Am. St. Rep. 757, 57 N. W. 671. Contra, see *Wilson v. Milliken*, 103 Ky. 165, 44 S. W. 661, 82 Am. St. Rep. 578, 42 L.R.A. 451. And see *Sharon v. Terry*, 13 Sawy. 399, 36 Fed. 355, 1 L.R.A. 572, per Field, J.

²See *Martin v. Baldwin*, 19 Fed. 340, 9 Sawy. 632; *Earl v. Raymond*, 4 McLean, 233, Fed. Cas. No. 4,243; *Nelson v. Foster*, 5 Biss. 44, Fed. Cas. No. 10,105; *Brooks v. Mills Co.* 4 Dill. 524, Fed. Cas. No. 1,955; *Brooks v. Vermont C. R. Co.* 14 Blatchf. 463, Fed. Cas. No. 1,964. See 29 Am. St. Rep. 310, 312, note. The Supreme Court has not always recognized the doctrine. *Memphis v. Dean*, 8 Wall. 64, 19 L. ed. 326.

³See cases cited, footnote 20.

⁴See cases cited supra, note.[e]

⁵*Loring v. Marsh*, 2 Cliff. 323, Fed. Cas. No. 8,514; *Ahlhauser v. Butler*, 50 Fed. 708; *Dwight v. Central*, etc. R. R. 9 Fed. 789, 20 Blatchf. 200; *Scottish*, etc. Co. v. *Follansbee*, 9 Biss. 482, 14 Fed. 125; *Wonderly v. Lafayette Co.* 77 Fed. 665; *Shaw v. Lyman*, 79 Fed. 2; *The*

another State.⁶ Other cases were proceedings in rem or otherwise concerned with property in the custody of the law as to which other principles are controlling;⁷ or with bankruptcy proceedings supervening upon prior litigation in State courts, in which the Federal jurisdiction becomes paramount if not exclusive;⁸ or with State probate proceedings, as to which the Federal courts possess certain well defined auxiliary powers;⁹ or with the effect of State garnishment or attachment upon a Federal suit.¹⁰ None of the decisions of the Supreme Court involved the precise point. The leading case merely decided that Louisiana proceedings for seizure and sale based upon a mortgage, did not oust subsequent Federal proceedings to obtain judgment on the mortgage note.¹¹ The parties were the same and the second suit grew out of the same matter, but the relief sought was different, so that the case comes within the very terms of an illustration employed by Mr. Justice Miller in an earlier case¹² and within the general limitations upon the availability of the plea of a prior action, already considered.¹³ So also in the earliest decision on the point, which has been relied upon largely for the doctrine, the position of the parties was reversed in the two actions and Mr. Justice Story consequently declared the causes of action to be different and the plea of prior action pending unavailable.¹⁴

It would perhaps be unsafe to declare the rule finally settled until presented and decided in the Supreme Court after a full consideration of the reasoning upon which it is founded, and in the light of their established doctrine that the court, Federal or State, first taking jurisdiction holds it "to the exclusion" of the other.¹⁵ As between courts sitting in different States, there is a manifest propriety in permitting both proceedings, since judgment and process in one can have no efficacy in the other, and a suitor should be permitted to vindicate his rights in any place where he can secure their practical enforcement. But this reason for permitting a second suit does not obtain as between State and Federal courts in the same State. The reasons generally advanced in such cases that being courts of different governments they are foreign to one another and that it would be a derogation of sovereignty for one to remit a suitor wholly to the other, do not seem of much weight. A Federal tribunal is provided by the removal act for one sued in a State court, in most cases of

Kolorama, 10 Wall. 204, 19 L. ed. 941; The Custer, 10 Wall. 215, 19 L. ed. 944; Sharon v. Hill, 22 Fed. 29, 30, 10 Sawy. 394; Pierce v. Feagans, 39 Fed. 588; Washburn, etc. Co. v. Scutt, 22 Fed. 711; and see other Federal cases cited supra, note [b].

⁶Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Rawitzer v. Wyatt, 40 Fed. 609; Woodbury v. Allegheny & K. R. Co. 72 Fed. 374; Robinson v. Suburban Brick Co. 127 Fed. 807.

⁷Gates v. Buckl, 53 Fed. 965, 4 C. C. A. 116.

⁸Leidigh C. Co. v. Stengel, 95 Fed. 642, 37 C. C. A. 210.

⁹Brendel v. Church, 82 Fed. 262; see ante, § 2, note. [1]

¹⁰Deming v. Orient Ins. Co. 78 Fed. 4.

¹¹Gordon v. Gilfoil, 99 U. S. 168, 25 L. ed. 386.

¹²Buck v. Colbath, 3 Wall. 345, 346, 18 L. ed. 261.

¹³See supra, note. [b]-[d]

¹⁴Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031.

¹⁵See supra note. [a]

Federal cognizance. The terms upon which litigants can avail themselves of their constitutional right to a Federal tribunal being thus lawfully defined, cases of this type, at least where the two actions are between the same parties,¹⁶ are not controlled by compelling constitutional principles. The question is merely one of expediency and good sense. The theory that a litigant should not be compelled to remain in a tribunal whose rules of procedure and capacity for affording relief are or may be different, is opposed to the ever broadening spirit of comity prevailing throughout the Anglo Saxon world; and, since it was declared, the principle has become firmly settled that a judgment rendered in another State, in England, or in Canada, may be pleaded as *res adjudicata*, if it appear that such court had proper jurisdiction.¹⁷

[f] Second court should suspend action until first court decides.

The embarrassment threatened by the rule that the Federal court will not entertain a plea of a prior action for the same matter in the State court, is greatly mitigated by the further rule declared in the late cases that the Federal court will suspend action pending a decision by the court first acquiring jurisdiction.¹⁸ Other cases, however, do not consider that comity requires even this forbearance where one case is at law and the other in equity,¹⁹ or where the actions are personal and no *res* is in the custody of the first court; but merely affirm that the judgment of the court first concluding its deliberations may be pleaded in the other.²⁰ But where a State suit for divorce and alimony proceeded concurrently with a prior Federal suit in equity for cancellation of the alleged marriage contract as a forgery, the Federal court refused to accept the State court's finding that the document was genuine.¹

[g] Effect of dismissal of prior action.

Where the prior action has been dismissed it cannot be pleaded in abatement of the subsequent suit.⁴ Although many early cases did not permit an avoidance of the plea dismissal of the first action after such plea

¹⁶When the parties are different, it is very properly held that those entitled to a Federal tribunal should not be deprived thereof because others have elected or must elect a State court. See *Shaw v. Lyman*, 79 Fed. 2.

¹⁷*Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 437.

¹⁸*Hurd v. Moiles*, 28 Fed. 899; *Ball v. Tompkins*, 41 Fed. 486, 491; *Howlett v. Central*, etc. Co. 56 Fed. 161; *Foley v. Hartley*, 72 Fed. 570, 571; *Gamble v. San Diego*, 79 Fed. 487, 500; *Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518; *Hughes v. Green*, 84 Fed. 833, 835, 28 C. C. A. 537; *Ryan v. Railroad Co.* 89 Fed. 397, 408; *Rodgers v. Pitt*, 96 Fed. 668,

671; *Bunker, etc. Co. v. Shoshone Min. Co.* 109 Fed. 508.

¹⁹*Ogden v. Weaver*, 108 Fed. 567, 568, 47 C. C. A. 485.

²⁰*Shaw v. Lyman*, 79 Fed. 2. See *Stout v. Lye*, 103 U. S. 68, 26 L. ed. 428; *Bruce v. Manchester*, etc. Co. 19 Fed. 345; *Memphis, etc. R. R. v. Grayson*, 88 Ala. 579, 16 Am. St. Rep. 74, 7 So. 124.

¹*Boatmen's Bank v. Fritzler*, 135 Fed. 650, 68 C. C. A. 288; *Sharon v. Terry*, 36 Fed. 339, 340, 13 Sawy. 387, 1 L.R.A. 572

⁴*Chamberlain v. Eckert*, 2 Biss. 124, Fed. Cas. No. 2,576; *Weaver v. Field*, 16 Fed. 22; 4 Woods, 152; *Coe v. Aiken*, 50 Fed. 640; *North Muskegon v. Clark*, 62 Fed. 694, 10 C. C. A. 591;

was filed, the later authorities permit a replication to the plea showing such a subsequent dismissal.⁵ At least where the second suit does not appear to have been vexatiously brought.⁶

[h] Admiralty causes.

A party is often in a position to pursue a remedy in admiralty, or a common law remedy in some other court.⁸ The admiralty remedy is so different from that accorded by the common law that one proceeding is no bar to the other. The pendency of a prior suit in personam in a State court for supplies is no bar to a libel in rem in admiralty.⁹ Garnishment of freight money in a State court will not prevent admiralty libel in rem for seamen's wages;¹⁰ nor will the obtaining of a State court judgment prevent the filing of a libel in rem for wages.¹¹ By a parity of reasoning a pending Federal action in admiralty is no bar to a common law action in the State court.¹² The commencement of proceedings in admiralty for the benefit of the limited liability act, does not ipso facto terminate suits for damages pending in the State courts,¹³ though the Federal court is empowered to restrain their further prosecution if the right to a limitation of liability seems clear.¹⁴

§ 17. — property in custody of the law and garnishment cases.

Another rule adopted with a view to avoiding conflict, is that where property is in the actual or constructive custody of one court, it acquires an exclusive dominion over it and other courts are powerless to interfere therewith.^[a] As between conflicting seizures under mesne or final process, the first in point of time prevails.^[b] But priority of actual seizure is not the determining

Hughes v. Green, 84 Fed. 833, 28 C. C. A. 537; *State v. New Orleans, etc.* Co. 42 La. Ann. 11, 7 So. 84; *Clark v. Comford*, 45 La. Ann. 502, 12 So. 763.

⁵*Chamberlain v. Eckert*, 2 Biss. 124, Fed. Cas. No. 2,576; *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776, *Trawick v. Martin B. Co.* 74 Tex. 522, 12 S. W. 216; *Grider v. Apperson*, 32 Ark. 332; *Findlay v. Keim*, 62 Pa. St. 113; *Moorman v. Gibbs*, 75 La. 537, 39 N. W. 632; *Nichols v. State Bank*, 45 Minn. 102, 47 N. W. 462.

⁶*Willson v. Milliken*, 103 Ky. 167, 44 S. W. 664, 82 Am. St. Rep. 578, 42 L.R.A. 449.

⁸See ante, § 15.[d]-[f]

⁹*The Kolorama*, 10 Wall. 204, 19 L. ed. 941; *The Custer*, 10 Wall. 215, 19 L. ed. 944; *The Alexander McNeil*,

22 Fed. Cas. 818, 822; *The Cerro Gordo*, 62 Conn. 580, 54 Fed. 392. See *Fisher v. The Plymouth*, 2 Int. Rev. Rec. 109, Fed. Cas. No. 4,822.

¹⁰*The Caroline*, 1 Low. 173, Fed. Cas. No. 2,419; *The Sailor Prince*, 1 Ben. 237, Fed. Cas. No. 12,218.

¹¹*The Isabella*, 1 Brown, 104, Fed. Cas. No. 7,100.

¹²*People, etc. v. Judge*, 27 Mich. 408, 15 Am. Rep. 197; *Caine v. Seattle, etc. R. R.* 12 Wash. 596, 41 Pac. 904.

¹³*Parcher v. Cuddy*, 110 U. S. 743, 28 L. ed. 312; 4 Sup. Ct. Rep. 194.

¹⁴*Providence, etc. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *The Tolchester*, 42 Fed. 184; *In re Whitelaw*, 71 Fed. 735; *In re Long, etc. Co.* 5 Fed. 627.

factor as respects a probate court's custody of a decedent's estate, or a bankruptcy or insolvency court's possession of a debtors property. Death and the voluntary act of the debtor place the property in custodia legis regardless of any actual seizure. Nor is it the determining factor in cases quasi in rem where a taking of property into custody is prayed or clearly contemplated by the institution of the proceeding. In such cases the commencement of the proceedings initiates a priority of right to take possession, which should prevail though actual seizure was first made in a subsequent suit.^{[c]-[b]} But other courts of competent jurisdiction may often entertain proceedings respecting the property in custody, such as establishing claims against it, so long as they do not attempt to take possession of the property or embarrass the proceedings of the court having custody.^[i] Upon termination of one court's possession, others are at liberty to proceed against the property.^[j] It is competent to show that the seizing court has no jurisdiction or that the seizure is unauthorized.^[k] When a person sued in one court is garnished out of another, the question which of the two actions shall proceed is determined by ascertaining which was first instituted.^[l]

Author's section.

[a] Property in custody of the law.

Imperative considerations require an observance of the rule that property in the possession or custody of one court shall not be taken or disturbed by process or other proceeding in another court of concurrent jurisdiction. In other words the court first obtaining custody of the res, has the paramount right to proceed.¹ The rule applies to property in custodia legis by virtue of probate,² bankruptcy or insolvency proceedings,³ or by virtue of a receivership,⁴ as well as to property held by sheriff or marshal

¹Hagan v. Lucas, 10 Pet. 404, 9 L. ed. 470; Taylor v. Carryl, 20 How. 595, 15 L. ed. 1028; Riggs v. Johnson Co. 6 Wall. 166, 18 L. ed. 768; Covell v. Heyman, 111 U. S. 180, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; Buck v. Colbath, 3 Wall. 341, 18 L. ed. 257; Tua v. Carriere, 117 U. S. 208, 29 L. ed. 835, 6 Sup. Ct. Rep. 565; Byers v. McCauley, 149 U. S. 614, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Moran v. Sturges, 154 U. S. 274, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; In re Chet-

wood, 165 U. S. 460, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

²Freeman v. Howe, 24 How. 455, 16 L. ed. 749.

³Byers v. McCauley, 149 U. S. 614, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

⁴Tua v. Carriere, 117 U. S. 208, 29 L. ed. 855, 6 Sup Ct Rep 565; Peale v Phipps, 14 How 368, 375, 14 L. ed. 459; Geilinger v. Philippi, 133 U. S. 257, 33 L. ed. 617, 10 Sup. Ct. Rep. 266, 269; Security T. Co. v. Union T. Co. 134 Fed. 301.

under mesne or final process of attachment,⁵ replevin,⁶ execution, or otherwise.⁷ It requires the Federal courts to respect the prior possession of a State court⁸ quite as much as it demands a respect by State courts for the prior possession of a Federal tribunal.⁹ When one coordinate court takes into custody a specific thing, it is withdrawn from the judicial power of the other.¹⁰ A marshal and sheriff cannot make a joint levy.¹¹ But the fact that a State court in a replevin suit has transferred certain personalty of a corporation from its vice president to the company, does not put the property in custodia legis so as to prevent a Federal court appointing a receiver of the corporate property and franchises in a suit to enforce a lien.¹² By R. S. § 934 property seized by a Federal officer under authority of a revenue law is irrepleviable and to be deemed in custodia legis.¹³ If one court having obtained actual custody, ascertains that another is rightfully entitled, it has been said that it may hold the property until the latter through its proper officers requests and offers to receive it.¹⁴

[b] When court's exclusive possession deemed to attach.

In cases involving a levy upon and actual seizure of property, priority of possession is not determined by ascertaining which action was first commenced,¹⁵ nor which writ was first issued,¹⁶ but depends upon the time when possession or what the law deems a taking of dominion or possession has actually occurred.¹⁷ If the property is capable of manual delivery there must be a manual taking possession, and where both sheriff

⁵Calhoun v. Lanaux, 127 U. S. 634, 32 L. ed. 297, 8 Sup. Ct. Rep. 1345; Shields v. Coleman, 157 U. S. 177, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

⁶Melvin v. Robinson, 31 Fed. 635, Porter v. Davidson, 62 Fed. 627; Domestic, etc. Co. v. Hinman, 13 Fed. 161, 2 McCrary, 543; United States v. Dantzler, 3 Woods, 719, Fed. Cas. No. 14,917; First Nat. Bank v. Dunn, 97 N. Y. 155, 49 Am. Rep. 518.

⁷Prince v. Bartlett, 8 Cranch, 434, 3 L. ed. 614; Covell v. Heyman, 111 U. S. 180, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

⁸Prince v. Bartlett, 8 Cranch, 434, 3 L. ed. 614; Borer v. Chapman, 119 U. S. 600, 30 L. ed. 532; 7 Sup. Ct. Rep. 342.

⁹Freeman v. Howe, 24 How. 456, 16 L. ed. 749; Kippendorf v. Hyde, 110 U. S. 280, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Covell v. Heyman, 111 U. S. 185, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

¹⁰Covell v. Heyman, 111 U. S. 182, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; Adler v. Roth, 5 Fed. 898.

¹¹Adler v. Roth, 5 Fed. 898.

¹²Put in Bay Co. v. Ryan, 181 U.

S. 409, 45 L. ed. 927, 21 Sup. Ct. Rep. 709.

¹³See post, § 1386.

¹⁴Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288.

¹⁵Wilmer v. Atlanta, etc. R. R. Co. 2 Woods, 426, Fed. Cas. No. 17,775; Heidritter v. Elizabeth, etc. Co. 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; East Tennessee, etc. R. R. v. Atlanta, etc. R. R. 49 Fed. 610, 611, 15 L.R.A. 109; Schaller v. Wickersham, 7 Coldw. 381; Longstreet v. Hill, 11 Heisk. 56.

¹⁶Wilmer v. Railroad, 2 Woods, 428, Fed. Cas. No. 17,775; Corning v. Dreyfus, 20 Fed. 428; Hale v. Bugg, 82 Fed. 37.

¹⁷Brown v. Clarke, 4 How. 4, 11 L. ed. 850; Adler v. Roth, 5 Fed. 898; Langdon v. Brumby, 7 Ala. 58; Metzner v. Graham, 57 Mo. 410; Schaller v. Wickersham, 7 Coldw. 381; James v. Kennedy, 10 Heisk. 611; Longstreet v. Hill, 11 Heisk. 59; Fountain v. 624 Pieces of Timber, 140 Fed. 381. In personal actions the time of service of process determines priority. See § 16.[a]

and marshal failed in that on their first levy, the one who first makes a proper levy and takes possession thereafter, has the priority.¹⁸ A marshal may levy upon a vessel to enforce a maritime lien so long as the custody of no other court has actually attached, even though a State court has appointed a receiver who has not yet given bond or assumed possession.¹⁹

[c] When exclusive jurisdiction attaches on proceedings quasi in rem.

There are two classes of cases to which the rule that accords exclusive jurisdiction over property to the court which makes the first actual seizure does not fully apply. In the first property is deemed to be placed in gremio legis and beyond the reach of other courts, by certain facts, in the absence of either actual or constructive possession. Thus upon the filing of a voluntary petition in insolvency or bankruptcy¹ or for the dissolution of a corporation,² it would seem proper to hold that the property involved, which is not then in the actual custody of some other court,³ passes eo instanti, under the exclusive control or dominion of the court having jurisdiction of such proceedings.⁴ The probate court acquires a similar custody upon the death of a decedent;⁵ and the same rule should apply in any other case where the filing of a bill or petition might fairly be construed as a surrender of property into the custody of the law. The second class of cases to which the rule does not fully apply⁶ are cases in which the filing of a bill or petition contemplates the ultimate assertion of dominion over a subject matter although it does not of itself draw the property immediately into the custody of the law. In a recent decision dealing with cases of this type it was said that the principle which gives a court with possession of the res, exclusive jurisdiction, "often applies" in cases where no actual seizure or possession has occurred but the suit is brought "to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where in the progress of the litigation the court may be compelled to assume the possession and control of the property to be affected."⁷ In that case the filing of a suit for foreclosure, by a trustee praying a receiver, was deemed to vest an exclusive jurisdiction in the Federal court in advance of service of process, so as to disable a State court from entertaining a subsequent suit, in which process was served first, to enjoin the

¹⁸Adler v. Roth, 5 Fed. 895.

¹⁹Moran v. Sturges, 154 U. S. 256, 33 L. ed. 981, 14 Sup. Ct. Rep. 1027.

¹In re Vogel, 7 Blatchf. 19, Fed. Cas. No. 16,982. See infra, note [d].

²See Gaylord v. Ft. Wayne, etc. R. R. 6 Biss. 286, Fed. Cas. No. 5,284; Foster v. Bank of Abingdon, 68 Fed. 726.

³Rio Grande R. R. v. Gomila, 132 U. S. 481, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Mollison v. Eaton, 16 Minn. 430, 10 Am. Rep. 152; Parks v. Wilcox, 6 Colo. 490.

⁴See opinion, Brewer, J., dissenting, Moran v. Sturges, 154 U. S. 256, 33 L. ed. 980, 14 Sup. Ct. Rep. 1029.

⁵See infra, note [e].

⁶See however, Knott v. Evening P. Co. 124 Fed. 355, 356, holding it should to apply to such cases, reversed, Louisville T. Co. v. Knott, 130 Fed. 820, 65 C. C. A. 158.

⁷Farmers L. & T. Co. v. Lake St. E. R. R. 177 U. S. 62, 44 L. ed. 671, 20 Sup. Ct. Rep. 566. See also, Louisville T. Co. v. Knott, 130 Fed. 820, 65 C. C. A. 158.

trustee from maintaining such suit. Doubtless it is a salutary rule to declare that the filing of a suit quasi in rem contemplating an assumption of actual dominion over a subject matter, should prevent other courts from subsequently attempting to enjoin such proceedings,⁷ or from litigating matters concerning the enforcement of that particular right in rem. But it should not disable other courts from entertaining subsequent suits to foreclose other liens or enforce other rights in rem, and as between two such proceedings it does not seem safe to say that the second court is disabled from appointing a receiver because the first might some time do so. Either court should be at liberty to appoint a receiver, conceding to the first the prior right,⁸ if the particular facts so require; and the control and disposition of the subject matter should ultimately go to the receivership tribunal. A suit to foreclose a mechanics lien and a suit to foreclose a mortgage may proceed against the same property in different courts at the same time.⁹ Indeed it was held that different bondholders, or bondholders and the trustee, may sue for relief under the same mortgage in different courts.¹⁰ The mere bringing of a foreclosure suit should not be deemed to initiate an exclusive jurisdiction, where no actual possession of the property is sought by receivership or levy.¹¹ But the filing of a bill praying a receiver is a sufficient assumption of dominion over the property to withdraw it from reach of a subsequent levy or garnishment in another court, at least until it has been acted upon.¹² Where a receiver is prayed in both courts, it would seem a proper rule that the second court should stay its hand until the application in the first case is disposed of, and the appointment of a receiver by the first should exclude similar action by the second.¹³ But if a receivership or possession is sought only in the second suit and the first does not seek to take the property into custody it would seem that the second might acquire an exclusive possession of the property through a receiver or sequestration.¹⁴ In any case where property has actually been taken into custody prior to

⁷See also *Phelps v. Mutual, etc.* Assn. 112 Fed. 453, 50 C. C. A. 339.

⁸See *Owens v. Ohio C. R. R.* 20 Fed. 10; *Central T. Co. v. South, etc.* R. R. 57 Fed. 3; *Sharon v. Terry*, 36 Fed. 337, 13 Sawy. 387, 1 L.R.A. 572.

⁹*National F. & P. Works v. Oconto, etc.* Co. 113 Fed. 793, 51 C. C. A. 465.

¹⁰*Brooks v. Vermont, etc.* R. R. 14 Blatchf. 463, Fed. Cas. No. 1,964; *Berkman v. Hudson, etc.* R. R. 35 Fed. 3.

¹¹*Compton v. Jesup*, 68 Fed. 283, 15 C. C. A. 397; *National F. Wks. v. Oconto, etc.* Co. 113 Fed. 798, 51 C. C. A. 465; *National F. Wks. v. Oconto, etc.* Co. 105 Wis. 48, 81 N. W. 125. Contra, see *Union T. Co. v. Rockford, etc.* R. R. 6 Biss. 197,

Fed. Cas. No. 14,401; *Gaylord v. Railway*, 6 Biss. 286, Fed. Cas. No. 5,284; *Cohen v. Solomon*, 66 Fed. 411.

¹²*Riesner v. Gulf, etc.* R. R. 89 Tex. 660, 59 Am. St. Rep. 88, 36 S. W. 55, 33 L.R.A. 173; *Perego v. Bone-steel*, 5 Biss. 69, Fed. Cas. No. 10,976.

¹³*Adams v. Mercantile T. Co.* 66 Fed. 617, 15 C. C. A. 1; *Appleton W. W. Co. v. Central T. Co.* 93 Fed. 286, 35 C. C. A. 302; *McKechney v. Weir*, 118 Fed. 805, 55 C. C. A. 417; *McDowell v. McCormick*, 121 Fed. 61, 57 C. C. A. 401.

¹⁴*Knott v. Evening Post Co.* 124 Fed. 342; *East, etc.* R. R. v. *Atlanta, etc.* R. R. 49 Fed. 608, 15 L.R.A. 109; *Pitt v. Rogers*, 104 Fed. 387, 43 C. C. A. 600; *Oliver v. Parlin, etc.* Co. 105 Fed. 272, 45 C. C. A. 200.

the filing of a second suit quasi in rem, there is no reason why that should not be paramount and exclusive so long as it continues. Thus where in the first suit an order to seize and sell on foreclosure has issued, this creates an exclusive dominion in the foreclosing court;¹⁵ so also does a taking of possession by the sheriff.¹⁶

[d] Bankruptcy and insolvency causes.

The exclusive nature and extent of the Federal bankruptcy jurisdiction, and the effect of bankruptcy proceedings upon cases pending in State courts, are elsewhere considered.¹ The effect of a voluntary petition in bankruptcy or insolvency is to place the property in the custody of the court, disabling other courts from maintaining replevin therefor, or setting aside a homestead.² Although if the property was in the State court's possession previous to the bankruptcy that possession is not disturbed except as provided by the bankrupt law.³ The Federal courts are without jurisdiction of State insolvency or assignment proceedings.⁴ They may not disturb a State court's custody of insolvency assets⁵ or seize such property under their own writs.⁶ But they may entertain suit to establish a claim where citizenship is diverse;⁷ or a foreclosure suit, although the mortgagor has made a State statutory assignment;⁸ or a suit to declare a mortgage invalid.⁹ It seems that they may entertain suits to inquire into the validity of the assignment itself.¹⁰ In short, where a controversy is within the Federal judicial power as defined by the Constitution and Congress, the Federal courts may take cognizance of it notwithstanding State insolvency proceedings, so long as their action does not interfere with or embarrass the administration of the estate in the State tribunal. The case is analogous to that of State probate proceedings.¹¹ The State court should respect a lien or priority based upon pro-

¹⁵Holland T. Co. v. International, Fed. 519; Chapman v. Brewer, 114 U. etc. Co. 85 Fed. 865, 29 C. C. A. 460; S. 173, 29 L. ed. 88, 5 Sup. Ct. Rep. 806.
¹⁶Fox v. Hempfield R. R. 2 Abb. U. S. 141, Fed. Cas. No. 5,011; Central N. Bank v. Hazard, 49 Fed. 295, 296.

¹Tefft v. Sternberg, 40 Fed. 3, 5 L.R.A. 223.

²See ante, § 15, note.[1]

³In re Cobb, 96 Fed. 823; In re Miller, 6 Biss. 34, Fed. Cas. No. 9,551; In re Litchfield, 13 Fed. 866; In re Askew, 3 N. B. R. 575, Fed. Cas. No. 585; Chapman v. Brewer, 114 U. S. 173, 29 L. ed. 88, 5, Sup. Ct. Rep. 806; In re Vogel, 7 Blatchf. 19, Fed. Cas. No. 16,982. But see Moran v. Sturges, 154 U. S. 252, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

⁴Conner v. Long, 104 U. S. 234, 26 L. ed. 726; Johnson v. Bishop, Woolw. 327, Fed. Cas. No. 7,373; Townsend v. Leonard, 3 Dill. 371, Fed. Cas. No. 14,117; Southern L. Co. v. Benbow, 96

⁴Adams v. Preston, 22 How. 473, 16 L. ed. 273.

⁵The J. G. Chapman, 62 Fed. 940.

⁶Geilinger v. Philippi, 133 U. S. 257, 33 L. ed. 617, 10 Sup. Ct. Rep. 269; Tua v. Carrieri, 117 U. S. 201, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; Milliken v. Barrow, 55 Fed. 145.

⁷Green v. Creighton, 23 How. 106, 16 L. ed. 419; Shelby v. Bacon, 10 How. 56, 13 L. ed. 326.

⁸Edwards v. Hill, 59 Fed. 721, 8 C. C. A. 233.

⁹Rumsey v. Town, 20 Fed. 563. Smith, etc. Co. v. McGroarty, 136 U. S. 240, 34 L. ed. 348, 10 Sup. Ct. Rep. 1018.

¹⁰Rejall v. Greenwood, 60 Fed. 786; Swofford Bros. v. Mills, 86 Fed. 559.

¹¹See infra, note.[e]

ceedings in the Federal court prior to the insolvency.¹² An assignment for the benefit of creditors does not, in general, put the property in custodia legis.¹³ A creditor not party to a proceeding thereunder in the State court may maintain a bill in the Federal court upon failure of the assignee to act, to set aside a deed of the debtor which withdrew most of the assets from the assignment.¹⁴ The extent to which proceedings in State courts are permissible, pending bankruptcy administration in the Federal court, is governed by statute and considered elsewhere.¹⁵

[e] Probate proceedings.

The Federal courts have no probate jurisdiction, yet they may take cognizance of a suit that arises in the course of probate, where between citizens of different States;¹ so long as their action does not interfere with the possession of the State tribunal. They may render judgment against an estate on a claim although it may be collected only through the probate court;² taking its place with other debts against the estate.³ Executors may sue in the Federal court to enforce rights or claims of the estate.⁴ Federal courts may entertain a foreclosure suit against a trustee of property in the custody of a probate court.⁵ It is held that they may determine the status of aliens as heirs and their right to share in an estate;⁶ and entertain a suit for partition and assignment of a widow's dower;⁷ or suit for specific performance.⁸ They may require an executor to account;⁹ or entertain a suit by a legatee to establish his claim;¹⁰ or set aside a receipt therefor, fraudulently obtained.¹¹ But they cannot entertain a proceeding to establish a will for probate;¹² or to construe it;¹³

¹²Claffin v. Lisso, 16 Fed. 897, 4 Woods, 552.

¹³Boltz v. Eagon, 34 Fed. 417; Lehman v. Rosengarten, 23 Fed. 642; The James Roy, 59 Fed. 785; Rothchild v. HasBrouck, 65 Fed. 287; Powers v. Blue Grass B. & L. Assn. 86 Fed. 709; Hamilton, etc. Co. v. Mercer, 84 Iowa, 539, 35 Am. St. Rep. 332, 51 N. W. 416.

¹⁴Gould v. Mullanphy, etc. Co. 32 Fed. 181.

¹⁵See post, § 20.

¹See ante, § 2, note.[w]

²Williams v. Benedier, 8 How. 112, 12 L. ed. 1007; Peale v. Phipps, 14 How. 375, 14 L. ed. 462; Kendall v. Creighton, 23 How. 90, 16 L. ed. 419; Gonley v. Lavender, 21 Wall. 283, 284, 22 L. ed. 536; Bedford Q. Co. v. Thomlinson, 95 Fed. 210, 36 C. C. A. 272; Continental N. Bank v. Heilman, 81 Fed. 43; Security T. Co. v. Dent, 104 Fed. 380, 43 C. C. A. 594.

³Byers v. McAuley, 149 U. S. 620, 37 L. ed. 867, 13 Sup. Ct. Rep. 906;

Terry v. Bank, 20 Fed. 775; Kitteredge v. Race, 92 U. S. 121, 23 L. ed. 490; Wickham v. Hull, 60 Fed. 330; Briggs v. Stroud, 58 Fed. 720; In re Foley, 80 Fed. 951; Brown v. Ellis, 86 Fed. 358.

⁴Griswold v. Central V. R. R. 9 Fed. 799, 20 Blatchf. 212.

⁵Erwin v. Lowry, 7 How. 181, 12 L. ed. 665; Black v. Scott, 9 Fed. 191; German Sav. Soc. v. Cannon, 65 Fed. 543.

⁶O'Callaghan v. O'Brien, 116 Fed. 934.

⁷Holton v. Guinn, 76 Fed. 96.

⁸Davis v. Davis, 89 Fed. 537.

⁹Pulliam v. Pulliam, 10 Fed. 30; Van Bokkelen v. Cook, 5 Sawy. 589, Fed. Oas. No. 16,831.

¹⁰Brendel v. Charch, 82 Fed. 263; Martin v. Fort, 83 Fed. 22, 27 C. C. A. 428.

¹¹Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Cowen v. Adams, 78 Fed. 543, 24 C. C. A. 198.

¹²In re Cilley, 58 Fed. 990.

¹³Security Co. v. Pratt, 65 Conn. 177, 32 Atl. 398.

or to oust an administrator;¹⁴ or to enjoin a sale by a probate court;¹⁵ And they can take cognizance of a suit to set aside a will only when it takes the form of a suit or controversy.¹⁶ They cannot entertain a suit to enforce an agreement of the testator to give his estate to complainant, since they cannot grant relief without taking the estate from the probate court;¹⁷ nor a suit for recovery of property which the administrator is directed to turn over to some one else.¹⁸ Nor have they power to appoint a receiver for the assets of an estate in course of probate on the ground of fraud and waste.¹⁹ Where property was conveyed by decedent in his lifetime and hence never was in possession of the probate court, a creditor's bill is maintainable in the Federal court to set aside such conveyance for fraud.²⁰ Where probate administration is complete and the assets have been distributed a Federal court may entertain suit in equity to subject such property to a debt of decedent.¹ And where a probate court's sale or decree in partition is attacked in a subsequent suit for fraud, or want of jurisdiction, there can be no reason for denying the Federal court's jurisdiction to examine into such question so far as affecting the rights of parties before it.² Where property of a debtor has been taken into custody by a Federal court, the debtor's death and probate proceedings in the State court, do not oust that possession.³

[f] Property taken on attachment or execution.

Property taken and held under mesne or final process is in custodia legis and no other court may take it into custody;⁶ nor is replevin to recover the same maintainable in another court.⁷ The first court's

¹⁴Lant v. Manley, 75 Fed. 634, 21 C. C. A. 457; Haines v. Carpenter, 1 Woods, 270, Fed. Cas. No. 5,905.

¹⁵Evans v. Gorman, 115 Fed. 399.

¹⁶See ante, § 2.[w]

¹⁷Hall v. Bridgeport T. Co. 123 Fed. 739.

¹⁸McPherson v. Mississippi V. T. Co. 122 Fed. 367, 58 C. C. A. 455.

¹⁹Johnson v. Ford, 109 Fed. 501. But see Ball v. Thompson, 41 Fed. 486.

²⁰Hale v. Tyler, 115 Fed. 833.

¹Chewett v. Moran, 17 Fed. 820; Hale v. Coffin, 114 Fed. 567.

²Johnson v. Waters, 111 U. S. 667, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; Arrowsmith v. Gleason, 129 U. S. 99, 32 L. ed. 634, 9 Sup. Ct. Rep. 241; Robinson v. Fair, 128 U. S. 86, 87, 32 L. ed. 415, 9 Sup. Ct. Rep. 35.

³Rio Grande R. R. v. Gormila, 132 U. S. 481, 33 L. ed. 400, 10 Sup. Ct. Rep. 155.

⁶Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028; Moore v. Withenburg, 13 La. Ann. 23; Townsend v. Leonard,

3 Dill. 371, Fed. Cas. No. 14,117; Clarke v. Shaw, 28 Fed. 356; Southern, etc. Bank v. Folsom, 75 Fed. 932, 21 C. C. A. 568; Naumberg v. Hyatt, 24 Fed. 900; Lewis v. Dillard, 76 Fed. 690, 22 C. C. A. 488; Fox v. Hempheld, etc. R. R. 2 Abb. (U. S.) 155, Fed. Cas. No. 5,011; Milliken v. Barrow, 55 Fed. 149, 19 L.R.A. 403.

⁷Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; Porter v. Davidson, 62 Fed. 627; Patterson v. Mater, 26 Fed. 31; Melvin v. Robinson, 31 Fed. 635; Pickett v. Filer, etc. Co. 40 Fed. 313; Krippendorf v. Hyde, 110 U. S. 280, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Hale v. Bugg, 82 Fed. 37; Munson v. Harroon, 34 Ill. 424, 85 Am. Dec. 317; Senior v. Pierce, 31 Fed. 627; Fensier v. Lammon, 6 Nev. 213, St. Paul, etc. Ry. v. Drake, 72 Fed. 949, 19 C. C. A. 252; Summers v. White, 71 Fed. 109, 17 C. C. A. 631. But replevin in the same court has been held maintainable. Maddux v. Usher, 2 Hask. 267,

possession must be permitted to continue until the purpose of the seizure is accomplished.⁸ However, the process of other courts may be served upon the sheriff or marshal in possession by way of garnishment of the surplus, and the court which has possession may determine priorities and allow other claims against the surplus.⁹ If the taking is alleged to be wrongful because another claims the property as his, he may make an ancillary application to the court under whose process the seizure was made¹⁰ or may maintain trespass, trover or conversion for damages, or an action on the bond of the seizing officer in any competent court, since that action would not interfere with the possession of the property or provoke a conflict.¹¹ But he may not apply to another court to enjoin the execution sale.¹² If it transpire that the marshal's levy was invalid the Federal court may, on application by the person making ineffectual levy from the State court, charge the marshal as garnishee;¹³ or order the proceeds to be paid over to an execution creditor in another court.¹⁴ Other courts cannot summon the marshal to appear before them as garnishee,¹⁵ nor arrest and imprison him for acts done under Federal process.¹⁶ The levy of execution or attachment upon realty does not, under the law of most States, bring the property into the actual or constructive possession of the court, but merely establishes a lien against it, and another court may thereafter appoint a receiver.¹⁷

[ff] Validity of execution sale.

Where the liens of two judgments are co-ordinate, the court first acquiring possession by seizure under execution may confer a good title¹

Fed. Cas. No. 8,936. See State authorities contra in 25 Am. St. Rep. 259 note.

⁸Rio Grande R. R. v. Gomila, 132 U. S. 481, 33 L. ed. 400, 10 Sup. Ct. Rep. 155.

⁹Gumbel v. Pitkin, 124 U. S. 150, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; Bates v. Days, 17 Fed. 167, 5 McCrary, 342; Bayard v. Bayard, Fed. Cas. No. 1,129; Claflin v. Beaver, 35 Fed. 261; Lockett v. Rumbaugh, 45 Fed. 39; Brooks v. Fry, 45 Fed. 778; The Daniel Kaine, 35 Fed. 788.

¹⁰See ante, § 3, note.[]

¹¹Busk v. Colbath 3 Wall. 334, 18 L. ed. 257; Lammon v. Feusier, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; Denny v. Bennett, 128 U. S. 500, 32 L. ed. 495, 9 Sup. Ct. Rep. 135; Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; Evans v. Pack, 2 Flip. 268, Fed. Cas. No. 4,566.

¹²American Assn. v. Hurst, 59 Fed. 1, 7 C. C. A. 598; Southern, etc. Co. v. Folsom, 75 Fed. 931, 21 C. C. A.

568; Central N. Bank v. Stevens, 169 U. S. 461, 42 L. ed. 817, 18 Sup. Ct. Rep. 413.

¹³Gumbel v. Pitkin, 124 U. S. 132, 31 L. ed. 374, 8 Sup. Ct. Rep. 379.

¹⁴The Daniel Kaine, 35 Fed. 788, 789.

¹⁵Gumbel v. Pitkin, 124 U. S. 150, 31 L. ed. 374, 8 Sup. Ct. Rep. 389.

¹⁶Beckett v. Sheriff, 21 Fed. 32. See Smith v. Bauer, 9 Colo. 381, 12 Pac. 398, where Federal court consented to process against marshal.

¹⁷Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Georgia v. Jesup, 106 U. S. 458, 464, 27 L. ed. 216, 1 Sup. Ct. Rep. 363; In re Hall, 73 Fed. 527; Ingraham v. National Salt Co. 139 Fed. 684. See Gates v. Bucki, 53 Fed. 961, 4 C. C. A. 116, where there was a receiver in the State court as well as an attachment. Contra see Southern B. & T. Co. v. Folsom, 75 Fed. 931, 21 C. C. A. 568.

¹Pulliam v. Osborne, 17 How. 475, 15 L. ed. 154.

even against a creditor recovering a judgment establishing a mechanic's lien against the property.² But a State court cannot acquire such a dominion over a vessel by seizure as to be able to sell the same on execution, free of prior maritime liens, and as it is without jurisdiction to adjudicate such liens, the practical consequence is that the title of its purchaser is subject to the assertion of maritime liens in the admiralty court.³ Sale under process of a court which has not acquired possession of the property is ineffective against a purchaser in the court which has acquired legal custody.⁴ Sale under execution without consent of the court whose receiver is in possession is void.⁵

[g] Receivers.

Property in possession of a receiver is in the custody of the law and of the court appointing him⁷ and may not be interfered with by any other court.⁸ The Federal court has no power to order its receiver to take property from the lawful custody of a State court receiver,⁹ nor may a State court deprive a Federal receiver of possession.¹⁰ The fact that a State court dissolves a corporation whose assets are being administered by a Federal court through its receiver, cannot oust the Federal court's prior possession or impair its right to carry its own decrees into execution.¹¹ Execution sale by another court, of property in a receiver's hands is void.¹² No other court has power to levy attachment or distress warrant on such property,¹³ or enjoin the proceedings in which the receiver was appointed.¹⁴ It may not be sold for taxes,¹⁵ nor on foreclosure in an-

²Heidritter v. Elizabeth, etc. Co. 112 U. S. 305, 28 L. ed. 729, 5 Sup. Ct. Rep. 136.

³McAllister v. The Sam Kirkman, 1 Bond, 384, Fed. Cas. No. 8,658; The Ellexena, 53 Fed. 361; Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

⁴Taylor v. Carryl, 20 How. 596, 15 L. ed. 1032; Heidritter v. Elizabeth, etc. Co. 112 U. S. 304, 28 L. ed. 733, 5 Sup. Ct. Rep. 139.

⁵Wiswall v. Sampson, 14 How. 52, 67, 14 L. ed. 322; Dugger v. Collins, 69 Ala. 330.

⁷Peale v. Phipps, 14 How. 374, 14 L. ed. 459; Wiswall v. Sampson, 14 How. 65, 14 L. ed. 322; Baggs v. Martin, 179, U. S. 209, 45 L. ed. 156, 21 Sup. Ct. Rep. 109.

⁸Young v. Montgomery, etc. R. R. 2 Woods, 606, Fed. Cas. No. 18,166; Blake v. Alabama, etc. R. R. 6. Nat. Bank Reg. 332, 3 Fed. Cas. 587; Bruce v. Manchester, etc. R. R. 19 Fed. 345; Adams v. Mercantile Trust Co. 66 Fed. 621, 15 C. C. A. 1; Blake v. Alabama, etc. R. R. 3 Fed. Cas. No. 537.

⁹Watson v. Jones, 13 Wall. 718, 719, 20 L. ed. 666; Shields v. Coleman, 157 U. S. 169, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; Missouri P. Ry. v. Fitzgerald, 160 U. S. 579, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Judd v. Bankers, etc. Co. 31 Fed. 182; 24 Blatchf. 420; In re Clark, 4 Ben. 88, Fed. Cas. No. 2,798. An allegation of fraud can make no difference. Attleborough, etc. Bank v. N. W. Mfg. Co. 28 Fed. 114.

¹⁰Calhoun v. Lanaux, 127 U. S. 640, 32 L. ed. 297, 8 Sup. Ct. Rep. 1345.

¹¹Leadville Coal Co. v. McCreery, 141 U. S. 476, 35 L. ed. 824, 12 Sup. Ct. Rep. 28.

¹²Wiswall v. Sampson, 14 How. 67, 68, 14 L. ed. 322.

¹³People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101; Malcomson v. Wappoo Mills, 85 Fed. 910; Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 C. C. A. 176.

¹⁴Gates v. Bucki, 53 Fed. 961, 4 C. C. A. 116.

¹⁵In re Tyler, 149 U. S. 181, 37 L. ed. 695, 13 Sup. Ct. Rep. 789; Ex parte

other court.¹⁶ But another court may adjudicate claims against property in a receiver's hands, so long as it does not attempt to interfere with the possession;¹⁷ so also, it may settle accounts.¹⁸ Interference with the possession of a receiver is punishable as contempt,¹⁹ and the general rule is that permission of the appointing court is a necessary condition precedent to suit against a receiver.²⁰ It is for the court having possession through its receiver to determine how far it will permit any other court to interfere with that possession.¹ A court will not entertain a bill to enforce the operation of a road pending receivership, foreclosure and sale in another tribunal.²

Where the first court accepts a bond in lieu of the property and discharges its receiver, the property is no longer in custodia legis and another court may appoint a receiver or otherwise take it into custody.³ Nor will a new order setting aside the discharge of the receiver attempting to resume possession be effective to oust an intervening possession of another court.⁴ A receiver of a national bank appointed by the treasury officers is not an officer of a court but of the United States so that his possession does not place property in custodia legis.⁵

[h] Admiralty causes.

In admiralty cases the Federal courts have sometimes not adhered quite as closely as in other cases, to the rules determining priority and right to exclusive possession.⁷ Indeed weighty arguments have been urged against the adoption of the rule that a common law court could acquire a custody over vessels excluding a court of admiralty from the discharge of its paramount and exclusive jurisdiction and the performance of its peculiar powers;⁸ and the practical efficacy of the rule permitting State courts to take a vessel into custody is considerably impaired by the fact that although they may attach and sell a vessel they may not give

Chamberlain, 55 Fed. 708; Virginia, etc. Co. v. Bristol L. Co. 88 Fed. 139; Lincoln v. Street Ry. 77 Fed. 660.

¹⁶Sutherland v. Railroad Co. 9 Nat. Bank Reg. 311, 23 Fed. Cas. 464.

¹⁷Gay v. Brierfield, etc. Co. 94 Ala. 309, 33 Am. St. Rep. 127, 11 So. 355, 16 L.R.A. 566.

¹⁸Logan v. Greenlaw, 12 Fed. 19; Andrews v. Smith, 5 Fed. 836, 19 Blatchf. 100.

¹⁹Wiswall v. Sampson, 14 How. 65, 14 L. ed. 322; In re Swan, 150 U. S. 652, 37 L. ed. 1207, 14 Sup. Ct. Rep. 223; Gates v. Bucki, 53 Fed. 961, 4 C. C. A. 116.

²⁰Porter v. Sabine, 149 U. S. 480, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101. See post, § 1110 et seq.

¹People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101.

²Bruce v. Manchester, etc. R. R. 19 Fed. 342.

³Shields v. Coleman, 157 U. S. 169, 39 L. ed. 660, 15 Sup. Ct. Rep. 574.

⁴Shields v. Coleman, 157 U. S. 169, 39 L. ed. 660, 15 Sup. Ct. Rep. 574. But see Union T. Co. v. Rockford, etc. R. R. 6 Biss. 197, Fed. Cas. No. 14,401, erroneously holding dismissal of suit did not enable another court to acquire possession through a receiver prior to its reinstatement.

⁵In re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; Snohomish Co. v. Puget S. N. Bank, 81 Fed. 520.

⁷Moran v. Sturges, 154 U. S. 286, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019, illustrates this.

⁸See dissenting opinion Taylor v. Carryl, 20 How. 595, 15 L. ed. 1034.

a marketable title free from maritime liens, nor enforce or satisfy those liens.⁹ However, it is well settled that both common law and admiralty courts may take a vessel into custody, and the general rule is applied that where one court has taken a vessel or res in controversy into custody, this prevents a proceeding in any other court interfering with that custody, or maintainable only by virtue of possession of such vessel or res.¹⁰ If the State court has possession through its receiver or by attachment or replevin, the established rule now is that libel in rem cannot be prosecuted in admiralty, although the libel will not be dismissed.¹¹ Nor is libel in rem maintainable if the vessel be in a State court's custody through possession by an assignee in insolvency.¹² It has been held that the question of prior custody is not determinable in favor of a State receiver as against a Federal marshal in admiralty by the date of the receiver's appointment; where the marshal took actual possession before the receiver had qualified and attempted to assume control, the admiralty court had power to enforce a lien.¹³ Moreover, if a State court receiver permit a vessel to go into another jurisdiction libel in rem for subsequent accruing liens is there maintainable in admiralty.¹⁴ The filing of a bankruptcy petition does not prevent libel in admiralty for a prior lien if the vessel be in another district.¹⁵ If a State court has not acquired actual custody by replevin, libel for salvage is maintainable in admiralty.¹⁶ So, if the court's possession be only nominal and no officer of the court be actually in control, subsequent liens may be enforced by libel.¹⁷ If an officer of a court be forcibly dispossessed by one from another court the former's right remains paramount.¹⁸ A suit which does not affect or interfere with the possession of the res by another court but merely ascertains and adjudicates a claim, is not objectionable.¹⁹ Where an admiralty court having satisfied all maritime liens, has money left

⁹See *supra*, note. [¶¶]

¹⁰*Taylor v. Carryl*, 20 How. 595, 15 L. ed. 1028; *The Daniel Kaine*, 35 Fed. 788; *The Robert Fulton*, Paine, 620, Fed. Cas. No. 11,890.

¹¹*The Celestine*, 1 Biss. 1, Fed. Cas. No. 2,541; *Anonymous*, 37 Hunt. Mer. Mag. 707, Fed. Cas. No. 452; *Fisher v. The Plymouth*, 2 Int. Rev. Rec. 109, Fed. Cas. No. 4,822; *Lewis v. The Orphans*, 3 Ware, 143, Fed. Cas. No. 8,330; *The Circassian*, Fed. Cas. No. 2,721, 1 Ben. 128; *The E. L. Cain*, 45 Fed. 369; *In re Schuyler's, etc. Co.* 136 N. Y. 174, 32 N. E. 625, 20 L.R.A. 397; *The Robert Fulton*, 1 Paine, 620, Fed. Cas. No. 11,890; *The Oliver Jordan*, 2 Curt. 414, Fed. Cas. No. 10,503. *Contra see*: *Wall v. The Royal Saxon*, 2 Am. Law Reg. 324, Fed. Cas. No. 17,093; *The Julia Ann*, 1 Spr. 382, Fed. Cas. No. 7,577; *The John Richards*, Newb. 73, Fed. Cas.

No. 11827; *The Gazelle*, 1 Spr. 378, Fed. Cas. No. 5,289; *In re Certain Logs*, 2 Sumn. 589, Fed. Cas. No. 2,559.

¹²*The J. G. Chapman*, 62 Fed. 940. But possession by an assignee for benefit of creditors, does not put property in custodia legis. *The James Roy*, 59 Fed. 785. See *infra*, note.

¹³*Moran v. Sturges*, 154 U. S. 286, 38 L. ed. 991, 14 Sup. Ct. Rep. 1019.

¹⁴*The Willamette Valley*, 66 Fed. 566, 13 C. C. A. 635; *The Resolute*, 168 U. S. 439, 42 L. ed. 533, 18 Sup. Ct. Rep. 112.

¹⁵*The Ironsides*, 4 Biss. 521, Fed. Cas. No. 7,069.

¹⁶*Scott v. Seventy-Five Tons of Iron*, 23 Fed. 197.

¹⁷*The Young America*, 30 Fed. 791.

¹⁸*The Joseph Gorham*, 7 Law Rep. 135, Fed. Cas. No. 7,537.

¹⁹*Russell v. Alvarez*, 5 Cal. 48.

in its registry, and the corporation owning the vessel is being wound up through a receivership in a State court, the court of admiralty should pay over such balance to the receiver rather than allow and pay other maritime claims as to which no lien exists.²⁰ The fact of a pending State court proceeding to cancel a mortgage on a vessel, has been held not to prevent the admiralty court having the proceeds from the sale of such vessel in its registry, from passing on the question of the validity of the mortgage.²¹ Garnishment of freight money in admiralty does not prevent a second garnishment of the surplus by a State court as the property is not in the custody of the law.¹ It has been held that petitory suit in admiralty is maintainable against a sheriff for a vessel where his possession is claimed to be tortious and wrongful;² or where the law under which a State officer made a seizure is alleged to be invalid as a regulation of commerce.³

After a court's possession is terminated other courts may proceed against the property.⁴ Upon the discharge of a vessel from a State court's custody, libels in rem are then maintainable in admiralty to enforce maritime liens or other maritime rights.⁵ If a State court has sold a vessel under execution, it is subject in the hands of the purchaser to prior maritime liens,⁶ even though the State law professes to give a title free of all liens.⁷

[1] Certain proceedings permissible notwithstanding possession of another court.

As is elsewhere shown probate or insolvency proceedings⁸ in one court do not absolutely prohibit actions or controversies concerning the subject-matter in other courts. The same is true of admiralty proceedings⁹ and receivership cases,¹⁰ and indeed of all cases where property is taken into custody. It may be necessary sometimes to stay proceedings until the other court's custody is terminated.¹¹ But claims ultimately enforceable out of, or liens upon, the property in custody, may be litigated without any stay, to the extent of ascertaining and preserving them, as such action has no tendency to disturb the other court's possession, or cause a conflict.¹² So also, a marshal or sheriff may be sued for a tortious taking of property in another court though it may not by replevin attempt

²⁰The Liberty, 119 Fed. 539.

²¹The Gordon Campbell, 131 Fed. 963.

¹The Olivia A. Carrigan, 7 Fed. 510.

²The J. W. French, 13 Fed. 916, 920.

³Jervay v. The Carolina, 66 Fed. 1019.

⁴Moran v. Sturges, 154 U. S. 279, 283, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; The Roslyn & Midland, 9 Ben. 119, Fed. Cas. No. 12,068.

⁵The Red Wing, 14 Fed. 869; The Roslyn, 9 Ben. 119, Fed. Cas. No. 12,068; The Sailor Prince, 1 Ben.

234, Fed. Cas. No. 12,218; The Caroline, 1 Low. 173, Fed. Cas. No. 2,419.

⁶McAllister v. The Sam Kirkman, 1 Bond, 384, Fed. Cas. No. 8,658.

⁷The Elexena, 53 Fed. 361.

⁸See supra, notes.[d]-[e]

⁹See supra, note.[b]

¹⁰See infra, note.[g]

¹¹Boatmens Bank v. Fitzlen, 135 Fed. 650, 68 C. C. A. 288; Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171.

¹²Williams v. Benedict, 8 How. 107, 12 L. ed. 1007; Yonley v. Laverder, 21 Wall. 276, 22 L. ed. 536; Heidritter v. Elizabeth, etc. Co. 112 U. S.

to dispossess such officer.¹³ A State court may entertain a suit against a county recorder for erasure of a mortgage, though the mortgagee corporation is in the hands of a receiver of a Federal court.¹⁴ So also a Federal court may appoint a receiver of property held in trust under administration of a State probate court.¹⁵ The fact that a national bank is in a Federal receiver's hands does not prevent a suit in a State court to establish a claim against its assets;¹⁶ or to determine and segregate a trust fund held by the receiver.¹⁷ The attachment of a fund by a Federal court does not prevent suit in a State court to try title thereto.¹⁸ It has been held that foreclosure in the Federal court will prevent a State court from entertaining a suit to quiet title to the property.¹⁹ Proceedings in a State court for the dissolution of a corporation do not deprive the Federal court of power to adjudicate claims between it and a stockholder.²⁰ A suit for damages for waste may proceed in a Federal court, notwithstanding foreclosure proceedings in a State court.¹ A suit to establish a right to one third of lands may precede in a State while the Federal court is entertaining proceedings for its condemnation to the government.² Pendency of Federal foreclosure proceedings will not prevent a State court from entertaining a bill by the mortgagor's creditors to have it declared fraudulent.³ Criminal proceedings may be taken against officers of a company in the hands of a receiver, and possession of the res gives the Federal court no power to enjoin such prosecution.⁴ The Federal court

304, 28 L. ed. 733, 5 Sup. Ct. Rep. 140; *Anglo, etc. Co. v. Cheshire*, 124 Fed. 464; *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. ed. 101; *Gates v. Bucki*, 53 Fed. 968, 4 C. C. A. 116; *Clifton v. Foster* 103 Mass. 233, 4 Am. Rep. 539; *United States v. Eisenbeir*, 112 Fed. 190, 50 C. C. A. 179; *Levi v. Columbia L. I. Co.* 1 Fed. 206, 1 McCrary, 34; *Mercantile T. Co. v. Lamoille, etc. R. R.* 16 Blatchf. 327, Fed. Cas. No. 9,432; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 288. But suit to foreclose a lien will not lie where mortgage foreclosure is pending in State court. *Security T. Co. v. Union T. Co.* 134 Fed. 301.

¹³See *supra*, note.[f] State courts have frequently asserted their right to maintain replevin. *Wilde v. Rawles*, 13 Colo. 586, 22 Pac. 898; *Leighton v. Harwood*, 111 Mass. 71, 15 Am. Rep. 8; *Carew v. Matthews*, 41 Mich. 577, 2 N. W. 830. See 25 Am. St. Rep. 259 note.

¹⁴*Calhoun v. Lanaux*, 127 U. S. 640, 32 L. ed. 297, 8 Sup. Ct. Rep. 1347, 1348.

¹⁵*Ball v. Tompkins*, 41 Fed. 490.

¹⁶*First Nat. Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 842. See *Chemical N. Bank v. Bailey*, 12 Blatchf. 483, Fed. Cas. No. 2,635. A receiver appointed by the comptroller is not an officer of the court at all. In *re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

¹⁷*Flint Co. v. Stephens*, 32 Mo. App. 349.

¹⁸*Montgomery v. McDermott*, 87 Fed. 374.

¹⁹*Cohen v. Solomon*, 66 Fed. 413.

²⁰*Straine v. Bradford Sav. Bank*, 88 Fed. 571.

¹*Hubinger v. Central T. Co.* 94 Fed. 791, 36 C. C. A. 494.

²*United States v. Eisenbeis*, 112 Fed. 190, 50 C. C. A. 179.

³*Gay v. Brierfield Coal Co.* 94 Ala. 309, 33 Am. St. Rep. 127, 11 So. 355, 16 L.R.A. 567, the court intimated that it might not be able to grant full relief.

⁴*Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119. See *Anglo, etc. Co. v. Cheshire, etc. Inst.* 134 Fed. 153.

may stay execution on its judgment in any case where it might interfere with the State court's custody, or refuse to do so if it would not.⁵

[j] Discharge or termination of custody or possession.

A right to proceed against or take property into custody attaches at once upon the termination of the possession or dominion of another court.⁶ As is elsewhere shown the completion of probate administration,⁷ or of admiralty proceedings,⁸ enables other courts to reach the property that has been in custodia legis. The giving of a forthcoming bond for replevied property does not release it from custody,⁹ though a bond to pay a judgment rendered does release property levied upon.¹⁰ Where a court has discharged property from its custody, it cannot thereafter resume possession if another court has meantime acquired an intervening custody.¹¹ The dismissal of the suit in one court leaves the other free to proceed.¹² Sale and conveyance of a foreclosed railroad to the purchasers terminates the court's possession, which is not revived as against an intervening possession of another court, by proceedings to set aside the decree for fraud.¹³ But where one of the conditions of a foreclosure sale is that the purchaser pay certain liens against the road, the foreclosing court retains jurisdiction to enforce compliance with this condition,¹⁴ and may enjoin a State proceeding to enforce against the purchaser, another liability for which the property in his hands is not properly liable.¹⁵ Where a State court has decreed possession of property to certain persons without defining the character of that possession, the Federal court may entertain suit to establish it as fiduciary.¹⁶

[k] Effect of unauthorized seizure and relief therefrom.

It is always competent to show that the court was without jurisdiction of the cause in which it took property into custody, and a seizure under such circumstances is illegal and relief may be had in the seizing court.¹ If the Federal writ of attachment though not void, is illegally levied on Sunday, the marshal's possession thereunder is illegal and an attaching creditor from a State court may upon application to the Federal court have his prior right as garnishee of the marshal, declared.² It has been argued in a number of cases that where a marshal seizes the property of

⁶Buck v. Colbath, 3 Wall. 342, 18 L. ed. 257; Day v. Gallup, 2 Wall. 97, 17 L. ed. 855; Moran v. Sturges, 154 U. S. 279, 283, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; Andrews v. Smith, 5 Fed. 836, 19 Blatchf. 100. See Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288.

⁷See supra, note. [e]

⁸See supra, note. [h]

⁹Hagan v. Lucas, 10 Pet. 404, 9 L. ed. 470; United States v. Dantzler, 3 Woods, 719, Fed. Cas. No. 14,917.

¹⁰Shields v. Coleman, 157 U. S. 183, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

¹¹Shields v. Coleman, 157 U. S. 183, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

¹²Glenn v. Leggett, 47 Fed. 474.

¹³Central N. Bank v. Hazard, 49 Fed. 293.

¹⁴Stewart v. Wisconsin, etc. Ry. 117 Fed. 782.

¹⁵Julian v. Central T. Co. 193 U. S. 93, 48 L. ed. 629; 24 Sup. Ct. Rep. 399.

¹⁶Watson v. Jones, 13 Wall. 720, 20 L. ed. 666.

¹Freeman v. Howe, 24 How. 459, 16 L. ed. 749.

²Gumbel v. Pitkin, 124 U. S. 154, 31 L. ed. 374, 8 Sup. Ct. Rep. 379.

A upon a writ against B, the property is not in custody of the Federal court because he has not obeyed the court's mandate, and hence that replevin in a State court would lie.³ But this contention was made in the leading case denying the right of replevin in a State court, and is there answered.⁴ If want of jurisdiction is alleged or seizure of another's property, the seizing court should pass upon the question, and not some other tribunal, and relief should be sought in the court which has taken the property into its custody.⁵ The Federal courts have not, however, always adhered to this reasoning and have granted injunction against the taking of A's property upon process against B.⁶ So also they have entertained a petitory suit in admiralty against a sheriff for a vessel in his possession where alleged to be tortious and wrongful;⁷ and where a law under which a State officer seized a vessel was claimed to be invalid as a regulation of commerce.⁸ Where receivers have been appointed by different courts for the same property, it would seem proper to settle the right of possession between them, in the court whose receiver has actually obtained possession.⁹ It is generally true, also, that the court having possession will protect that possession by injunction against proceedings elsewhere, notwithstanding the rule that neither Federal nor State court should enjoin proceedings in the other.¹⁰ If a seizure by a marshal was wrongful, it does not become rightful by mere forcible continuance.¹¹ If the appointment of a State receiver is invalid because made by a judge in vacation, the property is not in fact in custodia legis and where taken into custody by the Federal court through a receiver subsequently appointed the latter's action will be upheld.¹² An allegation that a receiver's appointment was obtained by fraud will not make his possession unauthorized or any the less the possession of the court.¹³ Nor will an allegation that a State court had no power to appoint a receiver justify a Federal court in enjoining such receiver from proceeding to reduce certain assets to actual possession.¹⁴

[1] Effect of garnishment in one court of debtor sued in another.

Garnishment does not place property strictly in the custody of the law.¹⁵ But there arises a necessity for comity where a debtor is garnished

³See 25 Am. St. Rep. 259 note.

⁴Freeman v. Howe, 24 How. 456, 16 L. ed. 749. But see Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416.

⁵See Senior v. Pierce, 31 Fed. 631, Phelps v. Mutual, etc. Assn. 112 Fed. 468, 50 C. C. A. 339.

⁶Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416; Julian v. Central T. Co. 115 Fed. 962, 963, 53 C. C. A. 438.

⁷The J. W. French, 13 Fed. 916.

⁸Jervey v. The Carolina, 66 Fed. 1019.

⁹Shields v. Coleman, 157 U. S. 183, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

¹⁰See Hammock v. Farmers L. & T. Co. 105 U. S. 77, 26 L. ed. 1111. See post, § 20[3] 21.

¹¹Shields v. Coleman, 157 U. S. 183, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

¹²Hammock v. Farmers L. & T. Co. 105 U. S. 77, 26 L. ed. 1111.

¹³Attleborough, etc. Bank v. N. W. Mfg. Co. 28 Fed. 114.

¹⁴Phelps v. Mutual, etc. Assn. 112 Fed. 467, 50 C. C. A. 339.

¹⁵The Olivia A. Carrigan, 7 Fed. 510.

in one court for part or all of the debt for which a suit by his creditor is then pending or is thereafter brought in another court, State or Federal, within the same State.¹⁶ As between the suit on the debt and the garnishment suit the rule of priority prevails, determined by the time of service of process.¹⁷ If the garnishment be subsequent to the suit on the debt, that suit will still proceed and a plea of abatement is not maintainable.¹⁸ Some courts have refused to entertain such subsequent garnishment.¹⁹ The State courts apply the rule as against subsequent garnishment by the Federal court.²⁰ If the garnishment precede a suit on the debt in the same State,¹ a plea of abatement in the latter will be sustained; and recovery in the garnishment proceeding against the defendant is a defense pro tanto to the suit on the debt.² In some jurisdictions judgment will be given in suit on the debt though subsequent to the garnishment, but with stay of execution until release from the garnishment.³ After recovery of judgment on a debt in a Federal court, it is held that the judgment cannot be garnished by process out of the State court.⁴ Nor can money proceeds in hands of a court of admiralty be garnished by creditors of the owner on a State court judgment.⁵ If a garnishee shows that notwithstanding his plea of the prior garnishment in a suit elsewhere on the debt he was compelled to pay, judgment will not be given against him in the garnishment proceeding.⁶ In admiralty it has been held that freight money may be ordered paid into court, though the party owing it has previously been garnished in a common law action.⁷

¹⁶The rule does not apply to suit in another State: *Lancashire, etc. Co. v. Corbetts*, 165 Ill. 600, 56 Am. St. Rep. 281, 46 N. E. 633, 36 L.R.A. 643; *Cole v. Fliteroft*, 47 Md. 315.

¹⁷*North, etc. Co. v. First Nat. Bk.* 3 Tex. Civ. App. 295, 22 S. W. 992.

¹⁸*Wallace v. McConnell*, 13 Pet. 151, 10 L. ed. 95; *Campbell v. Emerson*, 2 McLean, 33, Fed. Cas. No. 2,357; *Greenwood v. Rector*, Hempst. 708, Fed. Cas. No. 5,792; *Hauf v. Wilson*, 31 Fed. 388; *Blydenstein v. N. Y. etc. Co.* 59 Fed. 12; *Mack v. Winslow*, 59 Fed. 319, 8 C. C. A. 134; *Bingham v. Smith*, 5 Ala. 652; *Hamill v. Peck*, 11 Colo. App. 41, 52 Pac. 217; *American Bank v. Rollins*, 99 Mass. 314; *Miller v. Taylor*, 14 Tex. 541; *Burke v. Hance*, 76 Tex. 81, 18 Am. St. Rep. 31, 13 S. W. 164.

¹⁹*Perkins v. Guy*, 2 Mont. 21.

²⁰*Arthur v. Batte*, 42 Tex. 160.

¹It is no defence to suit in another State, *Deming v. Orient Ins. Co.* 78 Fed. 4.

²*Wabash, etc. R. R. v. Tourville*, 179 U. S. 322, 45 L. ed. 210, 21 Sup. Ct. Rep. 113; *Wauallace v. McConnell*, 13 Pet. 151, 10 L. ed. 102; *Brown v.*

Somerville, 8 Md. 458; *Minor v. Rogers* C. C. 25 Mo. App. 81. But see *Lynch v. Hartford F. I. Co.* 17 Fed. 627; *Avery v. Boston, etc. Co.* 72 Fed. 700; *Barnsdall v. Waltenmeyer*, 142 Fed. 415.

³*Howland v. Chicago, etc. R. R.* 134 Mo. 482, 36 S. W. 31; *Virginia, etc. Co. v. New York, etc. Co.* 95 Va. 518, 28 S. E. 889, 40 L.R.A. 239, and cases cited.

⁴*Thomas v. Wooldridge*, 2 Woods, 667, Fed. Cas. No. 13,918 per Bradley, J.; *Alabama, etc. Co. v. Girardy*, 9 Fed. 142; *Henry v. Gold P. Co.* 15 Fed. 650, 5 McCrary 70; *Loomis v. Carrington*, 18 Fed. 97; *American Bank v. Snow*, 9 R. I. 11, 98 Am. Dec. 364. See *Scott v. Rohman*, 43 Neb. 629, 47 Am. St. Rep. 775, 62 N. W. 49.

⁵*The Lottawanna*, 20 Wall. 223, 22 L. ed. 259; *In re Forsyth*, 78 Fed. 302.

⁶*Virginia, etc. Co. v. New York, etc. Co.* 95 Va. 518, 28 S. E. 889, 40 L.R.A. 239.

⁷*The Caroline*, 1 Low. 173; Fed. Cas. No. 2,419.

§ 18. — persons in custody—habeas corpus.

While there often exists a concurrent jurisdiction to punish an act because an offense against both State and Federal laws, no conflict between State and Federal courts seems ever to have resulted therefrom.^[a] The Federal courts, however, have a power to release on habeas corpus, State prisoners detained in violation of some Federal right, and this power, while it cannot create a conflict, has been deemed of so delicate a nature, as to require caution and temperate forbearance in its exercise. The Supreme Court has accordingly laid down and follows several rules governing the issuance of the writ for the release of State prisoners.^[b]

Author's section.

[a] Conflict of jurisdiction as to persons in custody.

As is elsewhere shown, many acts constitute crimes against both State and nation, with a resulting concurrent power of punishment in State and Federal courts.¹ There seem to be no cases in which conflict has arisen from attempts to prosecute the same person concurrently in the State and Federal courts, although there are cases where an accused has sought to create embarrassment between the two courts.² In case of such conflict the right to proceed would, by analogy to civil cases of concurrent jurisdiction, belong to the court in which proceedings looking to the apprehension of the defendant were first taken,³ or if arrest preceded the filing of information or complaint, then to the arresting court, if prior in time to the proceedings in the other court.

[b] When habeas corpus will issue to release State prisoner.

The cases calling for comity and forbearance between Federal and State tribunals are those in which habeas corpus is sought in one to free a person in custody of the other. State courts have no power upon habeas corpus to free a person in Federal custody and held by Federal authority.⁵ But the Federal courts are empowered by habeas corpus to inquire into the detention of persons by a State in violation of the Federal Constitution and laws or for acts done or omitted pursuant to such laws or for acts done or omitted under any right or authority derived from a foreign power, and thereupon to deal with such person "as law and justice re-

¹See ante, § 15.[b]

²United States v. French, 1 Gall. 1, Fed. Cas. No. 15,165; Mackin v. People, (Ill.) 8 N. E. 178; In re Fox, 51 Fed. 427.

³See In re Johnson, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 737.

⁵Duncan v. Darst, 1 How. 308, 11 L. ed. 139; Ableman v. Booth, 21 How. 523, 16 L. ed. 169; Tarble's

Case, 13 Wall. 403, 20 L. ed. 599; Robb v. Connolly, 111 U. S. 639, 28 L. ed. 547, 4 Sup. Ct. Rep. 544; Ex parte Royall, 117 U. S. 250, 29 L. ed. 868, 6 Sup. Ct. Rep. 739, Ex parte Kelly, 37 Ala. 476; In re Copenhaver, 118 Mo. 383, 40 Am. St. Rep. 384, 24 S. W. 162; In re Johnson, 46 Fed. 480.

quire."⁶ This gives the Federal courts a very important power of interference in criminal proceedings in State courts. With a view to harmony and out of respect to the co-ordinate State tribunals, the Federal courts have declared that they have a right in their discretion, to decline to pass upon the Federal questions raised, by the writ of habeas corpus, and to leave them for settlement by the ordinary method of trial and appeal in the State courts and thereafter by writ of error in the Federal Supreme Court.⁷ Where a State imprisons for an act done or omitted under some Federal authority or under a right or authority derived from a foreign State, the operations of the Federal government and its relations to foreign nations are involved; and in such cases because of their urgency and importance, the summary process of habeas corpus may properly be resorted to in advance of trial in the State court.⁸ But urgency is not deemed to exist even in such cases, where the petitioner is not an officer of the United States and his authority to do the act is doubtful.⁹ Where the detention by State authority is claimed to be in violation of the Federal Constitution or laws the general rule is that a Federal court will not release the prisoner on habeas corpus in advance of trial in the State court except under special circumstances, requiring immediate action.¹⁰ The practice of thus passing upon a Federal question before it has been raised and decided in the State court is not to be encouraged.¹¹

After trial in the State court the Federal court will still exercise its discretion in deciding whether the accused shall be put to his writ of error from the highest court of the State, or whether by habeas corpus it will summarily determine the alleged violation of the Federal Constitu-

⁶See post, § 1670 et seq. See *Ex parte Rogers*, 138 Fed. 961.

⁷*Ex parte Royall*, 117 U. S. 253, 29 L. ed. 868, 6 Sup. Ct. Rep. 741; *Whitten v. Tomlinson*, 160 U. S. 241, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Tinsley v. Anderson*, 171 U. S. 105, 43 L. ed. 96, 18 Sup. Ct. Rep. 807; *Minnesota v. Brundage*, 180 U. S. 501, 45 L. ed. 640, 21 Sup. Ct. Rep. 455, and cases cited; *McElvaine v. Brush*, 142 U. S. 160, 25 L. ed. 971, 12 Sup. Ct. Rep. 158.

⁸*Ex parte Royall*, 117 U. S. 252, 29 L. ed. 868, 6 Sup. Ct. Rep. 740; *In re Neagle*, 135 U. S. 41, 70, 34 L. ed. 55; 10 Sup. Ct. Rep. 658; *New York v. Eno*, 155 U. S. 94, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Ohio v. Thomas*, 173 U. S. 284, 43 L. ed. 702, 19 Sup. Ct. Rep. 456; *Boske v. Comingore*, 177 U. S. 466, 44 L. ed. 849, 20 Sup. Ct. Rep. 701; *In re Reinitz*, 39 Fed. 204, 4 L.R.A. 236; *Ex parte Conway*, 48 Fed. 77; *In re Waite*, 81 Fed. 359; *Campbell v. Waite*, 88 Fed. 107, 31 C. C. A. 403;

In re Anderson, 94 Fed. 487; *In re Loney*, 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; *Anderson v. Elliott*, 101 Fed. 609, 41 C. C. A. 521; *United States v. Fuellhart*, 106 Fed. 911.

⁹*In re Matthews*, 122 Fed. 248.

¹⁰*Ex parte Royall*, 117 U. S. 253, 29 L. ed. 868, 6 Sup. Ct. Rep. 741; *Tinsley v. Anderson*, 171 U. S. 105, 43 L. ed. 97, 18 Sup. Ct. Rep. 807; *Davis v. Burke*, 179 U. S. 402, 45 L. ed. 251, 21 Sup. Ct. Rep. 210; *United States v. Chapel*, 54 Fed. 140; *Ex parte Coy*, 32 Fed. 911; *United States v. Fiscus*, 42 Fed. 397; *United States v. McAleese*, 93 Fed. 656, 35 C. C. A. 529; *In re Bradley*, 96 Fed. 970; *Ex parte Glenn*, 103 Fed. 947; *Rogers v. Peck*, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87.

¹¹*Cook v. Hart*, 146 U. S. 195, 36 L. ed. 934, 13 Sup. Ct. Rep. 40. At circuit these principles have not always been followed: *In re Beine*, 42 Fed. 545; *In re White*, 43 Fed. 913, 11 L.R.A. 284.

tion and laws involved in his detention.¹² Special circumstances making out a case of urgency must appear before the Federal court will interfere.¹³ The same is true after decision in the State appellate court, and error is the proper mode of redress.¹⁴ In deciding whether a particular case is so urgent as to demand the exercise of this summary power, before and after trial, the Federal court will take into consideration and its decision will be influenced by the ability of the accused to give bail, and the reasonableness of the bail exacted;¹⁵ failure to raise the constitutional question in the State court;¹⁶ the prospect of a speedy trial in the State court;¹⁷ the absence of remedy by appeal of one convicted of contempt;¹⁸ the fact that no Federal indictment has been made in cases where release is sought because the act is only an offense against the Federal government;¹⁹ fact of want of diligence in the State courts;²⁰ the fact that the statute upon which the prosecution is founded, is admittedly valid;¹ the fact that an ordinance is plainly invalid;² the fact that the offense is plainly beyond the jurisdiction of the State;³ the existence of doubt as to the alleged violation of the Federal Constitution;⁴ the fact that petitioner himself instigated the state proceedings against him.⁵ But the fact that large interests affecting the business of many or the rights of the public are involved has recently been declared not a sufficient reason for discharge under the writ.⁶ The principle of these cases applies

¹²Ex parte Royall, 117 U. S. 253, 29 L. ed. 868, 6 Sup. Ct. Rep. 741; Duncan v. McCall, 139 U. S. 454, 35 L. ed. 222, 11 Sup. Ct. Rep. 573; Whitten v. Tomlinson, 160 U. S. 242, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; In re King, 51 Fed. 434; Nesbit v. Hert, 91 Fed. 123; Eaton v. West Virginia, 91 Fed. 760, 34 C. C. A. 68; Ex parte McMinn, 110 Fed. 954.

¹³Ex parte Fonda, 117 U. S. 518, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89; Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87.

¹⁴In re Wood, 140 U. S. 290, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; Whitten v. Tomlinson, 160 U. S. 242, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; Tinsley v. Anderson, 171 U. S. 104, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89.

¹⁵Ex parte Royall, 117 U. S. 250, 27 L. ed. 868, 6 Sup. Ct. Rep. 739; Baker v. Gwice, 169 U. S. 293, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; In re Flinn, 57 Fed. 496.

¹⁶Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210;

Gusman v. Marrero, 180 U. S. 81, 45 L. ed. 436, 21 Sup. Ct. Rep. 293.

¹⁷Ex parte Royall, 117 U. S. 252, 29 L. ed. 868, 6 Sup. Ct. Rep. 742.

¹⁸Ex parte Stricker, 109 Fed. 145.

¹⁹New York v. Eno, 155 U. S. 98, 39 L. ed. 80, 15 Sup. Ct. Rep. 33; In re Fox, 51 Fed. 427.

²⁰Minnesota v. Brundage, 180 U. S. 501, 45 L. ed. 640, 21 Sup. Ct. Rep. 455.

¹In re Wood, 140 U. S. 290, 35 L. ed. 505, 11 Sup. Ct. Rep. 738.

²In re Ah Jow, 29 Fed. 181; In re Christensen, 43 Fed. 243; Ex parte Green, 114 Fed. 959.

³In re Loney, 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; In re Ladd, 74 Fed. 31. See in re Bradley, 96 Fed. 970.

⁴Ex parte Hanson, 28 Fed. 127.

⁵In re Alexander, 84 Fed. 633.

⁶Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. Rep. 457, 45 L. ed. 639, reversing circuit court. In re Brundage, 96 Fed. 963, 969. Contra, see Ex parte Jervey, 66 Fed. 957; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 Sup. Ct. Rep. 862; Ex parte Kieffer, 40 Fed. 39.

to an attempt to review a State court's commitment for contempt.⁷ The commitment of persons to a State insane asylum is a matter for the States to regulate, and Federal courts will not generally interfere by habeas corpus.⁸

§ 19. — power of State or Federal court to vacate or relieve against the others judgment or decree.

When and to what extent a Federal court may attack or relieve against a State court's judgment or decree, is not altogether clear.^[a] Plainly inferior Federal courts have no supervisory or appellate jurisdiction over State tribunals, except in the special case of habeas corpus; and the salutary doctrine of *res adjudicata* should apply with especial force between the co-ordinate State and Federal tribunals. Moreover, a Federal court's power to take cognizance of a proceeding attacking a State judgment or decree, is necessarily limited to such as may fairly be deemed independent and original, involving a new case and depending upon new facts, as distinguished from proceedings ancillary and incidental, such as motion for new trial or bill of review based upon irregularities or newly discovered evidence. The original jurisdiction and their jurisdiction on removal is over suits,¹¹ and not over some incidental petition, motion or proceeding. Notwithstanding these limitations, however, they have an undoubted power to relieve against the effect of State judgment on equitable grounds. There is a distinction which, it is conceived, is of controlling importance, between a direct attack on a judgment by proceeding to vacate or annul it, and an indirect attack which, without attempting to disturb such judgment, deprives the parties of the benefits thereof and restrains its enforcement. The latter power has been exercised by courts of equity since long prior to the foundation of our government; and has never been deemed an exercise of appellate power over courts of law. Hence a Federal proceeding in equity for this indirect relief against a State judgment at law, or even a State decree in equity, is not to be deemed objectionable because an exercise of an appellate power.^[b] It is true that anciently there was no occasion for seeking indirect rather than direct relief against a decree in equity. Yet if a party chooses relief against the effect of a State decree in equity, rather than its reformation or annulment, and can show

⁷*Popke v. Cronan*, 155 U. S. 101, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; *Ex parte Stricker*, 109 Fed. 145. ⁸*In re Huse*, 79 Fed. 305, 25 C. C. A. 1; *Hoadly v. Chase*, 126 Fed. 818.

sufficient equitable grounds therefor, it would seem permissible that he apply to the Federal court.^[c] Where, however, direct relief is sought against a judgment or decree, by annulling, vacating or setting it aside, the rule is otherwise. Such relief is properly sought in the court making the judgment or decree, or else in an appellate court, and not in a court of co-ordinate jurisdiction. A proceeding therefore, in the Federal court to vacate a State judgment or decree would be objectionable because an exercise of appellate power and, where relief is sought for newly discovered evidence and not for fraud or want of jurisdiction, would be further objectionable because merely ancillary and incidental. The only present modification of this general rule seems to be that a statutory proceeding to vacate a judgment for fraud, which in all essentials is an original independent suit, may be removed to the Federal court for trial.^[d] With respect to the power of State courts over the judgments and decrees of Federal courts, it is clear that they may not entertain any proceeding directly attacking them. Such proceedings must be in the Federal court, where they are permitted, as ancillary, and regardless of the citizenship of the parties. It is not so clear that they would be competent to entertain a suit in equity for indirect relief against a Federal judgment upon equitable grounds.^[e]

Author's section.

[a] The case of *Barrow v. Hunton* considered.

Portions of the opinion in *Barrow v. Hunton*,¹² are responsible for the unsatisfactory condition of the authorities upon this subject. The case held that a statutory proceeding to vacate a judgment for want of service was not removable to the Federal court. It was concerned therefore with a direct attack on a State judgment. A distinction was there drawn between an attack on a State court's judgment by supplementary proceeding and by a separate suit. A supplementary proceeding to set aside a judgment for irregularity was declared to be ancillary and beyond the Federal court's jurisdiction on removal. "On the other hand" proceeded the court, "if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding and according to the doctrine laid down in *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524, the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist." But *Gaines v. Fuentes* was a case seeking relief, indirectly against the effect

¹¹Post, §§ 129, et seq.

¹²*Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407.

of a State probate decree and sale; and the distinction between the two cases was not only that between an original and a supplementary proceeding, but between a direct and an indirect attack upon a State decree. Other cases have similarly spoken of setting aside State decrees for fraud.¹³ But the more carefully considered opinions, including one by the same eminent judge in a later case, note the inaccuracy of this expression and declare that "the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage they have derived under it."¹⁴ "While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper circuit court of the United States may, without controlling, supervising, or annulling the proceedings of State courts, give such relief . . . as is consistent with the principles of equity."¹⁵ In other cases the Supreme Court has expressly denied the power of the circuit court to set aside State court's decrees for fraud.¹⁶ It is plain therefore that when subsequent cases have accepted the language of *Barrow v. Hunton* as furnishing a test of their power to vacate or relieve against State judgments they have been in danger of error.¹⁷ There is nothing in the decision or in the opinion inconsistent with the theory that the Federal inferior courts cannot under any circumstances vacate a State court's judgment or decree. Yet the case is largely responsible for the later decision that a State statutory proceeding to annul a State court's judgment for fraud, is removable to the Federal court.¹⁸ It would seem unsafe to declare that the doctrine of this later case will be extended so as to sustain the right to bring such a proceeding originally in the circuit court.

[b] Federal court's power to relieve against effect of State court judgments.

Equity has long possessed the power to relieve against the effect of the judgments of other courts, upon the ground of fraud, accident, mistake and the like. It acts upon the parties, and not upon the court rendering the judgment or decree.¹ This equitable power to relieve indirectly against the proceedings of other courts or proceedings upon the law side of the same

¹³See *Young v. Sigler*, 48 Fed. 182; *vis Co.* 73 Fed. 11, 12; *Davenport v. Wonderly v. Lafayette Co.* 150 Mo. Moore, 74 Fed. 949; *Hunt v. Fisher*, 635, 73 Am. St. Rep. 474, 51 S. W. 29 Fed. 801.
750, 45 L.R.A. 391.

¹⁴*Johnson v. Waters*, 111 U. S. 17 L. ed. 269; *Nogue v. Clapp*, 101 667, 28 L. ed. 556, 4 Sup. Ct. Rep. U. S. 551, 25 L. ed. 1026.
619.

¹⁵*Arrowsmith v. Gleason*, 129 U. 295, 1 McCrary, 291.

¹⁶*Randall v. Howard*, 2 Black, 585, 18 Cowley v. Northern Pac. Ry. 159 S. 99, 32 L. ed. 635, 9 Sup. Ct. Rep. U. S. 569, 40 L. ed. 263, 16 Sup. Ct. 241. And see: *Rhino v. Emery*, 72 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Fea. 386, 18 C. C. A. 600; *De Neufville v. New York, etc. Ry.* 81 Fed. Rep. 127.

¹⁷See *Sahlgard v. Kennedy*, 2 Fed. 295, 1 McCrary, 291.
¹⁸*Johnson v. Waters*, 111 U. S. 667, 28 L. ed. 556, 4 Sup. Ct. Rep. 619;

court pertains to the Federal circuit court sitting in equity,² and may be exercised as respects proceedings and judgments of State courts where the jurisdictional diverse citizenship and value in dispute exist; and notwithstanding the fact that the State law provides a statutory mode of obtaining relief in its own courts.³ Hence in case of sales under a probate court's decree procured and effected through fraud, the Federal court may deprive the parties of the benefit of such sales upon an original bill in equity maintained in such circuit court.⁴ Where a divorce is fraudulently procured, the Federal court may relieve against the effect thereof so far as property rights are involved.⁵ It may entertain a bill to set aside a sale of a ward's lands fraudulently procured by a guardian in a State court;⁶ or a sale for taxes irregularly procured.⁷ It may enjoin enforcement of a State court's judgment obtained through accident or fraud, and which is therefore inequitable;⁸ or enjoin foreclosure sale;⁹ or set aside a partition sale fraudulently procured;¹⁰ or enjoin or set aside a sheriff's sale;¹¹ or a sale in an action in which defendant's appearance was fraudulently entered.¹² Where a Federal court of equity ordered cancellation of a marriage contract as a forgery, and the State court in a suit brought after the Federal suit but proceeding concurrently therewith, found it valid and decreed divorce and alimony, the Federal court enjoined the parties from proceeding to enforce the State judgment.¹³ Where the customary or statute law of a State permits a proceeding essentially equitable in nature to cancel a will and limit the enforcement of a decree admitting it to probate, such proceeding may be removed to the local Federal court which may exercise this supervisory equitable power equally with the State court.¹⁴ There would seem to be no objection to declaring the power of the Federal courts of equity as large as that exercised by State tribunals in giving relief indirectly against probate or other State proceedings. But equity has

Arrowsmith v. Gleason, 129 U. S. 98, 9 L. ed. 237, 9 Sup. Ct. Rep. 240; De Neufville v. New York, etc. R. R. 81 Fed. 13, 26 C. C. A. 306; Hunt v. Fisher, 29 Fed. 801.

²See Platt v. Threadgill, 80 Fed. 195.

³Noyes v. Willard, 1 Wood, 187, Fed. Cas. No. 10,374; National S. Co. v. State Bank of Humboldt, 120 Fed. 593, 56 C. C. A. 657, 61 L.R.A. 394; Davenport v. Moore, 74 Fed. 945.

⁴Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; Rhino v. Emery, 72 Fed. 382, 18 C. C. A. 600.

⁵Daniels v. Benedict, 50 Fed. 347. And see McNeil v. McNeill, 78 Fed. 834, holding it may annul a State divorce decree.

⁶Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237.

⁷De Forest v. Thompson, 40 Fed. 375.

⁸National S. Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L.R.A. 394; Stackhouse v. Zunts, 15 Fed. 482, 4 Woods, 171; Marshall v. Holmes, 141 U. S. 596, 35 L. ed. 870, 12 Sup. Ct. Rep. 62.

⁹Carver v. Jarvis Co. 73 Fed. 9; Sahlgard v. Kennedy, 2 Fed. 297.

¹⁰Hatch v. Ferguson, 52 Fed. 833.

¹¹Massie v. Buck, 128 Fed. 31.

¹²62 C. C. A. 535; Davenport v. Moore, 74 Fed. 945; Northern Pac. Ry. v. Kurtzmar, 82 Fed. 243.

¹³Robb v. Vos, 155 U. S. 38, 39 L. ed. 61, 15 Sup. Ct. Rep. 13.

¹⁴Sharon v. Terry, 36 Fed. 337, 1 L.R.A. 592, 13 Sawy. 429.

¹⁵Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 528.

no jurisdiction to set aside the probate of a will on the ground of forgery.¹⁵ The Federal court will not interfere where the matters relied upon have been urged upon the State court in seeking a new trial there.¹⁶ Where by mistake judgment in a cause is entered for less than the proper amount and it is too late to obtain relief by proceedings in that cause, a bill for relief in equity is maintainable and is so far original that it may be removed to the Federal court.¹⁷ It is also competent for the Federal court to cancel a certificate of naturalization fraudulently procured from a State court.¹⁸ Where a State court's judgment is void for want of jurisdiction the aggrieved party may often have relief without suing to restrain its enforcement, as a Federal court will refuse to recognize it either at law or in equity in any proceeding seeking to give it effect.¹⁹

[c] Federal relief in equity against State equity decree.

A few decisions of the Supreme Court in which parties seeking relief against State foreclosure decrees for fraud have been remitted to the State courts,¹ seem to suggest that the Federal courts will not relieve against State decrees in equity upon the ordinary equitable grounds, as they will against State proceedings at law. None of the cases however attempt to draw this distinction in terms. There are doubtless several equitable grounds apart from any question of the power of the Federal court for a refusal in most cases to entertain an application of such a complainant in another tribunal. There is a probability that his plea of fraud has been within issues already disposed of by the court of original cognizance and perhaps a propriety in compelling him to exhaust his remedies in a tribunal equally competent to afford relief.² The State decree may be interlocutory and open to review by the State court by petition or motion in the cause.³ The nature and circumstances of the equity claimed may be such that the relief sought is purely ancillary and a supplemental bill or bill of review for newly discovered evidence presented to the State court the proper and only remedy.⁴ These cases perhaps illustrate the necessity for proper grounds of equitable interference by and relief in another court, rather than a want of power in the circuit court to relieve parties from a decree vitiated by fraud or invalid for want of jurisdiction.⁵

¹⁵Case of Brodericks Will, 21 Wall. L. ed. 196, 6 Sup. Ct. Rep. 1018. See 503, 22 L. ed. 599.

¹⁶Bailey v. Willeford, 126 Fed. 807.

¹⁷Pelzer Mfg. Co. v. Hamburg Ins. Co. 62 Fed. 2.

¹⁸United States v. Norsch, 42 Fed. 418; United States v. Gleason, 90 Fed. 778, 33 C. C. A. 272.

¹⁹Cooper v. Newell, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; First Nat. Bank v. Cunningham, 48 Fed. 510.

¹Randall v. Howard, 2 Black, 585, 17 L. ed. 269; Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026; Graham v. Boston, etc. R. R. 118 U. S. 178, 30

L. ed. 196, 6 Sup. Ct. Rep. 1018. See also; Furnald v. Glenn, 64 Fed. 54, 12 C. C. A. 27; Foote v. Glenn, 52 Fed. 530. Contra, see Sahlgard v. Kennedy 2 Fed. 295, 1 McCrary, 291.

²Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026; Graham v. Boston, etc. R. R. 118 U. S. 178, 30 L. ed. 196, 6 Sup. Ct. Rep. 1018; Pacific R. R. v. Missouri P. R. R. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583.

³Graham v. Boston, etc. R. R. 118 U. S. 178, 30 L. ed. 196, 6 Sup. Ct. Rep. 1018.

⁴Graver v. Faurot, 64 Fed. 241.

⁵See Carver v. Jarvis Co. 73 Fed. 9.

[d] Federal court's power to vacate or annul State court judgments.

The general rule is that a Federal court cannot annul or vacate a State court judgment for fraud or otherwise, since the inferior Federal courts have no appellate jurisdiction over State tribunals, and indeed are bound to give their judgments full faith and credit.⁸ It is equally improper for them to set aside a satisfaction of a State court's judgment.⁹ The proper court to vacate a judgment is the court rendering it,¹⁰ and if it be a Federal decree the application for relief is maintainable in the Federal court as ancillary and regardless of citizenship.¹¹ In a few cases, seeking relief against State judgments, for want of jurisdiction, a distinction is drawn between a latent defect and a want of jurisdiction apparent upon the face of the record.¹² But this would seem to have reference to the propriety and necessity for interference by a court of equity, and not to the question of the power of a Federal court over a State court's decree. In one case at circuit the right to maintain a bill in the Federal court to annul a State court's divorce decree for want of service, was recognized.¹³

The law of many States now provides a statutory mode for vacating a judgment upon application to the court rendering the same. If this statutory proceeding is merely a supplemental or ancillary application in the original cause, e. g., a motion to set aside a default judgment for want of service, it is not removable to the Federal court.¹⁴ But where a statutory application to vacate a judgment for fraud virtually constitutes an original proceeding, the Supreme Court has held that it may be removed to the Federal court.¹⁵

[e] State courts' power to relieve against Federal judgments.

It belongs to the Federal, and not to the State courts to revise and

⁸*Nogue v. Clapp*, 101 U. S. 551, 25 L. ed. 1026; *Graham v. Boston*, etc. R. R. 118 U. S. 177, 30 L. ed. 204, 6 Sup. Ct. Rep. 1018; *Hendrickson v. Bradley*, 85 Fed. 515, 29 C. C. A. 303; *Amory v. Amory*, 3 Biss. 266, Fed. Cas. No. 334; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Robinson v. Fair*, 128 U. S. 86, 87, 32 L. ed. 415, 9 Sup. Ct. Rep. 30; *Elder v. Richmond M. Co.* 58 Fed. 540, 7 C. C. A. 354. But see *McNeil v. McNeil*, 78 Fed. 834; *Sahlgard v. Kennedy*, 2 Fed. 295.

⁹*Lauderdale Co. v. Foster*, 23 Fed. 516.

¹⁰*Randall v. Howard*, 2 Black, 585, 17 L. ed. 269; *Nogue v. Clapp*, 101 U. S. 551, 25 L. ed. 1026; *Amory v. Amory*, 2 Biss. 266, Fed. Cas. No. 334. See *Hendryx v. Perkins*, 114 Fed. 801, 52 C. C. A. 435.

¹¹See ante, § 3.

¹²*Little Rock, etc. Ry. v. Burke*, 66 Fed. 83, 13 C. C. A. 341; *Blythe v. Hinckley*, 84 Fed. 246; *Bledsoe v. Erwin*, 33 La. Ann. 617.

¹³*McNeil v. McNeil*, 78 Fed. 834. The Federal court may undoubtedly relieve against a divorce decree upon equitable grounds, so far as respects alimony, *Sharon v. Terry*, 36 Fed. 337, 1 L.R.A. 592, 13 Sawy. 429; or other property rights, *Daniels v. Benedict*, 50 Fed. 347.

¹⁴*Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Edwards Mfg. Co. v. Sprague*, 76 Me. 61; *Smith v. Schwed*, 9 Fed. 483.

¹⁵*Cowley v. Northern P. R. R.* 159 U. S. 579, 40 L. ed. 266, 16 Sup. Ct. Rep. 129; *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156; *In re Iowa*, etc. Co. 10 Fed. 402. See *supra*, note, [a]

correct proceedings of inferior Federal courts.¹ The State tribunals have no power to enjoin proceedings in a Federal court.² An aggrieved party seeking relief directly or indirectly against a Federal judgment or decree should apply to the Federal court, which will entertain his application regardless of citizenship.³ It has sometimes been declared that a State court of equity may relieve indirectly and upon equitable grounds against the enforcement of an unconscionable Federal judgment by depriving parties of the benefit thereof, just as the Federal courts will relieve against a State judgment.⁴ But it is not altogether clear that they have this power and the reasoning of many cases is against it.⁵ The grant of jurisdiction for diverse citizenship which compels the Federal court to assume the power to relieve against State judgments, already considered, is wanting in the case of the State courts. And while they may refuse to allow a plea of *res adjudicata* where a Federal judgment was removed without jurisdiction and to that extent relieve against it, it would seem a proper rule of comity, even if no more fundamental considerations require it, that they compel one seeking relief against a Federal judgment to resort to the Federal court.

§ 20. — Federal injunction to stay proceedings in State courts.

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State,^{[a]-[e]} except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.^[f]

Rev. Stats. § 720, U. S. Comp. Stats. 1901, p. 581.

[a] Federal injunction against State court proceedings.

The first portion of the foregoing section was enacted in 1793. The exception of bankruptcy cases was added upon the adoption of the revised statutes and is to be read in connection with § 11 of the bankrupt act of 1898.¹⁰ The section is also to be read in connection with R. S. § 716,¹¹ authorizing the Federal courts to issue all writs necessary to the exercise of their respective jurisdictions; and in connection with R. S. § 646,¹² as to injunctions granted before removal of a cause from a State court. But it is not affected by R. S. § 1979, respecting civil rights.¹³ Notwithstanding the clear and unequivocal language of the section and the frequency with which its mandate has been reiterated by the courts,¹⁴

¹Ableman v. Booth, 21 How. 526, 16 L. ed. 169; *Semple v. Hagar*, 27 Cal. 170.

²See post, § 21.

³See ante, § 3, note.[e]

⁴*Ralston v. Sharon*, 51 Fed. 707; *Wonderly v. Lafayette Co.* 150 Mo. 653, 73 Am. St. Rep. 474, 51 S. W. 750, 45 L.R.A. 391. See *Central Nat. Bank v. Hazard*, 49 Fed. 296.

⁵See post, § 21.

¹⁰See post, § 2201 et seq.

¹¹*Fisk v. Railway Co.* 10 Blatchf. 520, Fed. Cas. No. 4,830; *Sharon v. Terry*, 36 Fed. 366, 1 L.R.A. 572, 13 Sawy. 429. See post, § 841.

¹²*Perry v. Sharpe*, 8 Fed. 24. See post, § 1153.

¹³*Hemsley v. Myers*, 45 Fed. 283.

¹⁴*Diggs v. Wolcott*, 4 Cranch, 179, 2 L. ed. 587; *Haines v. Carpenter*, 91 U. S. 257, 23 L. ed. 345; *Dial v. Rey-*

the task of reconciling the decided cases with its provisions, involves a resort to many nice distinctions, and a recognition of the fact that judicial exposition has robbed it of much of its force. Doubtless one of the chief purposes of its enactment was to forbid an exercise of supervisory or appellate power over State court proceedings through the agency of the writ of injunction, and it has been effective to that end. It has been effective in preventing injunction directly against a court, and, generally, against its officers. In cases where the writ issues to stay State court proceedings, it is directed to the parties and seeks only to control their acts, although it is conceded in other cases that an injunction to restrain proceedings in another court is no less objectionable because directed to the parties, and not to the court.¹⁵ It has been effective also in preventing the maintenance of Federal suits for the express purpose of enjoining proceedings begun in State courts, and where the injunction was not merely an incident to other relief sought.¹⁶

The difficulty with giving the latitude and scope to the operation of this section warranted by its language, is that strong equitable reasons often exist for protecting rightful Federal jurisdiction in this summary way rather than by the tedious and circuitous remedy of writ of error to the highest State court.¹⁷ The use of injunction for the purpose of rendering Federal jurisdiction effective, often prevents the enjoined party from instituting vexatious proceedings in the State tribunals.¹⁸ Equally strong equitable reasons sometimes exist for injunction against proceedings which are objectionable, not because prosecuted in a State court but because in a court of law, and which are or will be rendered useless or vexatious by the decision of some paramount and controlling issue in the court of chancery.¹⁹ Another circumstance which has contributed to the creation of precedents antagonistic to the mandate of R. S. § 720, is the fact that

nolds, 96 U. S. 340, 24 L. ed. 644; *Ex parte Schwab*, 98 U. S. 241, 25 L. ed. 105; *In re Sawyer*, 124 U. S. 219, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Peck v. Jenness*, 7 How. 625, 12 L. ed. 841; *Moran v. Sturges*, 154 U. S. 268, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *United States v. Parkhurst-Davis Co.* 176 U. S. 320, 44 L. ed. 486, 20 Sup. Ct. Rep. 423; *Dillon v. Kansas*, C. R. R. 43 Fed. 111; *Moloney v. Massachusetts, etc. Assn.* 53 Fed. 209; *Guaranty T. Co. v. North, etc. R. R.* 130 Fed. 801, 65 C. C. A. 65; *Security T. Co. v. Union & Co.* 134 Fed. 301.

¹⁵*Peck v. Jenness*, 7 How. 625, 12 L. ed. 841; *Haines v. Carpenter*, 91 U. S. 254, 23 L. ed. 345; *Dial v. R. R. Co.* 96 U. S. 340, 24 L. ed. 644; *Ex parte Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *Yick Wo v. Crowler*, 26 Fed. 207; *Coeur d'Alene Ry. v. Spalding*, 93 Fed. 280, 35 C. C. A. 295; *Security T. Co. v. Union T. Co.* 134 Fed. 301. The Federal Court may enjoin trespass notwithstanding proceedings by the trespasser in the State court to condemn a right of way: *Colorado, etc. Ry. v. Chicago, etc. Ry.* 141 Fed. 898.

¹⁶*Garner v. Second Nat. Bank*, 67 Fed. 833, 16 C. C. A. 86; *Central T. Co. v. St. Louis, etc. Ry.* 59 Fed. 385; *Terre H. R. R. v. Peoria, etc. R. R.* 82 Fed. 943; *Massie v. Buck*, 128 Fed. 31, 62 C. C. A. 535.

¹⁷*See Julian v. Central T. Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399.

¹⁸*Fisk v. Union Pac. Ry. Co.* 10 Blatchf. 520, Fed. Cas. No. 4830; *Texas & P. Ry. v. Kuteman*, 54 Fed. 551, 4 C. C. A. 503.

¹⁹*See for example, Hamilton v. Walsh*, 23 Fed. 420.

where the enjoined proceeding was one from which the party ought properly to desist, no right of his is injured by the court's improper issuance of the writ, and hence no wrong done for which relief is obtainable on appeal. The injunction stands not because of the propriety of its issuance, but because the thing it commands is proper. The word "proceedings" in the section includes all steps taken in a suit from its inception to final process.²⁰ Yet it has been said that injunction against a levy by a sheriff upon the property of some one other than the defendant in the writ does not interfere with a State court proceeding but merely with a trespass by an officer outside the scope of that proceeding;¹ although State courts have declined to enjoin levy by a marshal upon exempt property, or the property of a third person.²

It has been decided and very plausibly, that "proceedings" refers to such as are existing when the injunction is sought; and that where the injunction merely seeks to restrain the subsequent bringing of an action in the State court, it is not deemed to be within the prohibition of R. S. § 720.³ The further holding of many cases that the section only forbids injunction against State proceedings commenced prior to the Federal suit,⁴ finds less support in the wording of the section though it is often strongly justified by the necessity for protecting a prior and exclusive Federal jurisdiction.⁵ Election commissioners are not a State court within this provision.⁶ Any process or order though not strictly an injunction, regardless of its form, would be objectionable if its office was to stay State court proceedings.⁷ But a sale by an officer under a chattel mortgage in Vermont, is not a court proceeding.⁸

[b] Cases where injunction refused.

Under this section Federal courts have refused to enjoin State criminal proceedings;⁹ or proceedings to collect back taxes;¹⁰ or probate proceed-

²⁰United States v. Collins, 4 v. Union P. R. R. 10 Blatchf. 518, Blatchf. 142, Fed. Cas. No. 14,834. Fed. Cas. No. 4,830; Lanning v. Osborne, 79 Fed. 659.

¹Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416; Julian v. Central T. Co. 115 Fed. 962, 963, 53 C. C. A. 438. Contra, see Watson v. Bondurant, 2 Woods 166, Fed. Cas. No. 17,278; Perry v. Sharpe, 8 Fed. 23; Daly v. Sheriff, 1 Woods, 175, Fed. Cas. No. 3,553.

²Prugh v. Portsmouth, etc. Bank, 48 Neb. 418, 67 N. W. 311; Chapin v. James, 11 R. I. 86, 23 Am. Rep. 412.

³Transportation Co. v. Parkersburg, 107 U. S. 695, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Glucose R. Co. v. Chicago, 138 Fed. 209; Palatka W. Wks. v. Palatka, 127 Fed. 163. See Stateler v. California Nat. Bank, 77 Fed. 43.

⁴Hale v. Bugg, 82 Fed. 36; Fisk,

⁵Bowdoin Coll. v. Merritt, 59 Fed. 6; In re Whitelaw, 71 Fed. 733; Hamilton v. Walsh, 23 Fed. 420; Whitney v. Wilder, 54 Fed. 554, 4 C. C. A. 510.

⁶Busch v. Webb, 122 Fed. 655; Weil v. Calhoun, 25 Fed. 865.

⁷Ex parte Schulenberg, 25 Fed. 211, 214.

⁸Carpenter v. Talbot, 33 Fed. 539.

⁹Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 126; Fitts v. McGhee, 172 U. S. 531, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Yick Wo v. Crowley, 26 Fed. 207; Suess v. Noble, 31 Fed. 855. See Louisiana Lottery v. Fitzpatrick, 3 Woods, 222, Fed. Cas. No. 8,541.

¹⁰Aultman v. Brumfield, 102 Fed. 7; Douglas Co. v. Stone, 110 Fed. 812.

ings;¹¹ or attachment proceedings upon a Federal bill of interpleader;¹² or to enjoin the prosecution of a suit in a State court whose jurisdiction was prior to that of the Federal court;¹³ or which has already made a decree;¹⁴ or to enjoin execution sale by a sheriff of property rightfully in his possession;¹⁵ or of property claimed by a third person;¹⁶ or of property sold by a bankrupt;¹⁷ or to enjoin a bankrupt assignee from paying a dividend under a garnishment against a creditor of the bankrupt.¹⁸ They have refused to enjoin a State court from satisfying judgments prior to bankruptcy, out of proceeds of execution sale;¹⁹ to enjoin State court suit against a marshal for wrongful levy;²⁰ to enjoin State proceedings not really conflicting with a prior Federal custody;²¹ to enjoin suits brought against Indians in the State courts;¹ to enjoin ejectment proceedings in a State court;² or entry on land pending condemnation proceedings in a State court;³ or a proceeding under a law claimed to be invalid;⁴ to issue an injunction which would have the effect of settling a title in litigation between the parties in an equitable State action;⁵ to enjoin the proceedings in a State court to enforce a State court's judgment;⁶ or restrain a State garnishment proceeding served on a party while a witness before a Federal court.⁷

[c] Injunction to protect lawful exercise of Federal jurisdiction.

As already stated, R. S. § 720, must be construed in connection with R. S. § 716,¹⁰ empowering Federal courts to issue all writs necessary to the exercise of their jurisdiction.¹¹ Most of the cases where injunction has issued notwithstanding this section, are those where it was expressly or impliedly authorized by Congress as necessary to the effectual exercise of lawful jurisdiction;¹² or a mere incident to a cause seeking other re-

¹¹Hall v. Bridgeport T. Co. 123 Fed. 739; Whitney v. Wilder, 54 Fed. 554, 4 C. C. A. 510.

¹²McWhirter v. Halstead, 24 Fed. 828.

¹³Hale v. Bugg, 82 Fed. 36; Hamilton v. Walsh, 23 Fed. 420. See *infra*, note.[c]

¹⁴Chaffin v. St. Louis, 4 Dill, 23, Fed. Cas. No. 2,572.

¹⁵Ruggles v. Simonton, 3 Biss. 329, Fed. Cas. No. 12,120.

¹⁶Watson v. Bondurant, 2 Woods, 175, Fed. Cas. No. 17,278; Perry v. Sharpe, 8 Fed. 23; American Ass'n. v. Hurst, 59 Fed. 1, 7 C. C. A. 598.

¹⁷Sargent v. Helton, 115 U. S. 348, 29 L. ed. 412, 6 Sup. Ct. Rep. 78.

¹⁸Gilbert v. Lynch, 1 Fed. 114, 17 Blatchf. 402.

¹⁹Campbell's Case, 1 Abb. U. S. 189, Fed. Cas. No. 2,349.

²⁰Evans v. Pack, 2 Flipp. 274, Fed. Cas. No. 4,566.

²¹Guaranty T. Co. v. North, etc. R. R. 130 Fed. 801, 65 C. C. A. 65.

¹United States v. Parkhurst-Davis Co. 176 U. S. 320, 44 L. ed. 486, 20 Sup. Ct. Rep. 423.

²Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644.

³Dillon v. Kansas City R. R. 43 Fed. 109.

⁴Rennselaer, etc. R. R. v. Bennington, etc. R. R. 18 Fed. 618.

⁵Orton v. Smith, 18 How. 263, 15 L. ed. 393.

⁶Louisville & Co. v. Cincinnati, 73 Fed. 716.

⁷Ex parte, Schulenberg, 25 Fed. 211.

¹⁰See post, § 841.

¹¹Fisk v. Railway Co. 10 Blatchf. 520, Fed. Cas. No. 4,830; Sharon v. Terry, 36 Fed. 366, 1 L.R.A. 572, 13 Sawy. 429.

¹²Moran v. Sturges, 154 U. S. 270, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019;

lief and necessary to protect the court's jurisdiction or enforce its decrees.¹³ Thus the law limiting liability of ships impliedly authorizes injunction against damage suits in other courts after proceedings for limiting liability have been instituted.¹⁴ After removal of a case from a State court injunction is often deemed justifiable to prevent a continuance of the litigation in the State tribunal.¹⁵ So where a Federal court by priority or possession of the res in controversy, has acquired exclusive power to proceed, it will restrain the parties from proceedings in the State court.¹⁶ If the State court has priority, under principles elsewhere considered,¹⁷ it will refuse to issue injunction¹⁸ and much more will it refuse if the State court has already made a decree.¹⁹ If neither has acquired exclusive jurisdiction, and both suits may proceed concurrently without conflict, injunction will be refused.²⁰ If the Federal court did not have power to protect this prior jurisdiction vexatious proceedings might be maintained in the State tribunals.²¹ But while the Federal courts may thus protect their jurisdiction and their decrees they may not enjoin State proceedings upon the theory that their own decision concludes the issues therein as res adjudicata;¹ though it is held that a Federal court pending an appeal from its decision may restrain a suitor before it, over whom it has jurisdiction from vexatiously bringing another suit for the same cause in another State.²

Stewart v. Wisconsin C. Ry. 117 Fed. 782.

¹³*Garner v. Bank*, 67 Fed. 836, 16 C. C. A. 86; *Terre Haute, etc. R. R. v. Peoria, etc. R. R.* 82 Fed. 943; *Massie v. Buck*, 128 Fed. 31, 62 C. C. A. 535; *Chicago, etc. R. R. v. St. Joseph, etc. Co.* 92 Fed. 25.

¹⁴*Providence, etc. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379; *The Tolchester*, 42 Fed. 184; *In re Whitelaw*, 71 Fed. 735.

¹⁵See *infra*, note [d].

¹⁶*Julian v. Central T. Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Mercantile T. Co. v. Roanoke, etc. Ry.* 109 Fed. 3; *Central T. Co. v. Western N. C. R. R.* 112 Fed. 471; *Fisk v. Railroad*, 10 Blatchf. 520, Fed. Cas. No. 4,830; *Lanning v. Osborne*, 79 Fed. 657; *Missouri, etc. R. R. v. Scott*, 13 Fed. 795, 4 Woods, 386; *Terre Haute, etc. R. R. v. Peoria, etc. R. R.* 82 Fed. 943; *Hutchinson v. Green*, 6 Fed. 838, 2 McCrary, 471; *Fidelity, etc. Co. v. Norfolk, etc. Co.* 88 Fed. 815; *Iron M. R. R. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410; *Starr v. Chicago, etc. R. R.* 110 Fed. 3; *Pitt v. Rodgers*, 104 Fed.

387, 43 C. C. A. 600; *State T. Co. v. Kansas City R. R.* 110 Fed. 10; *Union, etc. Co. v. Riggs*, 123 Fed. 312. But see *Guaranty T. Co. v. North, etc. R. R.* 130 Fed. 801, 65 C. C. A. 65.

¹⁷See *ante*, § 16.

¹⁸*Oliver v. Parlin, etc. Co.* 105 Fed. 272, 45 C. C. A. 200; *Evans v. Gorman*, 115 Fed. 399; *Hamilton v. Walsh*, 23 Fed. 420; *Gates v. Bucki*, 53 Fed. 969, 4 C. C. A. 116; *Chicago, T. Co. v. Bentz*, 59 Fed. 647; *Whitney v. Wilder*, 54 Fed. 554, 4 C. C. A. 510. See *Orton v. Smith*, 18 How. 263, 15 L. ed. 393.

¹⁹*Chaffin v. St. Louis*, 4 Dill. 23, Fed. Cas. No. 2,572.

²⁰*Benjamin v. Brooklyn, U. E. R. R.* 120 Fed. 428; *Copeland v. Bruning*, 127 Fed. 550, 63 C. C. A. 435.

²¹*Fisk v. Union Pac. Ry. Co.* 10 Blatchf. 520, Fed. Cas. No. 4,830; *Texas & P. Ry. v. Kuteman*, 54 Fed. 551, 4 C. C. A. 503.

¹*Chicago, etc. R. R. v. St. Joseph, etc. Co.* 92 Fed. 25, 26.

²*Cochran v. Childs*, 111 Fed. 433, 49 C. C. A. 421.

[d] Federal injunction against State court proceedings after removal.

The removal laws expressly provide that an injunction granted by a State court prior to removal may be continued by the Federal court.⁵ A number of cases have affirmed the power of the Federal courts to protect the jurisdiction acquired by removal from subsequent interference, or proceedings in the State court, upon the ground that the relief is merely ancillary to a jurisdiction, lawfully acquired and necessary to give effect to its own judgment.⁶ Hence, if a party is suing in another State upon a judgment which the Federal court has set aside after removal, injunction may issue to restrain him.⁷ Suit on a replevin bond in a State court may be restrained where the judgment went for plaintiff in the Federal court after removal of the replevin suits, the State court having wrongfully disregarded the removal and proceeded to judgment for defendant.⁸ But injunction has been refused where no right to remove in fact existed;⁹ or where the removal was not perfected;¹⁰ or the right not clear;¹¹ or the proceeding sought to be removed merely ancillary;¹² or where the removed cause was dismissed and a second State action instituted for an amount smaller than that required by the removal laws.¹³

[e] Federal injunction upon ordinary equitable grounds against State court proceedings.

Equity has long exercised a right to enjoin proceedings at law; and, where the parties are within its jurisdiction, will even enjoin actions by them in other States.¹⁴ It would seem that the Federal court sitting in equity, possesses this power;¹⁵ though it should not be exercised as against a court of competent jurisdiction having power to decide all questions that may arise and to entertain and give full weight to the equitable defense;¹⁶ nor where there exists a full and adequate defense available in the legal action.¹⁷ Such a proceeding in equity may be brought before or during a suit at law, or after its decision, and is a separate action in-

⁵See post, § 1153; *Perry v. Sharpe*, 41 Fed. 8 Fed. 24; *Hunt v. Fisher*, 29 Fed. 449.

⁶*French v. Hay*, 22 Wall. 250, 22

L. ed. 857; *Wagner v. Drake*, 31 Fed. 849; *Baltimore, etc. R. R. v. Ford*, 35 Fed. 173; *Abeel v. Culberson*, 56 Fed. 333; *President, etc. v. Merritt*, 59 Fed. 7; *Lanning v. Osborne*, 79 Fed. 662.

⁷*French v. Hay*, 22 Wall. 250, 22 L. ed. 857.

⁸*Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. ed. 354.

⁹*Bertha, etc. Co. v. Carico*, 61 Fed. 132.

¹⁰*Ceour D'Alene Ry. v. Spalding*, 93 Fed. 280, 35 C. C. A. 295.

¹¹*Railroad Co. v. Scott*, 13 Fed. 793; *Wagner v. Drake*, 31 Fed. 849;

¹²*Mutual Res. F. L. Assn. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707.

¹³*Texas, etc. Co. v. Starnes*, 128 Fed. 183.

¹⁴See *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 539; *Allen v. Buchanan*, 97 Ala. 403, 38 Am. St. Rep. 191, 11 So. 778; *Gage v. Riverside T. Co.* 83 Fed. 998; *French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Pickatt v. Ferguson*, 45 Ark. 189, 55 Am. Rep. 549.

¹⁵*Fisher v. Lord*, 6 West. L. J. 137, Fed. Cas. No. 4,821.

¹⁶*Wilson v. Lambert*, 168 U. S. 618, 42 L. ed. 599, 18 Sup. Ct. Rep. 217.

¹⁷*Deweese v. Reinhard*, 165 U. S.

stituted by the filing of an original bill.²⁰ The Federal court in equity has thus interfered in several recent cases to enjoin actions at law in both State and Federal courts on insurance policies, pending the determination of a bill in equity for cancellation for fraud.¹ The State courts have similarly enjoined Federal actions at law.² Injunction against threatened State proceedings may sometimes issue to prevent a multiplicity of suits,³ though this ground of equitable interference has been deemed insufficient to take the case out of the terms of R. S. § 720, where the State court suits were already pending.⁴ So also because of the inadequacy of legal remedy or to prevent multiplicity of suits, injunction is often granted to restrain the enforcement of invalid laws or ordinances or unjust schedules of water, gas or railroad rates and in like cases. If the proper equitable grounds of interference exist it would seem to be no objection to the relief that the institution of proceedings in the State courts is prevented by the Federal writ⁵ or even that existing proceedings are stayed;⁶ so long as the suit is not in effect one against the State itself, prohibited by the Eleventh Amendment.⁷ After judgment has been obtained in a State court, the Federal court may, as is elsewhere shown,⁸ relieve against the effect thereof for fraud, accident or mistake, or upon other equitable grounds. It may be necessary to effective relief that proceedings to enforce such judgments be stayed and injunction has issued as an incident to the relief in such cases.⁹ Some of these were cases removed from the State courts.¹⁰

389, 41 L. ed. 757, 17 Sup. Ct. Rep. No. 8,541; *Gunter v. Atlantic, etc. R.* 340; *Freeman v. Timanns*, 12 Fla. R. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252.

²⁰*Parker v. Judges*, 12 Wheat. 564, 6 L. ed. 729.

¹*Home Ins. Co. v. Virginia, C. Co.* 109 Fed. 681, 113 Fed. 1, 51 C. C. A. 22; *Rochester, etc. Ins. Co. v. Schmidt*, 126 Fed. 998. See *Hamilton v. Walsh*, 23 Fed. 420.

²See *Insurance Co. v. Howell* 24 N. J. Eq. 238—quoted approvingly in *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1023.

³*Texas & P. Ry. v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503.

⁴*Haines v. Carpenter*, 91 U. S. 254, 23 L. ed. 345.

⁵See *Transportation Co. v. Parkersburg*, 107 U. S. 695, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Allen v. Baltimore, etc. R. R.* 114 U. S. 316, 29 L. ed. 201, 5 Sup. Ct. Rep. 927; *Wilson v. Lambert*, 168 U. S. 618, 42 L. ed. 599, 18 Sup. Ct. Rep. 217; *Palatka W. Works v. Palatka*, 127 Fed. 163; *Moore v. Holliday*, 4 Dill. 52, Fed. Cas. No. 9,765; *Louisiana S. Lottery v. Fitzpatrick*, 3 Woods, 222, Fed. Cas.

⁶*Tuchman v. Welch*, 42 Fed. 553; *Iron M. R. R. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410. But see *Rensselaer, etc. R. R. v. Bennington, etc. R. R.* 18 Fed. 618.

⁷In *re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Fitts v. McGhee*, 172 U. S. 529, 45 L. ed. 535, 19 Sup. Ct. Rep. 269.

⁸See ante, § 19.[b]

⁹*Stackhouse v. Zunts*, 15 Fed. 481, 4 Woods, 171; *Sahlgard v. Kennedy*, 2 Fed. 295, 1 McCrary, 291; *Carver v. Jarvis Co.* 73 Fed. 9; *Northern P. Ry. v. Kurtzman*, 82 Fed. 241; *National S. Co. v. State Bank*, 120 Fed. 593, 56 C. C. A. 657, 61 L.R.A. 394; *Marshall v. Holmes*, 141 U. S. 596, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Lehman v. Graham*, 135 Fed. 39, 67 C. C. A. 513.

¹⁰*Marshall v. Holmes*, 141 U. S. 596, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Stackhouse v. Zunts*, 15 Fed. 481, 4 Woods, 171; *Carver v. Jarvis Co.* 73 Fed. 9.

[f] Injunction in bankruptcy cases.

The proviso authorizing injunction against State court proceedings in bankruptcy cases was added upon the adoption of the Revised Statutes, apparently in deference to prior decisions of the courts affirming the necessity and the existence of such power in courts of bankruptcy.¹² Under former bankrupt laws many cases arose involving applications for injunction against State court proceedings some of which were allowed and some refused.¹³ The present bankrupt law equally requires the use of injunction to protect the paramount powers of a court of bankruptcy in its possession and administration of the bankrupt estate.¹⁴ Section 11 authorizes its issuance to stay proceedings under certain circumstances.¹⁵

§ 21. — State writ to restrain or control Federal proceedings.

The State courts have no appellate power over Federal courts; nor is it competent for them to restrain or impair in any way the jurisdiction conferred by the Constitution upon the Federal tribunals.¹ They may not release a Federal prisoner on habeas corpus.² They may not issue mandamus to an officer of the United States; and are as much restrained from using injunction to supervise the acts or proceedings of the Federal courts, as are the latter by the provisions of R. S. § 720,³ from issuing injunction against State court proceedings.^[a]

Author's section.

[a] Power of State court to enjoin proceedings in Federal Court.

State and Federal courts are independent of one another and within their respective spheres of action, it is said, the process issued by one is

¹²See *Ex parte Christy*, 3 How. 292, 318; 11 L. ed. 603.

¹³*Chapman v. Brewer*, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; *Irving v. Hughes*, 7 Am. Law Reg. 209, Fed. Cas. No. 7,076; *In re Schnepf*, 2 Ben. 72, Fed. Cas. No. 12,471; *In re Bernstein*, 2 Ben. 44, Fed. Cas. No. 1,350; *Pennington v. Lowenstein*, 1 N. B. R. 570, Fed. Cas. No. 10,938; *In re Bowie*, 1 Am. L. T. Rep. 97, Fed. Cas. No. 1,728; *Jones v. Leach*, 1 N. B. R. 595, Fed. Cas. No. 7,475; *In re Wallace*, *Deady*, 433, Fed. Cas. No. 17,094; *In re Kerosene Oil Co.* 3 Ben. 35, Fed. Cas. No. 7,725; *In re Fuller*, 1 Sawy. 243, Fed. Cas. No. 5,148; *In re Campbell*, 1 Abb. U. S. 185, Fed. Cas. No. 2,349; *Ex parte Schwab*, 98 U. S. 240, 25 L. ed. 105; *In re Burns*, 1 N. B. R. 174; Fed. Cas. No. 2,182; *Sargent v. Helton*,

115 U. S. 350, 29 L. ed. 413, 6 Sup. Ct. Rep. 80; *In re Davis*, 1 Sawy. 260, Fed. Cas. No. 3,620; *In re Mal-lory*, 1 Sawy. 88, Fed. Cas. No. 8,991; *In re Lady Bryan Co.* 6 N. B. R. 252, Fed. Cas. No. 7,980; *In re Clark*, 9 Blatchf. 372, Fed. Cas. No. 2,801; *Markson v. Haney*, 1 Dill. 497, Fed. Cas. No. 9,098; *In re Atkinson*, 3 Pittsb. Rep. 423, Fed. Cas. No. 606; *In re Ulrich*, 6 Ben. 483, Fed. Cas. No. 14,328; *In re Dillard*, 2 Hughes, 190, Fed. Cas. No. 3,912; *Hudson v. Schwab*, 18 N. B. R. 480, Fed. Cas. No. 6,835, and cases cited.

¹⁴*Lea v. Geo. West Co.* 91 Fed. 237; *In re Pittelkow*, 92 Fed. 903.

¹⁵See post, § 2201.

¹See ante, § 5.

²See ante, § 18,[b]

³Ante, § 20.

as far beyond the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye.⁴ State courts have no appellate power over the Federal tribunals. It belongs to the Federal courts and not to State tribunals to revise and correct proceedings of inferior Federal courts.⁵ It was early decided that a state court has no jurisdiction to issue a writ of mandamus to a Federal officer⁶ and that it has no power to stay execution or otherwise enjoin proceedings upon a Federal judgment;⁷ or interfere with the enforcement of a Federal decree.⁸ The proper mode of relief against a Federal judgment is by ancillary application upon the equity side of the Federal court rendering the same.⁹ It is also an established rule that State courts have no power to enjoin proceedings in a Federal court, before judgment any more than proceedings thereafter.¹⁰ If Federal court by mandamus has ordered performance of an act, injunction from a State court forbidding it is inoperative and no excuse for non-performance;¹¹ nor is the fact that the State injunction has already issued an obstacle to the granting of Federal mandamus.¹² Where an injunction issued by a State court does not restrain Federal proceedings, but merely certain acts of a Federal suitor, comity usually requires that the Federal court refuse a counter injunction, though if proper, it will protect its suitor by an order authorizing the enjoined act.¹³ In cases of concurrent State and Federal jurisdiction where the State court has acquired priority or an exclusive posses-

⁴Riggs v. Johnson Co. 6 Wall. 166, 18 L. ed. 776; Ableman v. Booth, 21 How. 516, 16 L. ed. 773; Peck v. Jenness, 7 How. 625, 12 L. ed. 841; Taylor v. Carryl, 20 How. 597, 15 L. ed. 1028; Supervisors v. Durant, 9 Wall. 418, 19 L. ed. 732; Matter of Farrand, 1 Abb. (U. S.) 145, Fed. Cas. No. 4,678.

⁵Ableman v. Booth, 21 How. 526, 16 L. ed. 169; Semple v. Hagar, 27 Cal. 170.

⁶McClung v. Silliman, 2 Wheat. 370, 4 L. ed. 263, 6 Wheat. 604, 5 L. ed. 340; Sheriff v. Turner, 119 Fed. 231.

⁷McKim v. Voorhies, 7 Cranch, 281, 3 L. ed. 342; Riggs v. Johnson Co. 6 Wall. 195, 18 L. ed. 768; Weber v. Lee Co. 6 Wall. 213, 18 L. ed. 781; United States v. Keokuk, 6 Wall. 517, 18 L. ed. 933; Dorr v. Rohr, 82 Va. 359, 3 Am. St. Rep. 106; Stozier v. Howes, 30 Ga. 579; Chapin v. James, 11 R. I. 89, 23 Am. Rep. 415; Central, etc. Bank v. Hagar, 49 Fed. 295; Reinach v. Atlantic, etc. Co. 58 Fed. 44; Royal T. Co. v. Washburn, etc. R. R. 113 Fed. 531; Central T. Co. v. Western, etc. R. R. 89 Fed. 27; Freeman v. Timanus, 12 Fla. 411.

⁸Woods v. Root, 123 Fed. 402, 59 C. C. A. 206.

⁹See ante, § 3.

¹⁰Schuyler v. Pelissier, 3 Edw. Ch. 193; Central N. Bank v. Hazard, 49 Fed. 293; Ex parte Holman, 28 Iowa 105, 4 Am. Rep. 168; Mead v. Merritt, 2 Paige, 404; Kendall v. Winsor, 6 R. I. 462; City of Opelika v. Daniel, 59 Ala. 216; Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; New Jersey Zinc Co. v. Franklin I. Co. 29 N. J. Eq. 431; Minchin v. Second Nat. Bank, 36 N. J. Eq. 443.

¹¹Riggs v. Johnson Co. 6 Wall. 194, 18 L. ed. 776; United States v. Keokuk, 6 Wall. 517, 18 L. ed. 934; Mayor v. Lord, 9 Wall. 414, 19 L. ed. 707; Supervisors v. Durant, 9 Wall. 417, 19 L. ed. 733; Supervisors v. Durant, 9 Wall. 417, 19 L. ed. 733; Army v. Supervisors, 11 Wall. 138, 20 L. ed. 102; Holt Co. v. National, etc. Co. 80 Fed. 691, 25 C. C. A. 469; Hill v. Scotland Co. Court, 32 Fed. 717; United States v. King, 74 Fed. 498, 499; Gaines v. Springer, 46 Ark. 507.

¹²Clews v. Lee, 2 Woods, 476, Fed. Cas. No. 2,892.

¹³Green v. Porter, 123 Fed. 351.

sion of the res in controversy under the principles elsewhere discussed,¹⁴ it will, just as would the Federal court,¹⁵ protect its exclusive jurisdiction by enjoining parties amenable to its process, from proceedings in other courts tending to embarrass or disturb it.¹⁶ The Federal cases do not seem to concede the right to do so.¹⁷ But if in fact the State court is entitled to proceed and the Federal court bound to stay its hand, the command of the injunction merely accords with the rule of comity which the Federal courts should observe. There is no mode for adjudging the action of the State court improper unless by contempt proceedings, because no legal right is impaired thereby. If the Federal court has priority of jurisdiction, injunction against its proceedings in the State court is such error as may be relieved against by the Supreme Court on writ of error.¹⁸

§ 22. — comity between different Federal courts.

The conflicts of jurisdiction which result from the fact that Federal and State courts have a large concurrent jurisdiction, and exercise it within the same territory, do not result as between co-ordinate Federal tribunals in different States, since their territorial jurisdictions are separate and distinct. Certain rules of comity are, however, observed where the same matter creates a right of action in different districts.^[a]

Author's section.

[a] Comity between Federal courts in different States.

Since the plea of prior action pending is not available where the two actions are in courts of different States,¹ a suit in one circuit court is not a bar to suit in another district situate in another State, though the second court will, as matter of comity, often suspend action until the first suit is terminated.² The principle that gives the court having possession of person or property exclusive jurisdiction, applies to Federal courts of different districts having co-ordinate jurisdiction.³ Where proceedings are instituted affecting the property of a corporation such as a railroad doing business and having property in several States comity re-

¹⁴See ante, § 16.

¹⁵See ante, § 20, note.[a]

¹⁶Home Insurance Co. v. Howell, 24 N. J. Eq. 238; Yick Wo v. Crowley, 26 Fed. 207; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Hines v. Rawson, 40 Ga. 356, 2 Am. Rep. 581; Ingraham v. National Salt Co. 139 Fed. 684; In Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019, the priority of the State court was denied and its injunction therefore held invalid.

¹⁷Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

¹⁸Central Nat. Bank v. Stevens, 169 U. S. 463, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; Farmers' L. & T. Co. v. Lake St. etc. R. R. 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564.

¹See ante, § 16.[d]

²Ryan v. Seaboard R. R. 89 Fed. 397.

³In re Johnson, 167 U. S. 125, 42 L. ed. 103, 17 Sup. Ct. Rep. 737.

quires the Federal courts appealed to in the different States, to respect a prior decision of the matters in controversy rendered in another circuit.⁴ So, upon application for a receiver, the one appointed by the court where the company's principal office is situate, will usually by comity be appointed in the other jurisdictions.⁵ A Federal court will restrain the marshal of another district and State from levying a void process within its jurisdiction.⁶

§ 23. Suits by assignees and colorable transfers to obtain or defeat Federal jurisdiction.

Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange,^[a] to recover the contents of any promissory note or other chose in action^[b] in favor of any assignee,^[c] or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation,^[d] unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.^[e]

Part of § 1 of act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 508.

[a] History of prohibition against suits by assignees.

Originally, by § 11 of the judiciary act of 1789, and R. S. § 629, only suits by an assignee of a foreign bill of exchange were excepted from the prohibition against suits by assignees where the assignor was incompetent to sue in the Federal court. The decisions under the law of 1789 made two further exceptions. The first was that an indorsee of a note might sue his immediate indorser if diverse citizenship existed between them, since the indorsee did not claim against his immediate indorser by assignment, but by virtue of a new contract between them.¹⁰ The second was that if an instrument was payable to bearer, or to a named person or bearer, the holder could sue the maker if diverse citizenship existed between them, regardless of prior holders' citizenship, because his title did not come by assignment, but by delivery merely.¹¹ The act of

⁴Dady v. Georgia, etc. Ry. 112 Fed. 838. City v. Ripley, 138 U. S. 96, 34 L. ed. 914, 11 Sup. Ct. Rep. 238; Manufacturing Co. v. Bradley, 105 U. S. 180, 26 L. ed. 1036; Campbell v. Jordan, Hempst. 534, Fed. Cas. No. 2,362; Codwise v. Gleason, 3 Day, 3, Fed. Cas. No. 2,938.

⁵Wilmer v. Atlanta, etc. Ry. 2 Woods 409, Fed. Cas. No. 17,775; Conklin v. United States Shipbuilding Co. 124 Fed. 1020.

⁶Kirk v. United States, 124 Fed. 324.

¹⁰Young v. Bryan, 6 Wheat. 146, 151, 5 L. ed. 228; Coffee v. Planters' Bank, 13 How. 187, 14 L. ed. 105; Mollan v. Torrance, 9 Wheat. 537, 538, 6 L. ed. 154; Phillips v. Preston, 5 How. 290, 12 L. ed. 152; Superior L. ed. 732; Lexington v. Butler, 14 7 L. ed. 437; Thompson v. Perrine, 106 U. S. 589, 27 L. ed. 298, 592, 1 Sup. Ct. Rep. 564, 568; Smith v. Clapp, 15 Pet. 129, 10 L. ed. 684; Bonnafer v. Williams, 3 How. 577, 11 L. ed. 732; Lexington v. Butler, 14

Mar. 3, 1875, § 1, excepted from the prohibition of suits by assignees "cases of promissory notes negotiable by the law merchant and bills of exchange."¹² The present law permits an assignee to sue the original obligor if citizen of another State, regardless of the citizenship of his assignor or other intermediate parties, (1) where the obligation is based on a foreign bill of exchange; (2) where it is based on a promissory note or other chose in action, made by a corporation and payable to bearer;¹³ (3) where the assignment is not of a "promissory note or other chose in action."¹⁴ The decisions under the act of 1875 are, for the most part, of no authority under the present law, and should be carefully discriminated.

The obvious purpose of the enactment was to prevent the bringing of suits in Federal courts not actually involving controversies between citizens of different States through the device of assignments.¹⁵ It is not inconsistent with the Constitution.¹⁶ Any bill of exchange drawn in one State upon a person in another is a foreign bill.¹⁷ But a check is not strictly a bill of exchange.¹⁸ It is a well settled rule of pleading in Federal practice, that in cases within this enactment, the citizenship of an assignor must affirmatively appear.¹⁹

[b] Suits for contents of choses in action within this proviso.

While assignable paper was doubtless the "chose in action" that Congress had specifically in view, the term is not to be restricted to choses of that character.¹ It is of comprehensive import and "includes the infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action."² The act of 1875 substituted the phrase "claims founded on contract" but the present law restored the earlier expression. The additional clause of the present law "if such instrument be payable to bearer and be not made by any corporation" does not limit the comprehensiveness of "chose in action" as previously understood,³ though in this Congress again has in view assignable paper. Nor is the word "contents" in speaking of a promissory note or other chose in action, of such plain

Wall. 293, 20 L. ed. 809; *Chickaming v. Carpenter*, 106 U. S. 666, 27 L. ed. 307, 1 Sup. Ct. Rep. 620; *Manufacturing Co. v. Bradley*, 105 U. S. 180, 26 L. ed. 1036; *Codman v. Vermont & C. R. R.* 17 Blatchf. 1, Fed. Cas. No. 2,936.

¹² 18 St. 470, c. 137, § 1.

¹³ See *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 913, reviewing the legislation on the subject. *Wilson v. Knox Co.* 43 Fed. 481.

¹⁴ See *infra*, note [b].

¹⁵ *Bushnell v. Kennedy*, 9 Wall. 392, 19 L. ed. 738; *Holmes v. Goldsmith*, 147 U. S. 160, 37 L. ed. 118, 13 Sup. Ct. Rep. 288.

¹⁶ *Sheldon v. Sill*, 8 How. 449, 12 L.

ed. 1147. But see *Bullard v. Bell*, 1 Mason, 251, Fed. Cas. No. 2,121.

¹⁷ *Townsley v. Sumrall*, 2 Pet. 179, 7 L. ed. 386; *Buckner v. Finlay*, 2 Pet. 590, 7 L. ed. 528; *Dickins v. Beal*, 10 Pet. 579, 9 L. ed. 538; *Armstrong v. American, etc. Bank*, 133 U. S. 453, 33 L. ed. 747, 10 Sup. Ct. Rep. 450.

¹⁸ *Bull v. Bank of Kasson*, 123 U. S. 105, 31 L. ed. 98, 8 Sup. Ct. Rep. 63.

¹⁹ See *ante*, § 9 [d].

¹ *Sere v. Pitot*, 6 Cranch, 335, 3 L. ed. 241.

² *Sheldon v. Sill*, 8 How. 441, 449, 12 L. ed. 1147.

³ *Mexican N. R. R. v. Davidson*, 157 U. S. 206, 39 L. ed. 672, 15 Sup. Ct. Rep. 565.

import that it can be deemed to limit the meaning of chose in action.⁴ An inland bill of exchange is within the terms of the prohibition.⁵ Promissory notes payable to order have likewise always been deemed within its terms;⁶ and it makes no difference that they are past due.⁷ Since the adoption of the law as it now exists, instruments payable to bearer are only suable by a transferee without regard to the citizenship of prior holders, where they are executed by a corporation.⁸ A right to an account of the proceeds of sale of mortgaged property is a chose in action.⁹ Merchant's accounts and unliquidated claims are choses in action and an assignee in insolvency cannot sue thereon in the Federal court unless the insolvent might have done so.¹⁰ Judgments are claims "founded upon contract" and by the act of 1875 an assignee could not sue in a Federal court unless his assignor might have done so.¹¹ It does not seem to have been decided in any case that a judgment could be regarded as a chose in action within the present law or the law of 1789.¹² A suit to enforce specific performance of a contract or its obligation is a suit to recover the contents of a chose in action;¹³ as also a suit to enforce payment out of a specific fund provided by agreement to meet that and other debts.¹⁴ A non-negotiable note is within this enactment;¹⁵ as also an oral contract.¹⁶

A mortgage note is a chose in action;¹⁷ and unless made by a corporation and payable to bearer,¹⁸ it would seem plain under the present law as well as under the act of 1789, that an assignee cannot sue thereon and for foreclosure in the Federal court unless his assignor might have done

⁴*Sere v. Pitot*, 6 Cranch, 335, 3 L. ed. 240.

⁵*Morgan v. Gay*, 19 Wall. 82, 22 L. ed. 100.

⁶*Turner v. Bank of N. A.* 4 Dall. 11, 1 L. ed. 718; *Parker v. Ormsby*, 141 U. S. 85, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *Steel v. Rathbun*, 42 Fed. 390.

⁷*Cross v. Allen*, 141 U. S. 533, 35 L. ed. 843, 12 Sup. Ct. Rep. 67.

⁸See *infra*, note [d].

⁹*Wilkinson v. Wilkinson*, 2 Curt. 582, Fed. Cas. No. 17,677.

¹⁰*Sere v. Pitot*, 6 Cranch, 335, 3 L. ed. 241.

¹¹*Walker v. Powers*, 104 U. S. 248, 26 L. ed. 729; *Mississippi Mills v. Cohn*, 150 U. S. 208, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; *Metcalf v. Wattertown*, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173.

¹²See *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174.

¹³*Corbin v. Blackhawk Co.* 105 U. S. 659, 26 L. ed. 1136; *Shoecraft v. Bloxham*, 124 U. S. 730, 31 L. ed. 574,

8 Sup. Ct. Rep. 686; *Plant Inv. Co. v. Jacksonville, etc. R. R.* 152 U. S. 77, 38 L. ed. 358, 14 Sup. Ct. Rep. 483.

¹⁴*Mexican N. R. R. v. Davidson*, 157 U. S. 206, 39 L. ed. 672, 15 Sup. Ct. Rep. 565.

¹⁵*George v. Wallace*, 135 Fed. 286, 68 C. C. A. 40.

¹⁶*Utah-Nevada Co. v. DeLamar*, 133 Fed. 113, 66 C. C. A. 179.

¹⁷*Sere v. Pitot*, 6 Cranch, 336, 3 L. ed. 241; *Sheldon v. Sill*, 8 How. 441, 12 L. ed. 1147. See *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377, 26 Sup. Ct. Rep. 220, holding same as to deed of trust.

¹⁸See *infra*, note [d]. It is doubtful whether the accompanying mortgage may be foreclosed in the Federal court even then. See *Hill v. Winne*, 1 Biss. 277, Fed. Cas. No. 6,503. But compare the reasoning of *Treadway v. Sanger*, 107 U. S. 324, 27 L. ed. 582, 2 Sup. Ct. Rep. 691, under the act of 1875.

so.¹⁹ Whether the mortgage itself is a chose in action²⁰ or a mere incident to the debt,¹ a suit for possession thereunder is not one to recover the "contents" of a chose in action. Hence where an assignee has obtained judgment in a State court on the mortgage note, he may enforce an equitable mortgage lien incident thereto in the Federal court regardless of the mortgagee's citizenship.² Similarly ejectment at law has been upheld where prosecuted by the assignee of a mortgagee, though the latter and mortgagor were citizens of the same State;³ also a statutory action for possession by the assignee of a mortgagee.⁴ Similarly the assignee of a note secured by chattel mortgage may replevin the property from a third person in a Federal court regardless of the rule against suits by assignees.⁵ A suit to foreclose a trust deed is one to recover the contents of a chose in action.⁶

While the term chose in action is very broad and has in this enactment been liberally construed, the context prescribes certain limitations thereon. The phrase "promissory note or other chose in action" would seem plainly to require application of the rule ejusdem generis to its interpretation and to mean other choses in action akin to promissory notes. Furthermore the word "contents" although it has been criticized as inapt and ambiguous,⁷ confines the meaning of "other chose in action" to such as may fairly be said to have contents. "Contents" it is said, means the rights conveyed by an instrument capable of enforcement by suit.⁸ It would seem that "chose in action" should be limited to rights growing out of contracts which are either unilateral in their inception or which have become so by performance of the consideration by one of the parties. If a bilateral contract is transferred to another by assignment and novation, a chose in action subsequently arising thereunder is original in the assignee, and therefore he is not assignee of such chose in action although assignee of the contract.⁹

The word "contents" refers, aptly enough, to rights of action founded on contracts containing within themselves some promise or duty to be performed, but not to rights of action founded on some wrongful act or

¹⁹Hill v. Winne, 1 Biss. 277, Fed. Cas. No. 6,503; Sheldon v. Sill, 8 How. 441, 12 L. ed. 1147. But see Dundas v. Bowler, 3 McLean, 204, Fed. Cas. No. 4,140; Seckel v. Backhans, 7 Biss. 354, Fed. Cas. No. 12,599. The law of 1875 permitted suit on an assigned mortgage note if negotiable, regardless of the assignors' citizenship. Tredway v. Sanger, 107 U. S. 324, 27 L. ed. 582, 2 Sup. Ct. Rep. 691; Mersman v. Werges, 112 U. S. 143, 28 L. ed. 641, 5 Sup. Ct. Rep. 65; Whiting v. Wellington, 10 Fed. 815.

²⁰Hill v. Winne, 1 Biss. 277, Fed. Cas. No. 6,503.

¹Sheldon v. Sill, 8 How. 441, 12 L. ed. 1147.

²Ober v. Gallagher, 93 U. S. 205, 23 L. ed. 829.

³Smith v. Kernochen, 7 How. 199, 12 L. ed. 666.

⁴Whiting v. Wellington, 10 Fed. 810.

⁵Buckingham v. Dake, 112 Fed. 258, 50 C. C. A. 492.

⁶Kolze v. Hoadley, 200 U. S. 76, 50 L. ed. 377, 26 Sup. Ct. Rep. 220.

⁷Sere v. Pitot, 6 Cranch, 235, 3 L. ed. 241; Shoecraft v. Bloxham, 124 U. S. 735, 31 L. ed. 574, 8 Sup. Ct. Rep. 686.

⁸Shoecraft v. Bloxham, 124 U. S. 735, 31 L. ed. 574, 8 Sup. Ct. Rep. 686.

⁹See infra, note.[c]

some neglect of duty to which the law attaches damages.¹⁰ An action for trespass by tortiously cutting logs could not be deemed to be for the contents of a chose in action, and Federal jurisdiction over such an action may arise from an assignment regardless of assignor's citizenship.¹¹ The act of 1875 referred to choses "founded on contract," thus expressly excluding those arising from tort;¹² but the effect of the present law would seem to be the same. A suit against a bank for negligence in failing to protest a draft is not for the contents of a chose in action and Federal jurisdiction may be created by assignment.¹³ So an action to recover possession of a thing even though it be a promissory note,¹⁴ or damages for its wrongful detention is not an action to recover the "contents" of a chose in action; neither is an action to obtain possession though based upon rights under a mortgage.¹⁵ An action between indorsers upon an agreement to pay half the loss is not for the contents of a chose in action.¹⁶

The transfer of land is very plainly not an assignment or transfer of a chose in action within this section.¹⁷ And it has been held at circuit that a Federal bail bond assigned to plaintiff was not taken from the ancillary jurisdiction of the Federal court by this provision;¹⁸ and that it does not apply to suits brought by the United States on bonds.¹⁹

[c] Assignees and assignments—indorsement.

This section refers only to suits in favor of an assignee and not to suits by an original party such as lessor, against one to whom his lessee has assigned;¹ or a mortgagee suing the assignee of his mortgagor.² Nor does it apply to a suit brought on the relation of the assignee of a note, on the official bond of a township trustee, for illegally executing the note.³ An assignee in the sense here intended, is anyone who by virtue of a transfer to him can claim the beneficial interest of a contract.⁴ It makes no difference that the assignment is by operation of law, and an assignee in insolvency is included;⁵ one buying a parish warrant payable to A

¹⁰*Deshler v. Dodge*, 16 How. 631, 14 L. ed. 1088; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736; *Ambler v. Eppinger*, 137 U. S. 480, 34 L. ed. 765, 11 Sup. Ct. Rep. 173.

¹¹*Ambler v. Eppinger*, 137 U. S. 480, 34 L. ed. 765, 11 Sup. Ct. Rep. 173.

¹²*Van Bokkelen v. Cook*, 5 Sawy. 587, Fed. Cas. No. 16,831.

¹³*Barney v. Globe Bank*, 5 Blatchf. 107, Fed. Cas. No. 1,031.

¹⁴*Deshler v. Dodge*, 16 How. 631, 14 L. ed. 1088.

¹⁵*Smith v. Kernochen*, 7 How. 198, 12 L. ed. 666; *Whiting v. Wellington*, 10 Fed. 810, 813.

¹⁶*Phillips v. Preston*, 5 How. 278, 12 L. ed. 152.

¹⁷*Jones v. League*, 18 How. 81, 15 L. ed. 263; *Lehigh Min. etc. Co. v. Kelly*, 160 U. S. 336, 40 L. ed. 444,

16 Sup. Ct. Rep. 307; *Dickerman v. Northern T. Co.* 176 U. S. 192, 44 L. ed. 431, 20 Sup. Ct. Rep. 311; *Briggs v. French*, 2 Sum. 251, Fed. Cas. No. 1,871.

¹⁸*Bobyshall v. Oppenheimer*, 4 Wash. C. C. 482, Fed. Cas. No. 1,592.

¹⁹*United States v. Greene*, 4 Mason, 427, Fed. Cas. No. 15,258.

¹*Adams v. Shirk*, 105 Fed. 659, 44 C. C. A. 653; *Brooks v. Laurent*, 98 Fed. 647, 39 C. C. A. 201.

²*Edwards v. Hill*, 59 Fed. 723, 8 C. C. A. 235.

³*Indiana v. Glover*, 155 U. S. 513, 39 L. ed. 243, 15 Sup. Ct. Rep. 186.

⁴*Plant Inv. Co. v. Jacksonville, etc. Ry.* 152 U. S. 77, 38 L. ed. 358, 14 Sup. Ct. Rep. 483.

⁵*Sere v. Pitot*, 6 Cranch, 335, 3 L. ed. 241. Doubted in *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 739. But

or order at probate sale of A's estate is an assignee and does not take title by legal adjudication in rem.⁶ But an executor or administrator is not an assignee;⁷ nor, it seems, is a receiver.⁸ A pledgee of stock has been held an assignee and bound by the stockholders citizenship as to suit in the Federal court.⁹ The power conferred upon the trustee in a water company's mortgage, to collect rentals due the company under certain circumstances, has been held to make him an assignee and debar suit by him in the Federal court where the water company could not there sue.¹⁰ A water company's mortgage covering rentals due under contracts with a city is no more than an assignment of such contract rights.¹¹ A deed of trust in the nature of a mortgage which, after setting forth the mortgagor's rights to certain lands under a certain contract, deeded all the mortgagor's rights "in or to" the said lands is virtually an assignment of a contract within this provision.¹² Equitable as well as legal assignments are included.¹³ A partner suing on a firm cause of action, in his own right and as assignee of his partner must show that his assignor's citizenship is such that he could have maintained the suit.¹⁴ But one subrogated to the rights of another is not an assignee even although the right is also assigned.¹⁵ A stockholder suing for a corporation is not an assignee.¹⁶

To constitute one an assignee of a chose in action, it is plain that the chose must have previously existed in some other, from whom the assignee must have derived it. If the liability sued on is not derivative but originates in favor of plaintiff and had no previous existence in another, it cannot be within the rule against suits by assignees, even though the instrument to which this new liability attaches and out of which it has arisen subsequent to the assignment, has been assigned or transferred to plaintiff by another. A continuing contract for furnishing water to a municipality by a water company, may be transferred or assigned without assigning also the claim for water already furnished.¹⁷ In such a case and in all other cases where a new contract virtually arises as the basis of the right sued on, plaintiff cannot be said to be an assignee. So where a new

reaffirmed in *Glass v. Police Jury*, 176 U. S. 210, 44 L. ed. 436, 20 Sup. Ct. Rep. 347. See also *United States Nat. Bank v. McNair*, 56 Fed. 323.

⁶*Glass v. Police Jury*, 176 U. S. 210, 44 L. ed. 436, 20 Sup. Ct. Rep. 346.

⁷*Mayer v. Foulkrod*, 4 Wash. C. C. 349, Fed. Cas. No. 9,341.

⁸*Paige v. Rochester*, 137 Fed. 663; *Davies v. Lathrop*, 12 Fed. 353, 20 Blatchf. 397. But see *Bradford v. Jenks*, 2 McLean, 130, Fed. Cas. No. 1,769; *Thompson v. Pool*, 70 Fed. 725.

⁹*Gorman W. Co. v. Wright*, 134 Fed. 365, 67 C. C. A. 345.

¹⁰*Eau Claire v. Payson*, 107 Fed. 552, 46 C. C. A. 466.

¹¹*American W. Works Co. v. Home W. Co.* 115 Fed. 171.

¹²*Shoecraft v. Bloxlam*, 124 U. S. 730, 31 L. ed. 574, 8 Sup. Ct. Rep. 686. See *Boston, etc. Co. v. Plattsmouth*, 76 Fed. 881.

¹³*Corbin v. Blackhawk Co.* 105 U. S. 666, 26 L. ed. 1136.

¹⁴*Ban v. Columbia S. Ry.* 117 Fed. 21, 54 C. C. A. 407.

¹⁵*New Orleans v. Gaines*, 138 U. S. 605, 34 L. ed. 1102, 11 Sup. Ct. Rep. 431.

¹⁶*Consumers' G. T. Co. v. Quinby*, 137 Fed. 882, 70 C. C. A. 220.

¹⁷See *Portage C. W. Co. v. Portage*, 102 Fed. 772.

corporation succeeds to the rights of an old concern upon a contract with a superintendent and continues the employment, it may acquire a chose in action under the assigned contract which is nevertheless original in its favor and not within the rule.¹⁸ And where breach of a continuing contract first occurs after its assignment, the chose in action arising from such breach is not an assigned one although the contract is an assigned contract.¹⁹ Nor is this merely true of continuing bilateral contracts such as the foregoing, but a new contract unilateral in character, may arise at the time of a transfer of a chose in action and new rights may accrue to an assignee. Thus it was settled under the old law that an indorsee suing his immediate indorser, was not an assignee, but sued upon the new contract between them which the law merchant implies from the indorsement;²⁰ and this would seem²¹ to be still the rule.¹ So where a note is made for the accommodation of the payee his citizenship is immaterial in suit by his indorsee against the maker, since he has really assigned nothing and the contract on which the liability is based is a new one.² And a suit by a first indorser against a second upon an agreement that the latter should pay half the loss, is clearly upon a new separate contract between them, and not within the statute.³ So also is a suit by the payee of an order against the drawee and acceptor, since the acceptance creates a new contract directly between acceptor and payee.⁴ Where transferees of an inland bill of exchange sued to impose individual liability on the stockholders of the drawee corporation it was held that their suit is not founded on the assignment of the bill.⁵ A suit by an assignee of a judgment to vacate satisfaction entered thereon, for failure of consideration, has been held not a suit on an assigned chose but on the implied contract of the corporation to make the judgment good if the consideration failed.⁶ So a corporation suing on the common money counts for coal sold and delivered is not barred by the fact that its agent took a note therefor, and assigned same to the corporation.⁷ And where requisite diverse citizenship exists between parties to a suit to secure the fruits of a prior judgment by setting aside fraudulent conveyances of the judgment debtor, it makes no difference that the original judgment could not have been obtained in the Federal court because based on an assigned

¹⁸American Colortype Co. v. Continental C. Co. 188 U. S. 104, 47 L. ed. 404, 23 Sup. Ct. Rep. 265.

¹⁹Eau Claire v. Payson, 109 Fed. 676, 48 C. C. A. 608.

²⁰See supra, note.[a]

¹Superior v. Ripley, 138 U. S. 96, 34 L. ed. 914, 11 Sup. Ct. Rep. 288, 289.

²Holmes v. Goldsmith, 147 U. S. 160, 37 L. ed. 118, 13 Sup. Ct. Rep. 288; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Wachusett Nat. Bank v. Sioux City S. Works, 56 Fed. 321. But this reasoning does not apply to the case

of an accommodation indorser: Shuford v. Cain, 1 Abb. U. S. 302, Fed. Cas. No. 12,823; Small v. King, 5 McLean, 147, Fed. Cas. No. 12,960; Noell v. Mitchell, 4 Biss. 346, Fed. Cas. No. 10,287.

³Phillips v. Preston, 5 How. 278, 12 L. ed. 152.

⁴Superior v. Ripley, 138 U. S. 96, 34 L. ed. 914, 11 Sup. Ct. Rep. 288.

⁵Barling v. Bank of B. N. A. 50 Fed. 260, 1 C. C. A. 510.

⁶Hay v. Alexandria, etc. R. R. 20 Fed. 15.

⁷Heckscher v. Binney, 3 Woodb. & M. 333, Fed. Cas. No. 6,316.

chose in action. The suit to enforce such judgment is not on the original chose in action.⁸ A New York corporation may sue an Illinois corporation on its notes, though indorsed by an Illinois citizen as treasurer before negotiation.⁹

[d] Instrument payable to bearer and not made by a corporation.

This new proviso first found in the legislation that is now in force, does not limit the meaning of "chose in action,"¹¹ but refers to the words "any subsequent holder,"¹² and is directed against the early rule under the act of 1789 and R. S. § 629, as to suits on instruments payable to bearer.¹³ The effect of these words is that the old rule permitting the holder of paper payable to bearer, or to A or bearer, to sue regardless of the citizenship of prior holders, now obtains only where the instrument is made by a corporation.¹⁴ A bill of exchange drawn by a corporation in favor of itself and by it indorsed in blank has been held payable to bearer.¹⁵ A municipality is a corporation within this clause.¹⁶ And suits on township, county and other municipal bonds, certificates and coupons when payable to bearer¹⁷ as they usually are, may be sued on by a citizen of another State in a Federal court regardless of the citizenship of intermediate holders.¹⁸ Bonds payable to "—— or order" and issued without the insertion of any name are in legal effect payable to bearer within this rule.¹⁹ If detached coupons are payable to bearer it makes no difference that the bonds themselves are not.²⁰ The fact that the payee indorses a bond in blank does not make it an instrument pay-

⁸*Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174; *Dexter v. Smith*, 2 Mason, 303, Fed. Cas. No. 3,866.

⁹*Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

¹¹*Mexican N. R. R. v. Davidson*, 157 U. S. 206, 39 L. ed. 672, 15 Sup. Ct. Rep. 565.

¹²*Skinner v. Barr*, 77 Fed. 816.

¹³See *supra*, note [a].

¹⁴*Bank of B. N. A. v. Barling*, 46 Fed. 357.

¹⁵*Bank of B. N. A. v. Barling*, 46 Fed. 357. This conforms to rulings under the act of 1789. *Towne v. Smith*, 1 Woodb. & M. 115, Fed. Cas. No. 14,115.

¹⁶*Loeb v. Columbia Twp.* 179 U. S. 486, 45 L. ed. 288, 21 Sup. Ct. Rep. 174.

¹⁷But not otherwise: *King, etc. Co. v. Otoe Co.* 120 U. S. 227, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *New Orleans v. Benjamin*, 153 U. S. 435, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *White v. Vermont, etc. R. R.* 21 Law Rep. 469, Fed. Cas. No. 17,559.

¹⁸*Thompson v. Perrine*, 106 U. S. 589, 592, 27 L. ed. 298, 1 Sup. Ct. Rep. 564; *Loeb v. Columbia Twp.* 179 U. S. 486, 45 L. ed. 288, 21 Sup. Ct. Rep. 174; *Lake Co. Com'rs. v. Dudley* 173 U. S. 250, 43 L. ed. 684, 19 Sup. Ct. Rep. 398; *New Orleans v. Quinlan*, 173 U. S. 192, 43 L. ed. 664, 19 Sup. Ct. Rep. 329; *Independent School D. v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L.R.A. 364; *McLean v. Valley Co.* 74 Fed. 389. Negotiability determined the right to sue on municipal obligations under the act of 1875. *Ackley School D. v. Hall*, 113 U. S. 141, 28 L. ed. 954, 5 Sup. Ct. Rep. 371; *New Providence v. Halsey*, 117 U. S. 338, 29 L. ed. 904, 6 Sup. Ct. Rep. 764; *Blacklock v. Small*, 127 U. S. 103, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096.

¹⁹*Lyon Co. v. Keene, etc. Bank*, 100 Fed. 337, 40 C. C. A. 391.

²⁰*Reynolds v. Lyon Co.* 97 Fed. 155. But see *Clarke v. Janesville*, 1 Biss. 98, Fed. Cas. No. 2,854.

able to bearer.¹ But a warrant payable to "A, B or bearer" is legally payable to bearer.²

[e] Where suit could have been brought if no assignment made.

The question whether the assignor might have sued is tested as of the time suit by the assignee is brought.⁴ It is determined by ascertaining the citizenship of plaintiff, the original payee, and defendant and not the citizenship of intermediate parties;⁵ although it was early declared that in suit by an indorsee against a remote indorser he must establish the requisite citizenship in intermediate indorsers.⁶ The fact that an intermediate holder who assigned to plaintiff could have sued does not help plaintiff if the original payee had not the requisite citizenship.⁷ The section refers to the citizenship of the assignor as affecting Federal jurisdiction, and not to the amount in controversy. Hence it is the rule that an assignee is not barred from the Federal court because his assignor was barred by lack of the jurisdictional amount in his claim where such assignor had the requisite diverse citizenship.⁸

[f] Right of removal in suit on assigned cause of action.

Under the original removal law, it was held that where a suit on an assigned cause was removed to the Federal court want of jurisdiction under this prohibition against suits by assignees could not be set up.¹⁰ The same conclusion was reached under the act of 1875.¹¹ But the law of 1888 only permits removal of suits "of which the circuit courts of the United States are given original jurisdiction by the preceding section."¹²

¹Thomson v. Elton, 100 Fed. 145.

²Thompson v. Searcy Co. 57 Fed. 1030, 6 C. C. A. 674; Kearney Co. Comrs. v. McMaster, 68 Fed. 177, 15 C. C. A. 353; Rollins v. Chaffee Co. 34 Fed. 91.

⁴Chamberlain v. Eckert, 2 Biss. 126, Fed. Cas. No. 2,577; Thaxter v. Hatch, 6 McLean, 68, Fed. Cas. No. 13,866; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; White v. Leahy, 3 Dill. 378, Fed. Cas. No. 17,551; Jones v. Shapera, 57 Fed. 457, 6 C. C. A. 423; Brainard v. Williams, 4 McLean, 122, Fed. Cas. No. 1,804; Noyes v. Crawford, 133 Fed. 796. But see Rogers v. Linn, 2 McLean, 126, Fed. Cas. No. 12,015.

⁵Milledollar v. Bell, 2 Wall, Jr. 334, Fed. Cas. No. 9,549; Emsheimer v. New Orleans, 116 Fed. 893, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 775; Wilson v. Fisher, Baldw. 133,

Fed. Cas. No. 17,803; Portage City W. Co. v. Portage, 102 Fed. 769.

⁶Mollan v. Torrance, 9 Wheat. 537, 6 L. ed. 154. This holding seems to be called in question by Emsheimer v. New Orleans, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 775. An indorser's contract is with all subsequent holders and his liability is not assigned by each succeeding holder.

⁷United States Nat. Bank v. McNair, 56 Fed. 323.

⁸Bernheim v. Birnbaum, 30 Fed. 885; Chase v. Sheldon R. M. Co. 56 Fed. 625; Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248; Bergman v. Inman, 91 Fed. 293.

¹⁰Green v. Custard, 23 How. 484, 16 L. ed. 471; Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 738.

¹¹Claffin v. Insurance Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507; Delaware Co. Comrs. v. Diebold S. & L. Co. 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399.

¹²See post, § 133, et seq.

This makes the provision here under consideration fully applicable to removed causes, and a defect of Federal jurisdiction arising from the fact that the plaintiff is an assignee of a chose in action is not waived by defendant's petition for removal to the Federal court.¹³

[g] Colorable transfers to defeat or confer Federal jurisdiction.

Apart from the provisions of this section the courts have held a merely colorable transfer made to confer jurisdiction to be a fraud on the court, and will dismiss such cases.¹⁵ The principle has been applied to a colorable transfer of lands;¹⁶ or bonds;¹⁷ or coupons.¹⁸ But if a transfer of land be actual it makes no difference that the intent was thereby to obtain a Federal tribunal.¹⁹ The motive with which Federal jurisdiction is invoked is immaterial.¹ So also the real owner of coupons may sue in the Federal court though he purchased for that sole purpose;² or the actual purchaser of bonds.³ A corporation created for the express purpose of suing in the Federal court is not therefor debarred.⁴ An assignment for value, of a mortgage though to oust State court's jurisdiction is not invalid where knowledge of such purpose is not brought home to the assignee.⁵ A merely colorable or fictitious assignment to confer a right of removal is nugatory and the case will be remanded.⁶ But an assignment which defeats a right of removal will not be disregarded by a Federal court because made with that avowed intent.⁷ It has been held

¹³Mexican N. R. R. v. Davidson, 157 U. S. 207, 39 L. ed. 675, 15 Sup. Ct. Rep. 565.

¹⁵Barney v. Baltimore, 6 Wall. 288, 18 L. ed. 825; Woodside v. Vasey, 142 Fed. 617; Cushman v. Amador, etc. Co. 118 U. S. 58, 30 L. ed. 72, 6 Sup. Ct. Rep. 926; Lehigh M. Co. v. Kelly, 160 U. S. 336, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; Lake Co. Comrs. v. Dudley, 173 U. S. 250, 43 L. ed. 684, 19 Sup. Ct. Rep. 398; Crawford v. Neal, 144 U. S. 593, 36 L. ed. 552, 12 Sup. Ct. Rep. 759.

¹⁶Jones v. League, 18 How. 81, 15 L. ed. 263.

¹⁷Williams v. Nottawa, 104 U. S. 211, 26 L. ed. 720; Bernards Twp. v. Stebbens, 109 U. S. 354, 27 L. ed. 961, 3 Sup. Ct. Rep. 261.

¹⁸Fountain v. Angelica, 12 Fed. 9, 20 Blatchf. 448.

¹⁹Jones v. League, 18 How. 81, 15 L. ed. 263; Crawford v. Neal, 144 U. S. 593, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Lehigh M. Co. v. Kelly, 160 U. S. 336, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; Dickerman v. Northern T. Co. 176 U. S. 192, 44 L. ed. 431, 20 Sup. Ct. Rep. 311; De Laveaga v. Williams, 5 Sawy. 575, Fed. Cas. No. 3,759; Neal

v. Foster, 36 Fed. 41, 13 Sawy. 236; Alkire Gro. Co. v. Richesin 91 Fed. 84; Willitt v. Baker, 133 Fed. 937; Cole v. Philadelphia, etc. Ry. 140 Fed. 944; Slaughter v. Mallett, 141 Fed. 282.

¹Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

²Foote v. Hancock, 15 Blatchf. 346, Fed. Cas. No. 4,911; McCall v. Hancock, 10 Fed. 8, 20 Blatchf. 344.

³Blackburn v. Selina, etc. R. R. 2 Flipp. 538, Fed. Cas. No. 1,467; Ashley v. Board of Superv. 83 Fed. 537, 27 C. C. A. 587.

⁴Irvine Co. v. Bond, 74 Fed. 854.

⁵Smith v. Kernoehen, 7 How. 215, 12 L. ed. 666.

⁶Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed. 116, 5 Sup. Ct. Rep. 809; Lehigh M. & M. Co. v. Kelly, 160 U. S. 335, 40 L. ed. 447, 16 Sup. Ct. Rep. 311; Mattocks v. Baker, 2 Fed. 457; Hawley v. Kepp, 2 Flipp. 178, Fed. Cas. No. 6,249.

⁷Provident Sav. Soc. v. Ford, 114 U. S. 641, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; Oakley v. Goodnow, 118 U. S. 44, 30 L. ed. 61, 6 Sup. Ct. Rep. 944; Leather, etc. Bank v. Cooper, 120 U. S. 781, 30 L. ed. 816, 7 Sup. Ct. Rep. 777;

recently that the joinder of an obviously sham party to defeat a right of removal will not be permitted to accomplish that result.⁸ The existence of an agreement to reconvey is evidence of the fictitious character of a transfer.⁹ A change of residence without intent to change domicile permanently is evidence of merely colorable scheme to impose upon Federal jurisdiction.¹⁰ But if a change of residence is bona fide, Federal jurisdiction is not defeated by the fact that it was for the very purpose of creating that jurisdiction.¹¹

To show a stockholder's suit on behalf of a corporation collusive, some agreement to that end, direct or inferential, must be proved.¹²

§ 24. National banks regarded as citizens of State for jurisdictional purposes.

All national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.^[a] The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.^[b]

Act of Aug. 13, 1888, § 4, 25 Stat. 436, U. S. Comp. Stat. 1901, p. 514.

[a] Denial of jurisdiction of circuit and district courts.

This law in effect repeals the provisions of R. S. § 563, par. 15, giving jurisdiction of actions by and against national banks to the district courts and of R. S. § 629, par. 10, giving similar jurisdiction to the circuit courts. It also supersedes the provision of the earlier law of 1882,¹⁵ imposing somewhat the same limitation on Federal jurisdiction. The venue of suits by national banks against the comptroller is provided by

Carson v. Dunham, 121 U. S. 426, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.

⁸Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288.

⁹Coffin v. Haggin, 11 Fed. 224, 7 Sawy. 509.

¹⁰Alabama, etc. R. R. v. Carroll, 84 Fed. 780, 28 C. C. A. 207.

¹¹Weiner v. Louisville W. Co. 130 Fed. 244.

¹²Mills v. Chicago, 143 Fed. 430.

¹⁵Act July 12, 1882, c. 290, § 4, 22 Stat. 163, U. S. Comp. Stat. 1901, p.

3458. That law provided that jurisdiction of suits by or against national banks "except suits between them and the United States, its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun." See Union Nat. Bank v. Mil-

another enactment.¹⁶ The enactment does not affect diverse citizenship as a ground of Federal jurisdiction, but still permits a national bank located in one State to sue a citizen of another, although the phrase "between individual citizens of the same State" is not happily chosen to express that intent.¹⁷ The object was to place national banks in the same position as citizens of the State where located, as respects Federal jurisdiction. Previously, by virtue of their Federal charter, actions to which they were parties were deemed to arise under the Federal laws and to be Federally cognizable originally, and by removal,¹⁸ and regardless of the amount involved.¹⁹ But this is no longer true.²⁰ Since jurisdiction in a suit between a national bank and a citizen of another State now rests upon diverse citizenship, judgment in the circuit court of appeals thereon is final.¹ But where a suit is incident to the winding up of a national bank or brought by the United States or its officer under the latter portion of the above law, jurisdiction exists because the case is one arising under Federal law and appeal lies to the Supreme Court.² Of course if an action to which a national bank is party is one arising under the Federal Constitution treaties and laws, it is of Federal cognizance, just as much as though between other parties.³ Suits against receivers respecting the administration of his trust are deemed suits arising under the Federal laws and of Federal cognizance either originally,⁴ or by removal.⁵ Under this section a State court may issue mandamus to allow a stockholder access to a national bank's books.⁶ National banks may be sued in the local State courts⁷ even though a receiver has been appointed by the comptroller.⁸ But by R. S. § 5242, no attachment, injunction or execution

ler, 15 Fed. 703; *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592.

¹⁶See post, § 415.

¹⁷*Petri v. Commercial Nat. Bank*, 142 U. S. 651; 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; *Whittemore v. Amoskeag Bank*, 134 U. S. 529, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592; *First Nat. Bank v. Forrest*, 40 Fed. 705; *Osborn v. Bank of United States*, 9 Wheat. 825, 6 L. ed. 204; *Cummings v. Nat. Bank*, 101 U. S. 155, 25 L. ed. 903.

¹⁸*Pacific Ry. Removal Case*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113.

¹⁹*Wilson Co. v. National Bank*, 103 U. S. 776, 26 L. ed. 488.

²⁰*Ex parte Jones*, 164 U. S. 693, 41 L. ed. 602, 17 Sup. Ct. Rep. 223; *Wichita Nat. Bank v. Smith*, 72 Fed. 568, 19 C. C. A. 42; *Leather Mfg. Bank v. Cooper*, 120 U. S. 781, 30 L. ed. 816; 7 Sup. Ct. Rep. 777; *Danahy v. Nat. Bank*, 64 Fed. 148, 12 C. C. A. 75.

¹*Ex parte Jones*, 164 U. S. 693, 41 L. ed. 602, 17 Sup. Ct. Rep. 223.

²*Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628.

³*Walker v. Winsor Nat. Bank*, 56 Fed. 76, 5 C. C. A. 421; *Auburn Sav. Bank v. Hayes*, 61 Fed. 911; *National Bank of Com. v. Wade*, 84 Fed. 10; *Union Nat. Bank v. Müller*, 15 Fed. 703.

⁴*Grant v. Spokane Nat. Bank*, 47 Fed. 673; *Gilbert v. McNulta*, 96 Fed. 83; *Bartley v. Hayden*, 74 Fed. 913. See *Wardens, etc. v. Sowles*, 51 Fed. 609.

⁵*Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4.

⁶*Hot Springs School Dist. v. First Nat. Bank*, 61 Fed. 417.

⁷*Casey v. Adams*, 102 U. S. 67, 26 L. ed. 52.

⁸*Bank of Bethel v. Pahquioque Bank*, 14 Wall. 395, 20 L. ed. 840; *Calhoun v. Lanaux*, 127 U. S. 639, 32 L. ed. 297, 8 Sup. Ct. Rep. 1345.

shall be issued against them or their property before final judgment in any suit, action or proceeding in any State, county or municipal court.⁹

[b] Suits by United States or its officers or for winding up bank's affairs.

The Federal jurisdiction reserved by the present law is perhaps broader than under the act of 1882 which excepted suits between national banks and the United States, its officers and agents.¹¹ This jurisdiction is at least concurrent in the Federal court.¹² Suits by receivers to enforce a stockholders liability are Federally cognizable under the present law because they are suits commenced by direction of an officer of the United States as well as because they are cases for winding up the affairs of a national bank.¹³ So also are other suits to recover assets by such receiver.¹⁴ Suits against such receiver in the execution of his duties, are deemed suits arising under the Federal laws and therefore of Federal cognizance.¹⁵ The amount in controversy does not effect the jurisdiction.¹⁶ The Federal courts have the same jurisdiction as respects the statutory agents as against statutory receivers.¹⁷ The jurisdiction of Federal courts over a creditor's bill to reach assets conferred by act of 1876¹⁸ is not impaired by this enactment.¹⁹

§ 25. Territorial limits and extent of Federal jurisdiction.

Within the several States, the jurisdiction possessed by the nation is limited, though it is also paramount, extending to all persons therein and every foot of soil.^[a] As respects other places and territories within the dominion of the United States, Federal jurisdiction is plenary and entire as well as paramount. Sovereignty is not divided between State and nation, but is complete in the nation; and legislative power is not limited to that delegated by the States, but is plenary as well as exclusive. Places within exclusive Federal jurisdiction fall into several classes. In the first are those whose acquisition the Constitution directly contemplates

⁹See § 907.

¹¹Supra, note.[a]

¹²Lake Nat. Bank v. Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195.

¹³Armstrong v. Trautman, 36 Fed. 276; Stephens v. Bernays, 44 Fed. 642; Yardley v. Dickson, 47 Fed. 835; Fisher v. Yoder, 53 Fed. 565; McCartney v. Earle, 115 Fed. 463, 53 C. C. A. 392.

¹⁴Shore v. Hepburn, 75 Fed. 113, 21 C. C. A. 252; Thompson v. Pool, 70 Fed. 725; Price v. Abbott, 17 Fed. 506; Linn Co. Nat. Bank v. Crawford, 69 Fed. 532.

¹⁵Gilbert v. McNulta, 96 Fed. 83; Grant v. Spokane Nat. Bank, 47 Fed. 673. See also supra, note.[a]

¹⁶Myers v. Hettinger, 94 Fed. 370, 37 C. C. A. 369; Brown v. Smith, 88 Fed. 565. See Thompson v. German Ins Co. 76 Fed. 892; Rankin v. Herod, 130 Fed. 390.

¹⁷McConville v. Gilmour, 36 Fed. 277, 1 L.R.A. 498; Snohomish Co. v. Puget Sound Nat. Bank, 81 Fed. 518.

¹⁸Post, § 964.

¹⁹George v. Wallate, 135 Fed. 286, 68 C. C. A. 40.

and provides for, viz., a place to serve as a seat for the national government, and places for forts, docks, and needful public buildings.¹ In the second are the territories of the United States, acquired by purchase or conquest, to some of which the Federal Constitution and laws have been extended and to others not.^[b] In the third are the reservations and lands occupied by Indians in their tribal relations under the provisions of various treaties with the United States, and which have not become part of any admitted State.^[c] In addition to this fixed territory over which the nation exercises a jurisdiction unaffected by the careful delegation of sovereignty contained in the Constitution, international law recognizes the jurisdiction and sovereignty of a nation over its public minister or military forces abroad; it recognizes the merchant vessels of a nation upon the high seas and its ships of war in all places, as detached portions of its territory.^[d]

Author's section.

[a] Federal jurisdiction within a State.

As the Federal government emanates from the people, so also it acts directly upon them, and not merely upon the States.³ Its powers and functions may be exercised and enforced through its physical agents on every foot of American soil.⁴ It has jurisdiction over every foot of soil within its territory.⁵ Within its sphere the Constitution makes it supreme.⁶ Yet it has only those powers given by the constitution;⁷ and within the borders of a State Federal jurisdiction and power are strictly limited.⁸ The borders of a State include adjacent waters within a marine league of the shore, and bays not exceeding two marine leagues in width at their mouth.⁹ Hence vessels lying in Boston harbor are within the borders of Massachusetts.¹⁰ Crimes on vessels within the limits of a State¹¹ except upon the Great Lakes,¹² are not punishable by the Federal

¹See § 26.

³McCulloch v. Maryland, 4 Wheat. 405, 4 L. ed. 601; Lane Co. v. Oregon, 7 Wall. 76, 19 L. ed. 104; In re Debs, 158 U. S. 599, 39 L. ed. 1092, 15 Sup. Ct. Rep. 911, 912.

⁴Ex parte Siebold, 100 U. S. 395, 25 L. ed. 726; In re Neagle, 135 U. S. 60, 34 L. ed. 70, 10 Sup. Ct. Rep. 666.

⁵In re Debs, 158 U. S. 599, 39 L. ed. 1092, 15 Sup. Ct. Rep. 911, 912; United States v. Flournoy, etc. Co. 69 Fed. 893; United States v. Debs, 64 Fed. 749, 751.

⁶See ante, § 14.

⁷Martin v. Hunter, 1 Wheat. 326, 4 L. ed. 97.

⁸McCulloch v. Maryland, 4 Wheat. 406, 4 L. ed. 579; Green v. Biddle, 8 Wheat. 88, 5 L. 547; Gillman v. Philadelphia, 3 Wall. 725, 18 L. ed. 96.

⁹Manchester v. Massachusetts, 139 U. S. 258, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; People v. Tyler, 7 Mich. 212, 74 Am. Dec. 708; People v. Welch, 141 N. Y. 270, 38 Am. St. Rep. 795, 36 N. E. 329, 24 L.R.A. 117.

¹⁰United States v. Bevans, 3 Wheat. 337, 4 L. ed. 404.

¹¹See ante, § 15.[b]

¹²See post, § 27.

statutes unless they would be crimes against the United States regardless of locality.

[b] Territories of United States and Federal legislative power thereover.

Over territories, forts etc., the United States exercises a general jurisdiction.¹⁴ The power of governing acquired territory belongs to the United States to the fullest extent.¹⁵ Its authority over it is supreme.¹⁶ Congress has full and exclusive legislative power over the territories.¹⁷ It may establish territorial governments and invest them with legislative powers.¹⁸ It has been settled in recent decisions that the Constitution does not ipso facto extend to newly acquired territory upon its acquisition, but that the status of such territory and the extent to which the provisions of the Constitution shall be deemed applicable therein, are to be determined by Congress.¹⁹

[c] Indian territory and reservations.

Indians living in their tribal relations are deemed to be wards of the nation;¹ in a state of pupilage.² Yet they have a status as dependent states,³ and as domestic rather than foreign dependent nations.⁴ By virtue of this distinct and quasi alien status the Federal government has made treaties from time to time with the different tribes and nations, and it is generally upon such treaties that the civil and political relations of any given tribe primarily rest. Being subject to the paramount authority of Congress⁵ whose statutes may operate to repeal a prior treaty,⁶ the laws of Congress as well as the Indian treaties are to be considered in ascertaining the legal relations and obligations of tribal Indians. The establishment of reservations for tribal Indians and their maintenance thereon has long been a feature of the government policy, and, commencing with 1882, a later development has been the partitioning of reservation lands among individual Indians with a view to ultimate obliteration

¹⁴New Orleans v. United States, 10 Pet. 737, 9 L. ed. 573.

¹⁵American Ins. Co. v. Bales of Cotton, 1 Pet. 543, 7 L. ed. 242.

¹⁶Late Corporation, etc. of Church v. United States, 136 U. S. 44, 34 L. ed. 481, 10 Sup. Ct. Rep. 792; Shively v. Bowlby, 152 U. S. 48, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

¹⁷Cohen v. Virginia, 6 Wheat. 428, 5 L. ed. 257; National Bank v. Yankton Co. 101 U. S. 133, 25 L. ed. 1046; McAllister v. United States, 141 U. S. 181, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; Utter v. Franklin, 172 U. S. 423, 43 L. ed. 498, 19 Sup. Ct. Rep. 183; Simms v. Simms, 175 U. S. 168, 44 L. ed. 115, 20 Sup. Ct. Rep. 58; United States v. McMillan, 165 U. S. 511, 41 L. ed. 805, 17 Sup. Ct. Rep. 395.

¹⁸Miners Bank v. Iowa, 12 How.

7, 13 L. ed. 867; Snow v. United States, 18 Wall. 319, 21 L. ed. 784.

¹⁹Downes v. Bidwell, 182 U. S. 279, 45 L. ed. 1103, 21 Sup. Ct. Rep. 770; Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

¹United States v. Kagama, 118 U. S. 383, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

²Jones v. Meehan, 175 U. S. 10, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

³Cherokee Nation v. Georgia, 5 Pet. 17, 8 L. ed. 25.

⁴Roff v. Burney, 168 U. S. 221, 42 L. ed. 442, 18 Sup. Ct. Rep. 60.

⁵Stephens v. Cherokee Nation, 174 U. S. 486, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

⁶The Cherokee Tobacco, 11 Wall. 616, 20 L. ed. 227.

of the tribal relation and the Indian reservations.⁷ So long as these reservations lie geographically within the limits of organized territories of the United States full and paramount power is vested in the nation, which treats them as part of such territory, or as separate jurisdictions, in the light of its treaties and according as one or the other policy seems suitable in any given case and for any given purpose.⁸ Upon the admission of any territory containing Indian reservations within its geographical borders, the question whether such reservations become part of the admitted State or whether by reservation of jurisdiction, they remain exclusively subject to the jurisdiction of the nation, as in the case of reserved forts,⁹ must be determined from the act of admission. In some instances Indian reservations have been excluded from the newly created State by force of treaties and the act of admission,¹⁰ in which cases their rights and status continue to be controlled by acts of Congress and existing treaties.¹¹ In others, where there was no clear purpose to except them, reservation lands have become part of the new State, enabling it to punish crimes thereon other than by Indians,¹² but generally not to legislate for or control the Indians themselves.¹³ In other words the jurisdiction reserved by the United States is over the tribes and not over the territory. The status of both reservation Indians and reservation lands within a State is therefore to be ascertained from the treaties, acts of Congress and terms of such States' admission.¹⁴ In some cases where reservation lands were not excepted from the limits of an admitted State, such State has subsequently ceded jurisdiction thereover to the national government.¹⁵

[d] Extraterritoriality—Vessels, military forces, public ministers.

By legal fiction public armed vessels of a nation are regarded as detached parts of its territory, both upon the high seas and in the waters

⁷Draper v. United States, 164 U. S. 241, 41 L. ed. 419, 17 Sup. Ct. Rep. 109.

⁸See *Ex parte Crow Dog*, 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *United States v. Rogers*, 4 How. 567, 11 L. ed. 1105.

⁹*Fort Leavenworth R. R. v. Lowe*, 114 U. S. 538, 29 L. ed. 264, 5 Sup. Ct. Rep. 999.

¹⁰The State has no authority to tax: *The Kansas Indians*, 5 Wall. 737, 18 L. ed. 672. Nor to punish crimes therein: *United States v. Ewing*, 47 Fed. 813; *United States v. Partello*, 48 Fed. 670.

¹¹*Ibid.*

¹²*United States v. McBratney*, 104 U. S. 624, 26 L. ed. 870; *Draper v. United States*, 164 U. S. 243, 41 L. ed. 420, 17 Sup. Ct. Rep. 108; *United States v. Sa-Coo-da-cot*, 1 Abb. U.

S.) 383, 1 Dill. 276, Fed. Cas. No. 16,212; *Benson v. United States*, 44 Fed. 182.

¹³*United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109, 30 L. ed. 231; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. ed. 846; *United States v. Thomas*, 151 U. S. 586, 38 L. ed. 276, 14 Sup. Ct. Rep. 426.

¹⁴Numerous cases deal with the taxing and other powers of States as against Indians: *The New York Indians*, 5 Wall. 769, 18 L. ed. 712; *The Kansas Indians*, 5 Wall. 737, 18 L. ed. 667; *Peck v. Miami Co.* 4 Dill. 371, Fed. Cas. No. 10,891; *Ward v. Race Horse*, 163 U. S. 515, 41 L. ed. 248, 16 Sup. Ct. Rep. 1080.

¹⁵South Dakota did so. See *Laws South Dakota*, 1901 c. 105. See also post, § 155, where Congress conferred

of a foreign power.¹ They are not liable to arrest on process for collision;² nor can our courts redress torts committed by them on the high seas.³ But a public armed vessel of the United States while in the harbor and waters of a State is so far within State jurisdiction that it may punish a crime committed on board.⁴ This exemption of public vessels from local jurisdiction does not extend to prize ships or goods taken by them in violation of our neutrality.⁵ Private vessels of a nation are also deemed detached portions of its territory so long as upon the high seas,⁶ but not while in foreign waters.⁷ When a private vessel enters foreign waters it is deemed to submit itself to the foreign law unless by treaty otherwise provided.⁸ By comity however all matters of discipline and things done on board affecting only the vessel and those on board and not disturbing the peace of the foreign port, will be left to the authorities of the nation to which the vessel belongs.⁹ The Constitution confers upon Congress power to punish piracies and felonies upon the high seas.¹⁰ And under its power to regulate commerce with foreign nations it has power to punish offenses on American vessels, though within the jurisdiction of a foreign power.¹¹

The international immunity from local law, of foreign public ministers and of foreign military forces¹² within a country by consent, attaches rather to the person than to the place, and is not relevant to the present discussion. However the residence of a foreign minister is also by fiction

jurisdiction on Federal courts over crimes therein.

¹*Schooner Exchange v. McFaddon*, 7 Cranch, 116, 3 L. ed. 287; *The Santissima Trinidad*, 7 Wheat. 283, 5 L. ed. 454.

²*The Pizarro v. Matthias*, 19 Fed. Cas. 787.

³*L'Invincible*, 1 Wheat. 252, 4 L. ed. 84.

⁴*United States v. Bevans*, 3 Wheat. 336, 4 L. ed. 404.

⁵*The Santissima Trinidad*, 7 Wheat. 283, 5 L. ed. 454.

⁶*Crapo v. Kelly*, 16 Wall. 610, 21 L. ed. 430; *United States v. Rogers*, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 115; *Chinese Cabin Waiters Case*, 13 Fed. 289, 7 Sawy. 536; *In re George Moncan*, 14 Fed. 48; *The E. B. Ward*, 17 Fed. 459; *McDonald v. Mallory*, 77 N. Y. 552, 33 Am. Rep. 668; *The Lamington*, 87 Fed. 754.

⁷*Wildenhus Case*, 120 U. S. 11, 30 L. ed. 567, 7 Sup. Ct. Rep. 387.

⁸*Schooner Exchange v. McFadden*, 7 Cranch, 144, 3 L. ed. 287; *United*

States v. Diekelman, 92 U. S. 520, 23 L. ed. 742.

⁹*Wildenhus Case*, 120 U. S. 11, 30 L. ed. 567, 7 Sup. Ct. Rep. 387.

¹⁰Cons. Art. I, § 8, cl. 10. See *Ex parte Byers*, 32 Fed. 408.

¹¹R. S. 5346 punishes assaults on American vessels in bays, rivers, etc., outside the jurisdiction of any State. The act of 1890 punishes offenses on American vessels in Canadian portions of the great lakes. See § —. See also *United States v. Rogers*, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 110; *United States v. Ross*, 1 Gall. 624, Fed. Cas. No. 16,196; *Ex parte Byers*, 32 Fed. 407; *United States v. Keefe*, 3 Mason, 475, Fed. Cas. No. 15,509; *United States v. Hamilton*, 1 Mason, 443, Fed. Cas. No. 15,291; *United States v. Stevens*, 4 Wash. C. C. 547, Fed. Cas. No. 16,394; *United States v. Bennett*, 3 Hughes, 466, Fed. Cas. No. 14,574; *United States v. Seagrist*, 4 Blatchf. 420, Fed. Cas. No. 16,245.

¹²*Schooner Exchange v. McFadden*, 7 Cranch, 116, 3 L. ed. 287.

deemed part of the territory of his sovereign.¹³ The extraterritorial jurisdiction exercised by consular courts over American citizens in foreign semicivilized countries, is a jurisdiction referable to the person and not based upon any fiction of sovereignty over the place.

§ 26. — District of Columbia, government forts, docks and buildings.

The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States^[a] and to exercise like authority over all places purchased by the consent^{[b]-[c]} of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.^{[e]-[f]}

Clause 17 of § 8, art I., U. S. Constitution.

[a] The District of Columbia.

Pursuant to the foregoing provision, Virginia by act of Dec. 3, 1789, ceded the county of Alexandria to the United States and Maryland thereafter ceded the county of Washington. These two constituted a territory ten miles square which Congress accepted, and organized into the District of Columbia, and set apart as the seat of government.¹ By act of July 9, 1846, and in violation of the Constitution,² Congress provided for retrocession of Alexandria county to Virginia upon a majority vote of the people thereof. And as a majority voted for retrocession, Virginia thereupon passed an act declaring the county reannexed, and ever since that time has assumed to exercise full jurisdiction over it. Since 1846 the territorial limits of the District have been deemed to include only the county of Washington ceded by the State of Maryland; and since the political departments of the Federal government and of Virginia recognize Alexandria as de facto a part of Virginia, the judicial department acquiesces in its status as such, and will not permit private litigants to question it vicariously.³ Commencing with the act of Feb. 27, 1801, and through numberless subsequent acts and parts of acts, Congress has "exercised exclusive legislation" over the District. It has never been its policy to delegate any legislative powers to inferior legislative boards in the District. By act of March 3, 1901, Congress enacted an elaborate code of laws for the District.

¹³United States v. Hand, 2 Wash. C. C. 435, Fed. Cas. No. 15,297; Stat. 130, U. S. Comp. Stat. 1901, p. Byrne v. Herran, 1 Daly, (N. Y.) 346; 1229.
¹Act July 16, 1790, c. 28 § 1, 1
²Phillips v. Payne, 92 U. S. 130, 117, 1 L. ed. 59; United States v. Jeffers, 4 Cranch (C. C.) 704, Fed. Cas. No. 15,471.
³Phillips v. Payne, 92 U. S. 130, 130, 23 L. ed. 649.

[b] Jurisdiction over forts, etc., acquired by purchase and State consent.

It results from the above provision of the Constitution that the Federal government acquires exclusive jurisdiction where the purchase of places for forts, arsenals, etc., is with the consent of the local State legislature.⁵ To such consent a stipulation may be attached that State civil and criminal process may be served in the purchased places,⁶ and such condition has usually been attached.⁷ It has been doubted whether the United States would have power to purchase by local legislative consent where the consent was so qualified as not to justify the exclusive legislation of Congress there.⁸ Consent is not to be implied from constant occupancy, even though a fort like Fort Niagara has been used by the United States continuously since the treaty with Great Britain.⁹ Where these conditions of purchase for the designated objects, and legislative consent, do not exist, exclusive jurisdiction cannot be derived from this clause of the Constitution,¹⁰ though it may arise in other ways.¹¹ R. S. § 1838, authorizes the President to procure the assent of the legislature of any State where land has been purchased for forts, etc., without such assent.¹²

[c] Jurisdiction over forts, etc., acquired otherwise than by purchase and State consent.

The national government has acquired lands for government purposes in various other ways than by purchase with the consent of the local legislature. Thus within States created out of territory belonging to the Federal government in the beginning or since acquired from time to time Congress has frequently, upon the admission of such States, reserved such public lands from sale as it deemed necessary, for forts, arsenals, light-houses, etc.¹⁴ Again, it is settled that the United States may acquire lands within the States for public purposes by condemnation in the Federal court, or in the local State court with the State's consent.¹⁵ And the power of the United States to acquire land in different States by direct purchase from the owners without legislative consent, is now con-

⁵Fort Leavenworth R. R. v. Lowe, 114 U. S. 538, 29 L. ed. 264, 5 Sup. Ct. Rep. 999.

⁶By R. S. § 4662, it is expressly provided that a cession of jurisdiction over places for lighthouses, beacons, public piers or landmarks shall be deemed sufficient though it reserves such right to serve process; and that if it be not reserved by the ceding State, it shall nevertheless be deemed to exist. See Hamburg, etc. S. S. v. Grube, 196 U. S. 408, 49 L. ed. 529, 25 Sup. Ct. Rep. 352, holding that New Jersey reserved the operation of its laws over Sandy Hook.

⁷United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; Martin v. Fed. Proc.—13.

House, 39 Fed. 694; Com. v. Clary, 8 Mass. 72.

⁸United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867.

⁹People v. Godfrey, 17 Johns. 225.
¹⁰Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 995, 29 L. ed. 264; In re Kelly, 71 Fed. 549.

¹¹See infra, note.[c]

¹²United States v. Tucker, 122 Fed. 518.

¹⁴See United States v. Bateman, 34 Fed. 86, 13 Sawy. 212.

¹⁵Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; United States v. Jones, 109 U. S. 513, 519, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; Matter of Petition of United States, 96 N. Y.

ceded though probably this mode of purchase was not thought of at the time of the adoption of the Constitution.¹⁶ As respects territory acquired in modes such as the foregoing, and other than by purchase with local legislative consent, it is plain that the Constitution does not confer upon Congress a right of exclusive legislation. As respects all such lands the United States has undoubtedly the rights of a proprietor. The States may not tax them; nor in any other way impair or burden their use by the Federal government for national purposes;¹⁷ as by punishing a Federal officer in a national soldiers' home for violation of a State oleomargarine law.¹⁸ But unless the State by some affirmative legislative act cedes its sovereignty and jurisdiction, the United States has merely its rights as a proprietor,¹⁹ coupled of course with the paramount rights which as a nation it possesses as against the States and all private owners; and crimes thereon are punishable by the State.²⁰

It is settled however that a State legislature may grant or cede to the national government full sovereignty and jurisdiction over lands acquired within the State, in the foregoing ways; and that it may attach to such grant of sovereignty stipulations broader than those permissible upon acquisition by purchase and consent. It may in fact impose any conditions not inconsistent with the effective use of the property for the intended public purpose.¹ Reservation of a right to serve civil and criminal process in the ceded place is very generally made.² The reservation by Kansas of a right to tax railroad, bridge, and other corporations, their franchises and property at Fort Leavenworth which the United States owned prior to Kansas statehood and omitted to reserve on admitting Kansas to the union, has been upheld.³ New York accompanied a cession of State lands and jurisdiction with a condition protecting canal uses of the land.⁴ Nebraska ceded jurisdiction over government forts upon the condition that public roads thereon might be kept open and in repair.⁵ New York ceded jurisdiction over the Brooklyn navy yard on condition that the United States pay an accrued street assessment.⁶ A reservation by the Ohio legislature of the right of inmates of Federal soldier's asylum to vote

227; *Chappell v. United States*, 160 U. S. 510, 40 L. ed. 514, 16 Sup. Ct. Rep. 400.

¹⁶*Fort Leavenworth R. R. v. Lowe*, 114 U. S. 539, 29 L. ed. 264, 5 Sup. Ct. Rep. 998.

¹⁷*Fort Leavenworth R. R. v. Lowe*, 114 U. S. 539, 29 L. ed. 264, 5 Sup. Ct. Rep. 1002, 1003.

¹⁸*Ohio v. Thomas*, 173 U. S. 282, 43 L. ed. 701, 19 Sup. Ct. Rep. 455.

¹⁹*People v. Godfrey*, 17 Johns. 225; *United States v. Bateman*, 34 Fed. 86.

²⁰*United States v. Bateman*, 34 Fed. 86; *People v. Godfrey*, 17 Johns. 225.

¹*Fort Leavenworth R. R. v. Lowe*, 114 U. S. 538, 29 L. ed. 264, 5 Sup.

Ct. Rep. 999; *Hamburg A. S. S. Co. v. Grube*, 196 U. S. 408, 49 L. ed. 529, 25 Sup. Ct. Rep. 352; *United States v. Carter*, 84 Fed. 624; *In re Ladd*, 74 Fed. 31; *United States v. Tucker*, 122 Fed. 518; *Chicago, etc. Ry. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1006.

²See *In re Ladd*, 74 Fed. 38, and cases there cited.

³*Fort Leavenworth R. R. v. Lowe*, 114 U. S. 538, 29 L. ed. 270, 5 Sup. Ct. Rep. 997.

⁴*The Fort Porter Mil. Reserv.* 16 Ops. Atty. Gen. 592.

⁵*In re Ladd*, 74 Fed. 35.

⁶*Palmer v. Barrett*, 162 U. S. 401, 40 L. ed. 1016, 16 Sup. Ct. Rep. 837.

in the State has been declared invalid by the State supreme court as giving the suffrage to persons not residents of the State.⁷ In ceding Fort Munroe, Virginia reserved a right to serve process, the use and existence of a road, and a right of fishery.⁸ A cession of State jurisdiction is obtained more frequently perhaps than a local legislative consent to purchase. Having once ceded jurisdiction upon certain conditions the State is without power thereafter to impose other conditions.⁹ Where the State law merely ceded "jurisdiction" it was held to mean concurrent and not exclusive jurisdiction, in view of the fact that a place for a soldiers' home was one which did not demand exclusive Federal control and the further fact that the purchase of such place was by a corporation maintained by the United States and not by the United States as such.¹⁰ R. S. § 4661 provides that "no lighthouse, beacon, public piers, or landmark, shall be built on any site until cession of jurisdiction over the same has been made to the United States."¹¹ And laws empowering the executive department to purchase sites for government buildings frequently provide that no building shall be erected until the State relinquish its jurisdiction so long as the United States remains the owner.¹²

[d] Exclusive nature of jurisdiction acquired.

While the Constitution merely enumerates this power of exclusive legislation among the powers of Congress, the effect of the provision is to create under the named circumstances a Federal jurisdiction that is ipso facto exclusive, and not merely to be made so at the option of Congress. All other authority than that of Congress is excluded.¹⁴ It is not necessary that the State expressly cede jurisdiction, the result follows from the legislative consent to the purchase,¹⁵ though a cession of jurisdiction is perhaps the commoner method pursued, and sometimes there is both a consent and an express cession of jurisdiction.¹⁶ The Federal government may acquire just as exclusive a jurisdiction where ceded by the State as where derived under the Constitution by purchase and local legislative consent. However the ceding State may grant only a partial jurisdiction, and it has a much larger power of imposing conditions than where Federal jurisdiction is acquired by purchase and consent.¹⁷

⁷Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

⁸Crook v. Old Point, etc. Hotel Co. 54 Fed. 606.

⁹In re Ladd, 74 Fed. 38.

¹⁰In re Kelly, 71 Fed. 545. But see Foley v. Shriver, 81 Va. 568; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

¹¹Other acts have permitted condemnation of such sites. See Chapell v. United States, 160 U. S. 510, 40 L. ed. 514, 16 Sup. Ct. Rep. 400.

¹²See Martin v. House, 39 Fed. 694.

¹⁴Fort Leavenworth R. R. v. Lowe, 114 U. S. 538, 29 L. ed. 264, 5 Sup. Ct. Rep. 999; United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,868; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; People v. Godfrey, 17 Johns. 225; Foley v. Shriver, 81 Va. 568.

¹⁵United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867.

¹⁶Bannon v. Burnes, 39 Fed. 897; United States v. Tucker, 122 Fed. 518.

¹⁷See supra, note [c]. Fort Leavenworth R. R. v. Lowe, 114 U. S. 539, 29 L. ed. 264, 5 Sup. Ct. Rep. 1002;

The fact that the ceding statute speaks of retaining a "concurrent jurisdiction" in the State where it refers only to reservation of a right to serve process, will not be construed as making the Federal jurisdiction anything less than exclusive.¹⁸ The reservation by a State of a right to serve process does not imply a concurrent right of jurisdiction or legislation in the State over the granted lands, but is merely a condition annexed to the cession and an agreement of the new sovereign.¹⁹ Though the land when purchased and ceded was subject to a judgment lien, process of execution cannot issue from the State court after the title has passed to the United States²⁰ and prior taxes may not be enforced.¹ Criminal acts committed in such places are crimes against the United States and not punishable by the State;² and this is just as true where the jurisdiction is ceded, as where acquired by purchase and consent.³ The State law as to license and sale of liquor is no longer applicable.⁴ The burden is on the government to prove that the offense was committed in a place within exclusive Federal jurisdiction.⁵ But a State court has held that perjury committed in a State court held in a building over which the United States has acquired exclusive jurisdiction may be punished by the State.⁶ A territory has jurisdiction to punish crime within a military fort, as no question of separate sovereignties is there involved.⁷

It is customary in Federal criminal laws to extend their operation to the high seas, and all places within the exclusive jurisdiction of the United States. By R. S. § 539, and an act of July 7, 1898, offenses in places ceded to and within the exclusive jurisdiction of the United States are made punishable by the laws of the State where not within the prohibition of any Federal law. Persons living in such places do not acquire the civil and political privileges, nor are they subject to the civil duties and obligations of the inhabitants of contiguous towns or other portions of the State.⁸ They may not be taxed by the ceding State.⁹ They have no rights

Chicago, etc. R. R. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1006.

¹⁸In re Ladd, 74 Fed. 38; United States v. Meagher, 37 Fed. 875.

¹⁹Exum v. State, 90 Tenn. 501, 25 Am. St. Rep. 704, 17 S. W. 107, 15 L.R.A. 381; Barrett v. Palmer, 135 N. Y. 336, 31 Am. St. Rep. 835, 31 N. E. 1017, 17 L.R.A. 720; United States v. Cornell, 2 Mason, 60; Fed. Cas. No. 14,867; Com. v. Clary, 8 Mass. 72; Opinion of Justices, 1 Metc. 580; In re Ladd, 74 Fed. 35; Lasher v. State, 30 Tex. App. 387, 28 Am. St. Rep. 922, 17 S. W. 1064.

²⁰Martin v. House, 39 Fed. 695.

¹Bannon v. Burnes, 39 Fed. 897.

²United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; Com. v. Clary, 8 Mass. 72; Mitchell v.

Tibbets, 17 Pick. 298; United States v. Meagher, 37 Fed. 875.

³See In re Ladd, 74 Fed. 35; Benson v. United States, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60; United States v. Meagher, 37 Fed. 875; State v. Mack, 23 Nev. 359, 62 Am. St. Rep. 816, 47 Pac. 764; United States v. Carter, 84 Fed. 623.

⁴In re Ladd, 74 Fed. 41.

⁵United States v. Lewis, 111 Fed. 631.

⁶Exum v. State, 90 Tenn. 501, 25 Am. St. Rep. 700, 17 S. W. 108, 15 L.R.A. 382.

⁷Territory v. Burgess, 8 Mont. 67, 19 Pac. 561, 1 L.R.A. 810.

⁸Opinion of the Justices, 1 Metc. 580.

⁹Armory at Harpers Ferry, 6 Op. Attys. Gen. 577; The New York Post-office Site, 10 Ops. Attys. Gen. 35.

against the contiguous municipality or under its ordinances.¹⁰ The civil laws of the State governing the use and enjoyment of property and not in conflict with the Federal laws, continue in force in the ceded place until displaced by the new sovereign, just as in the case of a cession of lands by a foreign power.¹¹ This does not include a State liquor law penal in character.¹²

[dd] Cession to State of jurisdiction over Federal immigrant stations.

The legislation of Congress shows at least one instance of a cession of jurisdiction to the several States. The alien immigrant law of 1891 provides "that for the preservation of the peace and in order that arrests may be made for crimes under the laws of the States where the various United States immigrant stations are located, the officials in charge of such stations as occasion may require shall admit therein the proper State and municipal officers charged with the enforcement of such laws, and for the purposes of this section the jurisdiction of such officers and of the local courts shall extend over such stations."¹³

[e] Purposes for which exclusive jurisdiction has been acquired and ceded.

There are many cases in which the Federal government has acquired lands and a cession of jurisdiction thereover, for the purpose of erecting forts,¹⁴ magazines and arsenals,¹⁵ armories,¹⁶ dockyards or navy yards.¹⁷ Among "other needful buildings," to accommodate which exclusive jurisdiction has been acquired are, places for an asylum for disabled volunteers,¹⁸ for a postoffice,¹ for an appraiser's building,² for postoffice, Federal courts, internal revenue offices, etc.,³ for maintenance of locks and dams.⁴ The Constitution creates an exclusive jurisdiction on purchase with legislative consent only where the purchase is for the purposes enumerated in the constitution. Hence it has been held that purchase by legislative consent, for a soldiers' home, would not, ipso facto, create exclusive jurisdiction, though the power of the State to grant such a jurisdiction is conceded.⁵ Other authori-

¹⁰United States v. American W. Works Co. 37 Fed. 748.

¹¹Chicago, etc. R. R. v. McGlinn, 114 U. S. 546, 29 L. ed. 270, 5 Sup. Ct. Rep. 1006; In re Ladd, 74 Fed. 40; Crook v. Old Point, etc. Co. 54 Fed. 609; Barnett v. Barnett, 9 N. Mex. 212, 50 Pac. 338; Barrett v. Palmer, 135 N. Y. 340, 31 Am. St. Rep. 837, 31 N. E. 1018, 17 L.R.A. 723; Crook v. Old Point, etc. Co. 54 Fed. 608.

¹²In re Ladd, 74 Fed. 40.

¹³Section 9, act March 3, 1891, c. 551, 26 Stat. 1086, U. S. Comp. Stat. 1901, p. 1299.

¹⁴See United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867.

¹⁵See Com. v. Clary, 8 Mass. 72.

¹⁶See Armory at Harpers Ferry, 6 Op. Atty. Gen. 577.

¹⁷See Mitchell v. Tibbits, 17 Pick.

298; Barrett v. Palmer, 135 N. Y. 340, 31 Am. St. Rep. 837, 31 N. E. 1018, 17 L.R.A. 723.

¹⁸See Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397. But jurisdiction of this Ohio site was afterwards relinquished. See in re Kelly, 71 Fed. 545; Ohio v. Thomas, 173 U. S. 282, 43 L. ed. 701, 19 Sup. Ct. Rep. 455.

¹See New York Postoffice Site, 10 Op. Attys. Gen. 35.

²Sharon v. Hill, 24 Fed. 731, 11 Sawy. 130.

³Martin v. House, 39 Fed. 694; State v. Mack, 23 Nev. 365, 62 Am. St. Rep. 815, 47 Pac. 764.

⁴United States v. Tucker, 122 Fed. 518.

⁵See In re Kelly, 71 Fed. 545; In re O'Connor, 37 Wis. 379. In Foley v.

ties, however, do not seem to have applied the rule *ejusdem generis*, to the construction of "other needful buildings," but have given the phrase a liberal interpretation, and a late case maintains that land for locks and dams on a canal is within the phrase.⁶ So also Congress in its legislation has gone upon the theory that jurisdiction might be acquired over lands for national cemeteries under this clause of the constitution, though that is a far cry from lands for "needful public building." It has declared that upon payment of the purchase price of lands acquired for that purpose exclusive Federal jurisdiction shall arise thereover;⁷ and that after the assent of a State has been obtained, complete Federal jurisdiction shall vest as provided in the clause of the Constitution here under consideration.⁸ So long as the State's assent to a purchase is accompanied by a cession of jurisdiction it is immaterial that the land is not acquired for "other needful buildings," in any proper sense of that term. But there is no authoritative decision that lands purchased by consent for cemeteries, or for locks and dams without any cession of jurisdiction, pass to the exclusive jurisdiction of the nation.

[f] Retrocession of ceded lands.

States have often accompanied a cession of jurisdiction over lands or places acquired by the United States with the condition that it shall continue only while the United States shall be and continue the owner,¹⁰ or continue to use the same.¹¹ It would seem that in cases of a cession of jurisdiction, the ceded jurisdiction necessarily terminates when the place ceases to be used for the granted purpose.¹² But where the exclusive jurisdiction is only to continue while the premises are used for the designated purpose, State jurisdiction reattaches when that use terminates, e. g., where the government leases the land for market purposes,¹³ or for a hotel.¹⁴ In one case Congress relinquished the jurisdiction ceded for a soldiers' home.¹⁵ The retrocession of Alexandria county ceded by Virginia as part of the District of Columbia has already been referred to.¹⁶

§ 27. Federal jurisdiction over crimes on great lakes.

Every person who shall, upon any vessel registered or enrolled under the laws of the United States, and being on a voyage upon

Shriver, 81 Va. 572, and *Sinkes v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397, it was held that exclusive Federal jurisdiction was granted by the State.

⁶*United States v. Tucker*, 122 Fed. 522.

⁷See R. S. § 4872, U. S. Comp. Stat. 1901, p. 3376, 14 Stat. 400.

⁸See R. S. § 4882, U. S. Comp. Stat. 1901, p. 3379, 16 Stat. 188. See *In re Kelly*, 71 Fed. 551, discussing this.

¹⁰*Martin v. House*, 39 Fed. 694; *In re Ladd*, 74 Fed. 35.

¹¹*Bannon v. Burnes*, 39 Fed. 897;

Palmer v. Barrett, 162 U. S. 402, 40 L. ed. 1016, 16 Sup. Ct. Rep. 837; *Crook v. Old Point*, etc. Co. 54 Fed. 606; *United States v. Carter*, 84 Fed. 623.

¹²*Chicago, etc. R. R. v. McGlenn*, 114 U. S. 545, 29 L. ed. 271, 5 Sup. Ct. Rep. 1006.

¹³*Palmer v. Barrett*, 162 U. S. 403, 40 L. ed. 1016, 16 Sup. Ct. Rep. 837.

¹⁴*Crook v. Old Point, etc. Co.* 54 Fed. 604.

¹⁵16 Stat. 399. See *In re Kelly*, 71 Fed. 551.

¹⁶*Supra*, note.[a]

the waters of any of the great lakes, namely, Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of the said lakes, commit or be guilty of any of the acts, neglects, or omissions, respectively, mentioned in chapter three of title seventy of the Revised Statutes of the United States [defining and punishing crimes arising within the maritime and territorial jurisdiction of the United States], shall upon conviction thereof be punished with the same punishments in the said title and chapter, respectively, affixed to the same offenses therein mentioned, respectively.

§ 1 of act Sept. 4, 1890, c. 874, 26 Stat. 424, U. S. Comp. Stat. 1901, p. 3629.

At the time of this enactment a case was pending and afterwards decided by the Supreme Court¹ holding that Federal jurisdiction existed to punish an offense upon one of the great lakes within the territorial jurisdiction of the Dominion of Canada, by virtue of R. S. § 5346, punishing offenses on the "high seas, . . . or in any river . . . within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state" on board an American vessel. This was upon the theory that the great lakes may be deemed "high seas" under the power to regulate commerce with foreign nations. Congress has power to punish offenses on American vessels on navigable waters though within the territorial limits of a foreign nation,² and this enactment of 1890 which was probably suggested by observations contained in an opinion of Mr. Justice Brown at circuit,³ is valid. The Federal jurisdiction of crimes on the great lakes and connecting waters is concurrent with the jurisdiction of Canada when committed within portions thereof upon the Canadian side of the boundary, and with the different States, upon the American side.⁴ Another section of the act of 1890 gives jurisdiction over such offenses to the circuit and district court.⁵

§ 28. Local law as to remedies for improvements applies to Federal occupants.

When an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant

¹United States v. Rogers, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 110. ⁹ L. ed. 1004.

Contra, see Ex parte Byers, 32 Fed. 410.

²Ex parte Byers, 32 Fed. 404. ³Bigelow v. Nickerson, 70 Fed. 116,

30 L.R.A. 338, 17 C. C. A. 1.

⁴See post, § 157.

shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made.

Act June 1, 1874, c. 200, 18 Stat. 50, U. S. Comp. Stat. 1901, p. 581.

§ 29. The law applied in civil rights cases.

The jurisdiction in civil and criminal matters conferred on the district and circuit court by the provisions of this title [i. e., Title 13, covering "The Judiciary"], and of title "Civil Rights," and of title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

R. S. § 722, U. S. Comp. Stat. 1901, p. 582.

This provision was originally part of the civil rights statutes of 1866, 1870.⁷ It has been said that it does not attempt to prescribe the rule of decision but merely the forms of process and remedy;⁸ and that the court is at liberty to adopt the State practice as to challenges to grand jurors.⁹ The section has been criticized as an incongruous and meaningless jumble.¹⁰ Congress has undoubted power to prescribe the procedure of Federal courts both civil and criminal,¹¹ and to adopt the punishment for offenses against

⁷Act, April 9, 1866, c. 31, § 31, 14 Stat. 27; Act, May 31, 1870, c. 114, § 18, 16 Stat. 144.

⁸In *re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563.

⁹*United States v. Eagan*, 30 Fed. 608.

¹⁰Per Clifford, J., dissenting in *Tennessee v. Davis*, 100 U. S. 299, 25 L. ed. 663.

¹¹Post, § 579.

Federal laws, that is prescribed by the States in like cases. But if the section is an attempt to provide the substantive law to be administered or the rule of decision in the cases referred to, it would seem ineffective in denying the general principles by which the Federal courts must be governed.¹²

¹²Ante, § 10.

CHAPTER 2.

THE SUPREME COURT.

- § 31. References to code sections not herein included.
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- § 55. Appeals from Porto Rico supreme and district courts.
- § 56. Error and appeal from Supreme Court of Philippines.
- § 57. Appeal from Oklahoma supreme court.
- § 58. Appeals from Court of Claims.
- § 59. Writ of error on conviction of capital crime.
- § 60. Direct appeal in suits for failure to alter bridge obstructing navigation.
- § 61. Appeal in bankrupt cases.
- § 62. Appeal in proceedings under name of Commerce Commission.

- § 63. —in proceedings by petition to enforce Commerce Commission's orders.
§ 64. —in suits against the Commission to suspend orders, etc.
§ 65. Certiorari in trademark cases.
§ 66. Appeals in cases from court in China.

§ 31. References to code sections not herein included.

Elsewhere in this code will be found provisions respecting the allotment of justices of the Supreme Court to different circuits;¹ the appointment, tenure and salaries of judges.² The matter of appellate procedure in general;³ the determination of a cause and execution of mandate,⁴ and other kindred subjects, are contained in subsequent chapters. Elsewhere also is discussed the power of the Supreme Court to issue mandamus and prohibition;⁵ to make rules for equity admiralty and bankruptcy practice, etc.,⁶ and issue writs.⁷ The clerks, marshals, reporters and other officers of the Supreme Court are referred to in subsequent chapters.⁸ The law as to appeal from the court of private land claims is omitted because temporary in character, and because the work of that court is now virtually completed.

Author's section.

§ 32. Number of Justices.

The Supreme Court of the United States shall consist of a chief justice and eight associate justices, any six of whom shall constitute a quorum.

R. S. § 673, U. S. Comp. Stat. 1901, p. 558.

As originally constituted the Supreme Court consisted of seven members, but § 1 of an act of April 10, 1869,²⁰ which became R. S. § 673, supra, increased the number to nine. Another section provides for adjournment in case a quorum is not present¹ but a quorum has all the powers of a full bench. Hence a minority of the court may constitute a majority of a quorum and render a binding decision.

§ 33. Precedence of Associate Justices.

The associate justices shall have precedence according to the dates

¹Post, § 101.

²Post, §§ 467, 469.

³Post, § 1886, et seq.

⁴Post, § 2105, et seq.

⁵Post, § 844.

⁶Post, § 802, 803.

⁷Post, § 841.

⁸Post, § 558, et seq.; § 613. et seq.

²⁰C. 22, 16 Stat. 44.

¹See Post § 305.

of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages.

R. S. § 674, U. S. Comp. Stat. 1901, p. 558.

This was part of § 1 of the original judiciary act.²

§ 34. Vacancy in the office of Chief Justice.

In case of a vacancy in the office of chief justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another chief justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of chief justice.

R. S. § 675, U. S. Comp. Stat. 1901, p. 558.

This was part of § 1 of the original judiciary act³ and also of § 1 of an act of 1868.⁴

§ 35. Original and appellate jurisdiction of Supreme Court declared.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction.^[a] In all the other cases before mentioned,⁶ the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.^[b]

U. S. Const. Art. III., § 2, cl. 2.

[a] Original jurisdiction—not exclusive, but may not be enlarged.

This clause does not in terms make the original jurisdiction exclusive, and it is settled that Congress may confer jurisdiction on inferior courts over the cases above enumerated and then appellate jurisdiction on the Supreme Court.⁷ In other words a mere affirmative grant of original jurisdiction does not make it exclusive, or negative a right in Congress to confer appellate jurisdiction.⁸ Nor does it negative the existence of

²Act, Sept. 24, 1789, c. 20, 1 Stat. 447; *Gittings v. Crawford*, Taney, Dec. 1, Fed. Cas. No. 5,465. See ante, § 2.^[1]

³Act Sept. 24, 1789, c. 20, 1 Stat. 447.

⁴Act June 25, 1868, c. 81, 15 Stat. 80.

⁶Ante, § 2.

⁷*Börs v. Preston*, 111 U. S. 256, 277, 260, 28 L. ed. 421, 4 Sup. Ct. Rep. 407, 419; *Ames v. Kansas*, 111 U. S. 472, 6 L. ed. 523. See U. S. Notes, 469, 28 L. ed. 490, 4 Sup. Ct. Rep. Book I. p. 123.

⁸The contrary was declared in *Marbury v. Madison*, 1 Cranch, 173-176, 2 L. ed. 60. But its dictum has been qualified by later cases: *Cohens v. Virginia*, 6 Wheat. 397, 5 L. ed. 289; *United States v. Ortega*, 11 Wheat. 472, 6 L. ed. 523.

jurisdiction in a State court.⁹ It is equally well settled that the original jurisdiction of the Supreme Court as defined by the Constitution, may not be enlarged by Congress. The affirmative grant of original jurisdiction in certain cases negatives its existence in all other cases.¹⁰ Hence, as the Supreme Court has no original prize jurisdiction,¹¹ intervenors, not parties below, cannot come in there,¹² and a claim cannot be interposed there for the first time.¹³ The enumeration of cases affecting ambassadors, etc., and cases to which a State is party, has reference to the grant of jurisdiction over such cases contained in the preceding clause of the same section,¹⁴ and does not enlarge that grant.

[b] Appellate jurisdiction regulated by Congress.

Whether appellate jurisdiction could have been exercised by the Supreme Court in the absence of any legislation of Congress conferring power,¹⁶ has never been a practical question, since Congress has legislated very fully upon the subject ever since the judiciary act of 1789. Any enumeration by Congress of cases within the Supreme Courts appellate jurisdiction is the equivalent of excepting non-enumerated cases therefrom.¹⁷ Hence it is true that, Congress having legislated, the Supreme Court has appellate power only in the cases provided for by Congress;¹⁸ and that where the act conferring jurisdiction of particular cases has expired, the jurisdiction ceases.¹⁹ While the appellate jurisdiction is derived from the Constitution, yet the power to regulate and limit it is in Congress and, having been assumed by Congress that body must declare the right of appeal in a given case or the right does not exist.²⁰ The Constitution must confer capacity to take jurisdiction and an act of Congress must supply the requisite authority.¹ The power of Congress to confer appellate jurisdiction is not re-

⁹Delafield v. Illinois, 26 Wend. 215, 2 Hill, 168.

¹⁰Marbury v. Madison, 1 Cranch, 173, 2 L. ed. 60; Cohens v. Virginia, 6 Wheat. 396, 5 L. ed. 257; United States v. Ferriera, 13 How. 49, 14 L. ed. 42; United States v. Old Settlers, 148 U. S. 466, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; California v. Southern Pac. Co. 157 U. S. 261, 39 L. ed. 683, 15 Sup. Ct. Rep. 591; Ex parte Yergier, 8 Wall. 98, 19 L. ed. 332.

¹¹The Alicia, 7 Wall. 571, 19 L. ed. 84.

¹²The William Bagaley, 5 Wall. 412, 18 L. ed. 591.

¹³Walden v. Gratz, 1 Wheat. 300, 4 L. ed. 94.

¹⁴See ante, § 2.

¹⁶See Wiscart v. D'Auchy, 3 Dall. 328, 1 L. ed. 619; Dourousseau v. United States, 6 Cranch, 314, 3 L. ed. 232.

¹⁷Dourousseau v. United States, 6 Cranch, 314, 3 L. ed. 232; United

States v. American B. T. Co. 159 U. S. 549, 40 L. ed. 255, 16 Sup. Ct. Rep. 69; Ex parte McCordle, 7 Wall. 513, 19 L. ed. 264.

¹⁸United States v. Moore, 3 Cranch, 173, 2 L. ed. 397; United States v. Young, 94 U. S. 259, 24 L. ed. 153; United States v. Sanges, 144 U. S. 319, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; National Exch. Bank v. Peters, 144 U. S. 572, 36 L. ed. 545, 12 Sup. Ct. Rep. 767; Colorado, etc. M. Co. v. Turck, 150 U. S. 141, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

¹⁹United States v. Boisdore, 8 How. 121, 12 L. ed. 1009.

²⁰Dourousseau v. United States, 6 Cranch, 314, 3 L. ed. 232; Ex parte McCordle, 7 Wall. 512, 19 L. ed. 264.

¹Daniels v. Railroad Co. 3 Wall. 254, 18 L. ed. 226; American Con. Co. v. Jacksonville, etc. Ry. 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep.

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stricted to appeals from Federal courts established by Congress under § 1 of article three² of the Constitution. It extends to specified cases and not particular courts.³ An important part of that appellate jurisdiction is over State tribunals.⁴ Congress may confer appellate jurisdiction upon the Supreme Court over the territorial courts and over the court of private land claims, neither of which is organized under § 1 of article three.⁵ But Congress cannot extend the appellate power of the Supreme Court beyond limits prescribed by the Constitution, and cannot authorize it to express an opinion on a case where its judicial power could not be exercised or its judgment carried into effect.⁶ Hence under an early law which made decisions of the court of claims merely advisory no appeal lay to the Supreme Court.⁷ But since the act of March 17, 1866, its decisions are appealable just as the decisions of other courts.⁸ The Supreme Court is a court of limited jurisdiction just as are all the other Federal courts.⁹ No appeal lies to the Supreme Court from a decision of the Interstate Commerce Commission.¹⁰

State laws may not regulate or restrain the appellate jurisdiction of the Supreme Court any more than the jurisdiction of other Federal courts.¹¹ State laws may not regulate the right of review in the Supreme Court;¹² nor make a State decision final and non-reviewable.¹³

Appellate jurisdiction is that jurisdiction which revises and corrects proceedings in a cause already instituted and does not create that cause.¹⁴ It would be an exercise of original jurisdiction for the Supreme Court to issue mandamus to an executive officer of the government, and Congress may not authorize its issuance to such an officer except in cases within the original jurisdiction of the Supreme Court as above defined.¹⁵ The issuance of the various writs to inferior courts is however an exercise of

²Ante, § 8.

³Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401.

⁴Bridge Prop. v. Hoboken Co. 1 Wall. 116, 17 L. ed. 571. See post, § 38.

⁵See American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 546, 7 L. ed. 243; Bermer v. Porter, 9 How. 244, 13 L. ed. 123; United States v. Coe, 155 U. S. 86, 39 L. ed. 76, 15 Sup. Ct. Rep. 18; Hunt v. Palao, 4 How. 589, 11 L. ed. 1115. But query, what authority has Congress to confer appellate jurisdiction from a territorial court where a case is not one within the scope of Federal judicial power as defined, ante, § 2. Most if not all such cases might be deemed to arise under Federal laws and be Federally justiciable on that ground.

⁶Gordon v. United States, 117 U. S. 702; United States v. Old Settlers,

148 U. S. 466, 37 L. ed. 524, 13 Sup. Ct. Rep. 666.

⁷Gordon v. United States, 117 U. S. 702.

⁸United States v. Klein, 13 Wall. 145, 20 L. ed. 525; United States v. Jones, 119 U. S. 477, 30 L. ed. 440, 7 Sup. Ct. Rep. 283.

⁹See ante, § 9.

¹⁰Interstate C. C. v. Atchison, etc. R. R. 149 U. S. 265, 37 L. ed. 727, 13 Sup. Ct. Rep. 837.

¹¹See ante, § 5.

¹²Gelston v. Hoyt, 3 Wheat. 303, 4 L. ed. 396; Boogher v. New York L. I. Co. 103 U. S. 95, 26 L. ed. 310.

¹³Wilson v. Mason, 1 Cranch, 91, 92, 2 L. ed. 29.

¹⁴Marbury v. Madison, 1 Cranch, 173, 2 L. ed. 60.

¹⁵Marbury v. Madison, 1 Cranch, 173, 2 L. ed. 60. The law authorizing mandamus was altered to conform of the decision. See post, § 844.

appellate jurisdiction¹⁶ and is provided for by act of Congress.¹⁷ The issuance of a writ of habeas corpus is deemed a revision of the action of an inferior court and therefore an exercise of appellate jurisdiction.¹⁸

§ 36. When original jurisdiction exclusive and when not.

The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction.^[a] And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party.^[b]

R. S. § 687, U. S. Comp. Stat. 1901, p. 565.

[a] Suits affecting States.

The foregoing provision has remained unchanged since the enactment of the original judiciary act of which it was a part.¹ In this section Congress has declared as it has power to do,² when the original jurisdiction conferred by the Constitution³ is exclusive and when not. Jurisdiction was conferred on the Supreme Court over cases affecting States, to secure an impartial tribunal.⁴ Federal jurisdiction does not extend to suits against States by citizens of other States, or of foreign countries.⁵ The scope of Federal jurisdiction over suits between States,⁶ and by States against citizens of other States or aliens,⁷ and between States and the United States,⁸ has already been considered.

[b] Suits by and against ambassadors, consuls, etc.

R. S. § 711 originally contained a provision making Federal jurisdiction of suits against ambassadors and their servants exclusive of the several States.¹⁰ It was however stricken out in 1875 and is unnecessary in view

¹⁶Ex parte Crane, 5 Pet. 200, 8 L. ed. 96; Ex parte Newman, 14 Wall. 165, 20 L. ed. 879; Virginia v. Rives, 100 U. S. 327, 25 L. ed. 672.

¹⁷See post, §§ 841, 844.

¹⁸Ex parte Bollman, 4 Cranch, 101, 2 L. ed. 563; Ex parte Watkins, 7 Pet. 572, 8 L. ed. 788; Ex parte Virginia, 100 U. S. 341, 25 L. ed. 677. Criticized in In re Metzger, 5 How. 191, 12 L. ed. 111. See U. S. Notes, Book I. p. 122.

§ 13, Act Sept. 24, 1789, c. 20, 1 Stat. 80.

²Ante, § 35.[a]

³Ante, § 35.

⁴Chisholm v. Georgia, 2 Dall. 475, 1 L. ed. 440.

⁵See ante, § 7.

⁶See ante, § 2.[n]

⁷Ante, § 2.[o]

⁸Ante, § 2.[p]

¹⁰See ante, § 15.[a]

of R. S. § 687, *supra*. The scope of Federal jurisdiction as respects suits by and against ambassadors, consuls, etc., has already been considered.¹¹

§ 37. Appellate jurisdiction.

The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for.

R. S. § 690, U. S. Comp. Stat. 1901, p. 566.

The scheme of appellate jurisdiction contemplated by this section when enacted as part of the judiciary act of 1789,¹² and when embodied in the Revised Statutes, was altered in fundamental particulars in the act of 1891, creating the circuit court of appeals. It was provided in § 4 of that act¹³ that review "by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same." And by § 14 that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the proceeding sections five and six¹⁴ of this act are hereby repealed." The act of 1891 did not, however, affect the existing law respecting review on writ of error to state courts.¹⁵ The circuit court of appeals act has been uniformly construed and applied to promote its manifest purpose of lessening the burden of litigation in the Supreme Court.¹⁷ The general purpose of the act was to so distribute the appellate jurisdiction as to permit appeal to only one court.¹⁸ The Supreme Court's appellate jurisdiction and the necessity for an act of Congress conferring jurisdiction in a particular case, have already been considered.¹⁹

§ 38. On writ of error to State courts.

A final judgment^[aa] or decree in any suit in the highest court of a State, in which a decision in the suit could be had,^[b] where is drawn in question^{[c]-[e]} the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against^{[h]-[j]} their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the

¹¹Ante, § 2.[h]-[j]

¹²Act Sept. 24, 1789, c. 20, § 13, 1 Stat. 80.

¹³Act Mar. 3, 1891, c. 517, 26 Stat. 827.

¹⁵Relating to direct appeals from circuit and district to Supreme Court. Post, § 42; and relating to appeals to and from the circuit court of appeals, post, § 39.

¹⁶See § 5 of act Mar. 3, 1891, *supra*.

¹⁷Carey v. Houston, etc. Ry. 150 U. S. 179, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

¹⁸Huguley Mfg. Co. v. Galeton C. Mills, 184 U. S. 295, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; Carter v. Roberts, 177 U. S. 499, 44 L. ed. 863, 20 Sup. Ct. Rep. 713.

¹⁹Ante, § 35.[b]

decision is in favor of their validity;^{[m]-[mm]} or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of,^[k] or commission held or authority exercised under, the United States,^[l] and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority,^{[n]-[v]} may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

Part of R. S. § 709, as amended February 18, 1875, c. 80, 18 Stat. 318, U. S. Comp. Stat. 1901, p. 575.

[a] History of section and cross references.

The omitted portion of the foregoing section deals with the effect of the writ upon proceedings in the State court;¹ and with the scope of review, determination, and disposition of the cause in the Supreme Court.² The procedure upon writ of error to State courts is discussed elsewhere.³ The section was originally § 25 of the judiciary act of 1789. Its validity was elaborately argued and upheld in an early case from Virginia.⁴ An act of 1867⁵ repealed the original section, substituting one very similar,⁶ and an act of 1875⁷ gave the provision the form which it has since retained. The substantial purpose of the provision is to vest appellate jurisdiction in the Supreme Court in all cases where rights protected by the Federal Constitution treaties or laws are violated by a State decision.⁸

[aa] What is final reviewable judgment in a State court suit.

Final judgments in criminal cases are as much reviewable as in civil cases.¹⁰ It is not the amount of the controversy that is material nor the citizenship of parties,¹¹ but the character of the judgment.¹² A quo warranto proceeding¹³ or a proceeding for prohibition¹⁴ or mandamus¹⁵ is a suit in a State court within R. S. § 709. But an order of a judge at chambers on habeas corpus is not a final judgment of a court.¹⁶

¹See post, § 2018.

²See post, § 2084.

³Post, § 1888.

⁴Martin v. Hunter, 1 Wheat. 352, 4 L. ed. 97.

⁵Act Feb. 5, 1867, c. 28, § 2, 14 Stat. 386.

⁶See *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 437, where the two are compared.

⁷Act Feb. 18, 1875, c. 80, 18 Stat. 318.

⁸*New Orleans v. DeArmas*, 9 Pet. 234, 9 L. ed. 109; *Dower v. Richards*, 151 U. S. 666, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *De Lamar's, etc. Co. v. Nesbitt*, 177 U. S. 529, 44 L. ed. 874, 20 Sup. Ct. Rep. 715.

¹⁰*Worcester v. Georgia*, 6 Pet. 567, 8 L. ed. 483; *Twitchell v. Common-*

wealth, 7 Wall. 324, 19 L. ed. 223.

¹¹*French v. Hopkins*, 124 U. S. 525, 31 L. ed. 536, 8 Sup. Ct. Rep. 589.

¹²*Barry v. Mercein*, 5 How. 120, 12 L. ed. 70; *Buell v. Van Ness*, 8 Wheat. 322, 5 L. ed. 624.

¹³*Boyd v. Nebraska*, 143 U. S. 161, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

¹⁴*Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481.

¹⁵*American Exp. Co. v. Michigan*, 177 U. S. 407, 44 L. ed. 824, 20 Sup. Ct. Rep. 695; *Hartman v. Greenhow*, 102 U. S. 675, 26 L. ed. 271.

¹⁶*McKnight v. James*, 155 U. S. 687, 39 L. ed. 310, 15 Sup. Ct. Rep. 248; *Clarke v. McDade*, 165 U. S. 172, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

The State judgment must be final or the writ will not lie.¹⁷ In determining the finality of a State judgment the Supreme Court looks to the record sent up;¹⁸ and where that shows merely a reversal with directions to enter judgment below in accordance with an order which does not appear therein, the writ will not lie.¹⁹ A decree or motion to dissolve an injunction is not final within this section;²⁰ neither is a judgment of reversal in the highest State court and for further proceedings below;¹ neither is a judgment of dismissal and remand for further proceedings.² After further proceedings have been had, the case must again go to the highest State court before error will lie.³ Reversal with directions to dismiss the complaint is final.⁴ And, in general, if by any direction of the highest State court, the entire cause is determined, the decision, when reduced to form and entered, constitutes a final reviewable judgment.⁵ The opinion of the State court that a judgment which it affirms, is final will be followed.⁶ It makes no difference that the judgment is by a court evenly divided in opinion and in a cause of original cognizance.⁷ Nor that it is based on agreed facts.⁸ A judgment merely for costs is not reviewable.⁹ An order to commissioners in condemnation proceedings to assess damages, is ordinarily not final,¹⁰ but will be treated as final where the State court does so.¹¹ A judgment affirming or reversing a judgment below is reviewable though such judgment refuse a writ of error or dismiss one previously allowed.¹²

[b] Highest State court in which decision could be had.

It is plain from the wording of the section that it is only the judgment or decree of the highest State court in which a decision in the suit could be had, that is reviewable in the Supreme Court.¹⁶ That court may, be-

¹⁷Houston v. Moore, 3 Wheat. 434, 4 L. ed. 428; Davis v. Packard, 6 Pet. 49, 8 L. ed. 312; California Nat. Bank v. Stateler, 171 U. S. 449, 43 L. ed. 233, 19 Sup. Ct. Rep. 6; Great W. Tel. Co. v. Burnham, 162 U. S. 341, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.

¹⁸Goodenough, etc. Co. v. Rhode Island, etc. Co. 154 U. S. 636, 24 L. ed. 368, 14 Sup. Ct. Rep. 1180.

¹⁹Union M. L. I. Co. v. Kirchoff, 160 U. S. 378, 40 L. ed. 461, 16 Sup. Ct. Rep. 318.

²⁰Verden v. Coleman, 18 How. 86, 15 L. ed. 272.

¹Winn v. Jackson, 12 Wheat. 135, 6 L. ed. 577; Rice v. Sanger, 144 U. S. 197, 36 L. ed. 403, 12 Sup. Ct. Rep. 664.

²McComb v. Commissioners, 91 U. S. 2, 23 L. ed. 185.

³Brown v. Baxter, 146 U. S. 620, 36 L. ed. 1106, 13 Sup. Ct. Rep. 260.

⁴Commissioners v. Lucas, 93 U. S. 113, 23 L. ed. 822.

⁵Commissioners v. Lucas, 93 U. S. 113, 23 L. ed. 822.

⁶Wheeling, etc. Co. v. Wheeling, etc. Co. 138 U. S. 290, 34 L. ed. 967, 11 Sup. Ct. Rep. 301.

⁷Hartman v. Greenhow, 102 U. S. 676, 26 L. ed. 271.

⁸Aldrich v. Aetna Co. 8 Wall. 495, 19 L. ed. 473.

⁹Wood v. Weimar, 104 U. S. 792, 26 L. ed. 779.

¹⁰Luxton v. North R. B. Co. 147 U. S. 337, 37 L. ed. 194, 13 Sup. Ct. Rep. 356.

¹¹Whe ling & B. Bridge Co. v. Bridge Co. 138 U. S. 287, 34 L. ed. 907, 11 Sup. Ct. Rep. 301.

¹²Williams v. Bruffy, 102 U. S. 255, 26 L. ed. 135.

¹⁶Atherton v. Fowler, 91 U. S. 146, 23 L. ed. 265; Fisher v. Perkins, 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct.

cause of the smallness of the amount involved or for other reason, be in fact an inferior court such as a county court.¹⁷ Where by the State practice the infringement of a Federal right in the impaneling of a jury is not reviewable in the State appellate court, it has recently been intimated that the Supreme Court will issue writ of error to such trial court as the highest State court in which a decision of the Federal question could be had, though the case itself in other aspects was appealable to the appellate State court.¹⁸ But if the writ be to an inferior State court it must affirmatively appear that a decision could not be had in the highest court, otherwise the writ will be dismissed.¹⁹ In those cases where State laws make an inferior tribunal's decision final, but also vest a discretion in the judge of the inferior or appellate court to allow an appeal or provide some other contingency upon which an appeal might possibly be taken, it must appear that that mode of securing review in the highest State court has been attempted and has failed.²⁰ After the highest State court has refused writ of error or other mode of review of an inferior court's decision, the writ of error should issue to the inferior court as the highest State court in which judgment could be had.¹ So if the highest State court dismisses an appeal for want of jurisdiction the writ should issue to the lower court.²

While the judgment to be re-examined must be that of the highest court of the State having power to decide, the record of that judgment may be brought from an inferior court if legally deposited there and not in the highest court.³ Hence where an appellate court reverses and remands with directions to the court below to enter judgment in accordance with its opinion and the record is sent down and not even a copy of it remains in the higher court, the writ is properly directed to the lower court;⁴ so also where certain questions only, are sent to the higher court and it sends down a rescript of its decision therein.⁵ In those States, as for instance, New York, where the practice is for the highest court to send the record

Rep. 1227; *Mullen v. Western U. B. Co.* 173 U. S. 119, 43 L. ed. 635, 19 Sup. Ct. Rep. 404.

¹⁷*The Moses Taylor*, 4 Wall. 426, 18 L. ed. 397, or a district court. *Downham v. Alexandria*, 9 Wall. 661, 19 L. ed. 807.

¹⁸*Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387.

¹⁹*Fisher v. Perkins*, 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227; *Mullen v. Western U. B. Co.* 173 U. S. 123, 43 L. ed. 635, 19 Sup. Ct. Rep. 404.

²⁰*Gregory v. McVeigh*, 23 Wall. 294, 23 L. ed. 156; *Fisher v. Perkins*, 122 U. S. 522, 30 L. ed. 1193, 7 Sup. Ct. Rep. 1227.

¹*Bergemann v. Backer*, 157 U. S. 659, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Clarke v. Pennsylvania*, 128 U.

S. 396, 32 L. ed. 487, 9 Sup. Ct. Rep. 2, 113; *Stanley v. Schwalby*, 162 U. S. 269, 40 L. ed. 965, 16 Sup. Ct. Rep. 760; *Bacon v. Texas*, 163 U. S. 215, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Missouri, etc. Ry. v. Elliott*, 184 U. S. 539, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; *Miller v. Joseph*, 17 Wall. 656, 21 L. ed. 741.

²*Lane v. Wallace*, 131 U. S. cxcix, 26 L. ed. 703.

³*Gelston v. Hoyt*, 3 Wheat. 304, 4 L. ed. 396; *Webster v. Reid*, 11 How. 457, 13 L. ed. 769.

⁴*Lee v. Johnson*, 116 U. S. 49, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Polleys Black R. I. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369.

⁵*McGuire v. Com.* 3 Wall. 382, 18 L. ed. 164.

and its judgment to the lower court where it remains, the writ may properly be directed to such lower court.⁶ The same is true of Massachusetts cases under a form of review whereby only certain questions are taken to the highest court and the record remains in the Superior Court.⁷ It has been said that it would probably be no ground for dismissal that the writ had issued to the highest court in such a case, since that tribunal might possibly obtain and send the record.⁸ But in cases from States like New York and Massachusetts the Supreme Court will probably take notice of the local procedure, so that it would be the better practice to issue the writ in the first instance to the lower court which has the record in its custody. Where the highest court is the custodian of its own records and the record is obtainable there, the writ must be directed to that court.⁹

[c] Necessity that Federal right be claimed or drawn in question.

In every case it must appear that the Federal claim or right was interposed in the State court. Plaintiff in error must bring the case within the letter and spirit of the law allowing the writ.¹² There is no jurisdiction to review State decisions which do not raise Federal questions;¹³ even though similar questions under State constitutional provisions are litigated;¹⁴ and the writ must be dismissed.¹⁵ The mere fact that a tax deed was based upon a Federal law does not give a right of review in the absence of any question growing out of that law;¹⁶ nor does the fact that a Federal receiver is a party;¹⁷ nor that an award recovered by an attorney who is sued therefor by the client, was an award for the United States.¹⁸ The validity of a statute is not drawn in question every time rights claimed thereunder are controverted, nor the validity of an authority, every time an act done by such authority is disputed; there must be direct resulting injury from a denial of their existence, constitutionality or legality.¹⁹ Cases merely affecting construction do not question the

⁶Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 396; Green v. Van Buskirk, 3 Wall. 450, 18 L. ed. 245; Atherton v. Fowler, 91 U. S. 146, 23 L. ed. 265; Wurts v. Hoagland, 105 U. S. 702, 26 L. ed. 1109.

⁷McGuire v. Com. 3 Wall. 382, 18 L. ed. 164; McDonald v. Com. 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; Rothschild v. Knight, 184 U. S. 339, 46 L. ed. 573, 22 Sup. Ct. Rep. 393.

⁸Atherton v. Fowler, 91 U. S. 146, 23 L. ed. 265.

⁹Atherton v. Fowler, 91 U. S. 146, 23 L. ed. 265, disapproving dictum in Gelston v. Hoyt, *supra*, that the writ may be directed to any court having the record.

¹²Scott v. Jones, 5 How. 375, 12 L. ed. 181; Home Ins. Co. v. City Council, 93 U. S. 116, 23 L. ed. 825.

¹³Walker v. Sanvenet, 92 U. S. 92, 23 L. ed. 678; McQuade v. Trenton, 172 U. S. 639, 43 L. ed. 581, 19 Sup. Ct. Rep. 292.

¹⁴Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

¹⁵Santa Cruz Co. v. Santa Cruz R. R. 111 U. S. 362, 28 L. ed. 456, 4 Sup. Ct. Rep. 474; Chapin v. Fye, 179 U. S. 129, 45 L. ed. 121, 21 Sup. Ct. Rep. 71.

¹⁶McBride v. Hoey, 11 Pet. 172, 9 L. ed. 673.

¹⁷Bausman v. Dixon, 173 U. S. 115, 43 L. ed. 633, 19 Sup. Ct. Rep. 316.

¹⁸Sherman v. Grinnell, 144 U. S. 202, 36 L. ed. 403, 12 Sup. Ct. Rep. 574.

¹⁹United States v. Lynch, 137 U. S. 285, 34 L. ed. 700, 11 Sup. Ct. Rep.

validity of a law or treaty.²⁰ A suit to try adverse title to a mining claim under R. S. 2326, does not necessarily involve a Federal question.²¹ Questions of comity are in general not Federal.²²

[cc] Decisions upon matters of purely local law.

Where the questions sought to be presented in a case as Federal, fall entirely within the powers of a State, and pertain to matters outside the legislative powers of Congress and outside the limitations and restrictions of the Constitution, it is obvious that there can be no jurisdiction to review the decision of the State court under R. S. § 709.¹ The highest State court may administer the common law according to its understanding thereof.² In the cases denying a right to review State decisions on error because no Federal question existed and in cases admitting a right of review, but confining it to the Federal question raised, the Supreme Court has frequently observed that a matter decided by the State court was one of purely local law which it would not re-examine. Some of these cases in which a re-examination of questions of local law has been refused are collected in a footnote.³ Many of them deal with questions of local practice

114; *Muse v. Arlington H. Co.* 168 U. S. 435, 42 L. ed. 533, 18 Sup. Ct. Rep. 111; *Cook Co. v. Calumet*, etc. Co. 138 U. S. 653, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Bushnell v. Crooke*, etc. Co. 148 U. S. 689, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Miller v. Cornwall R. R.* 168 U. S. 133, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Keenard v. Nebraska*, 186 U. S. 308, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879.

²⁰*South Carolina v. Seymour*, 153 U. S. 358, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; *Kennard v. Nebraska*, 186 U. S. 308, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879; *Missouri P. Ry. v. Fitzgerald*, 160 U. S. 576, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Southern R. R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

²¹*McMillen v. Ferrum M. Co.* 197 U. S. 433, 49 L. ed. 784, 25 Sup. Ct. Rep. 553.

²²*Allen v. Allegheny Co.* 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311.

¹*Davis v. Texas*, 139 U. S. 652, 657, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

²*Pennsylvania R. R. v. Hughes*, 191 U. S. 477, 49 L. ed. 268, 24 Sup. Ct. Rep. 132.

³*Strader v. Graham*, 10 How. 93, 13 L. ed. 337, as to status of slaves taken to free States; *Robertson v. Coulter*, 16 How. 113, 14 L. ed. 865, powers of trustee under local statute;

Young v. Steamship Co. 105 U. S. 44, 26 L. ed. 966, as to repayment of fees by commissioner; *Susquehanna B. Co. v. West Branch Boom Co.* 110 U. S. 58, 28 L. ed. 69, 3 Sup. Ct. Rep. 438, as to corporate powers; *Colt v. Colt*, 111 U. S. 578, 28 L. ed. 520, 4 Sup. Ct. Rep. 553, competency of guardian ad litem; *Shreveport v. Cole*, 129 U. S. 41, 32 L. ed. 589, 9 Sup. Ct. Rep. 210, action to recover balance on contract; *Beatty v. Benton*, 135 U. S. 254, 34 L. ed. 124, 10 Sup. Ct. Rep. 747, rights under trust deed and State statute; *McNulta v. Lochridge*, 141 U. S. 329, 35 L. ed. 796, 12 Sup. Ct. Rep. 11, liability of receiver for predecessors' acts; *Delaware City Co. v. Reybold*, 142 U. S. 641, 35 L. ed. 1141, 12 Sup. Ct. Rep. 200, claim for legal services; *Missouri v. Harris*, 144 U. S. 211, 36 L. ed. 407, 12 Sup. Ct. Rep. 833, validity of assent to municipal stock subscription; *O'Neil v. Vermont*, 144 U. S. 332, 36 L. ed. 450, 12 Sup. Ct. Rep. 693, what constitutes a sale under liquor statute; *Northern Pac. R. R. v. Ellis*, 144 U. S. 464, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; *Yazoo*, etc. R. Co. v. *Adams*, 180 U. S. 26, 45 L. ed. 409, 21 Sup. Ct. Rep. 282; and *Adams v. Louisiana Bd. of Liq.* 144 U. S. 653, 36 L. ed. 578, 12 Sup. Ct. Rep. 756, former judgment as res adjudicata or estoppel, and what

which are in no respect of a Federal character;⁴ and with questions of pleading;⁵ and evidence and variance;⁶ and competency of witnesses.⁷ State taxation is primarily a matter of local law only and many decisions in tax matters have been held not reviewable on error,⁸ though others

constitutes sale of bonds; *Bier v. McGehee*, 148 U. S. 141, 37 L. ed. 397, 13 Sup. Ct. Rep. 580, rescission of sale of bond; *Snell v. Chicago*, 152 U. S. 198, 38 L. ed. 408, 14 Sup. Ct. Rep. 489, rights of heirs of vender in franchise; *Israel v. Arthur*, 152 U. S. 362, 38 L. ed. 474, 14 Sup. Ct. Rep. 583, second marriage as estopping right to avoid divorce; *Wailes v. Smith*, 157 U. S. 275, 39 L. ed. 698, 15 Sup. Ct. Rep. 624, state comptroller's duty in drawing warrants; *New York v. Roberts*, 171 U. S. 663, 43 L. ed. 325, 19 Sup. Ct. Rep. 58, in determining corporate stock used in State; *Wilson v. North Carolina*, 169 U. S. 593, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Rae v. Homestead L. Co.* 176 U. S. 126, 44 L. ed. 399, 20 Sup. Ct. Rep. 341, as to decree for payment in lawful money; *Weyerhaeuser v. Minnesota*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 485, as to law estoppel; *Gundling v. Chicago*, 177 U. S. 188, 44 L. ed. 729, 20 Sup. Ct. Rep. 633, as to powers of mayor; *Forsyth v. Vehmeyer*, 177 U. S. 180, 44 L. ed. 724, 20 Sup. Ct. Rep. 623, as to what constitutes fraud; *New Orleans, etc. Co. v. Louisiana*, 180 U. S. 330, 45 L. ed. 556, 21 Sup. Ct. Rep. 378, validity of incorporation under Federal laws; *Hale v. Lewis*, 181 U. S. 480, 45 L. ed. 963, 21 Sup. Ct. Rep. 677, as to estoppel to question validity of statute; *New Orleans W. W. Co. v. Louisiana*, 185 U. S. 353, 46 L. ed. 936, 22 Sup. Ct. Rep. 691, whether bondholders necessary parties to quo warranto to forfeit charter; *Smith v. Adsit*, 23 Wall. 373, 23 L. ed. 114, what constitutes a trust; *Lange v. Benedict*, 99 U. S. 71, 25 L. ed. 469, personal liability of judge; *Forsyth v. Hammond*, 166 U. S. 518, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665, and *McCain v. Des Moines*, 174 U. S. 181, 43 L. ed. 936, 19 Sup. Ct. Rep. 644, as to boundaries and powers of municipality.

⁴*Richmond M. Co. v. Rose*, 114 U. S. 583, 29 L. ed. 273, 5 Sup. Ct. Rep.

1055, when action deemed commenced; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 476, 30 L. ed. 461, 7 Sup. Ct. Rep. 260, as to proper service of process; *Thonington v. Montgomery*, 147 U. S. 494, 37 L. ed. 252, 13 Sup. Ct. Rep. 394, as to exclusion of depositions; *Brown v. Massachusetts*, 144 U. S. 580, 36 L. ed. 546, 12 Sup. Ct. Rep. 757; and *Gibson v. Mississippi*, 162 U. S. 591, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904, as to objections to and impaneling of jurors; *Loeber v. Schroeder*, 149 U. S. 585, 37 L. ed. 856, 13 Sup. Ct. Rep. 934, as to remedy in law or equity; *St. Louis, etc. Ry. v. Missouri*, 156 U. S. 484, 39 L. ed. 502, 15 Sup. Ct. Rep. 443, prohibition to inferior State court; *Moore v. Missouri*, 159 U. S. 680, 40 L. ed. 301, 16 Sup. Ct. Rep. 179, failure to give hearing in bank; *Seneca Nation v. Christy*, 162 U. S. 288, 40 L. ed. 970, 16 Sup. Ct. Rep. 828, as to bar of statute of limitations; *Beaupre v. Noyes*, 138 U. S. 402, 34 L. ed. 991, 11 Sup. Ct. Rep. 296, and *Davis v. Texas*, 139 U. S. 653, 35 L. ed. 300, 11 Sup. Ct. Rep. 675, as to motion for new trial.

⁵*Buena Vista Co. v. Iowa, etc. Co.* 112 U. S. 177, 28 L. ed. 680, 5 Sup. Ct. Rep. 84; *Grand Rapids, etc. R. R. v. Butler*, 159 U. S. 91, 41 L. ed. 85, 15 Sup. Ct. Rep. 991; *Abbott v. Tacoma Bank*, 175 U. S. 413, 44 L. ed. 217, 20 Sup. Ct. Rep. 153; *Yazoo, etc. Ry. v. Adams*, 180 U. S. 3, 45 L. ed. 402, 21 Sup. Ct. Rep. 240; *National F. Co. v. Oconoto, etc. Co.* 183 U. S. 237, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; *Allen v. Allegheny Co.* 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311.

⁶*Martin v. Marks*, 97 U. S. 348, 24 L. ed. 940; *California Nat. Bank v. Thomas*, 171 U. S. 446, 43 L. ed. 231, 19 Sup. Ct. Rep. 6; *Brooks v. Missouri*, 124 U. S. 395, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

⁷*Spies v. Illinois*, 123 U. S. 180, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22.

⁸*See Bardon v. Land, etc. Co.* 157 U.

presenting questions of State laws impairing contracts, or denying the equal protection of the laws, etc., are reviewable where the Federal constitutional right is adversely decided.⁹ Others are concerned with questions arising in criminal cases, and it is uniformly decided that errors in administration¹⁰ of State criminal laws, or in the interpretation of the State guaranties to the accused are not of themselves sufficient to justify review on error in the Supreme Court.¹¹ There must be a denial of some Federal right;¹² and as the first ten amendments do not apply to the States¹³ the Fourteenth Amendment is the commonest basis for the asserted Federal right. Decisions as to the validity of acts compelled by the Confederate government, or of payments in Confederate money or insurance losses due to Confederate acts, do not raise a Federal question;¹⁴ nor is a

S. 332, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; *Kirtland v. Hotchkiss*, 100 U. S. 498, 25 L. ed. 558; *Louisiana v. New Orleans*, 108 U. S. 569, 27 L. ed. 823, 2 Sup. Ct. Rep. 955; *Chapman v. Goodnow*, 123 U. S. 547, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Wells v. Goodnow*, 150 U. S. 84, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22; *Tyler v. Cass* Co. 142 U. S. 290, 35 L. ed. 1016, 12 Sup. Ct. Rep. 225; *Orr v. Gilman*, 183 U. S. 288, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Central P. R. R. v. Nevada*, 162 U. S. 523, 40 L. ed. 1057, 16 Sup. Ct. Rep. 885; *Western U. T. Co. v. Indiana*, 165 U. S. 307, 41 L. ed. 725, 17 Sup. Ct. Rep. 345.

⁹See *infra*, note, [ml]

¹⁰*Gibson v. Mississippi*, 162 U. S. 591, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

¹¹*Brooks v. Missouri*, 124 U. S. 395, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Caldwell v. Texas*, 137 U. S. 698, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Moore v. Missouri*, 159 U. S. 678, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *O'Neil v. Vermont*, 144 U. S. 327, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; and *McDonald v. Massachusetts*, 180 U. S. 313, 45 L. ed. 547, 21 Sup. Ct. Rep. 389, all dealing with questions under indictment or complaint; *Baldwin v. Kansas*, 129 U. S. 57, 32 L. ed. 640, 9 Sup. Ct. Rep. 193, as to oath of jury; *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675; *Storti v. Massachusetts*, 183 U. S. 142, 46 L. ed. 120, 22 Sup. Ct. Rep. 72, and *St. Louis C. C. Co. v. Illinois*, 185 U. S. 206,

46 L. ed. 872, 22 Sup. Ct. Rep. 616, as to continuance, respite and motion in arrest; *Kohl v. Lehlback*, 160 U. S. 298, 40 L. ed. 432, 16 Sup. Ct. Rep. 304, right of appeal in State court; *Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, refusal of jury trial; *O'Neil v. Vermont*, 144 U. S. 327, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; consolidation of offenses in one complaint; *Lambert v. Barrett*, 157 U. S. 699, 39 L. ed. 865, 15 Sup. Ct. Rep. 722; power of reprieve; *In re Kemmler*, 136 U. S. 447, 34 L. ed. 519, 10 Sup. Ct. Rep. 930, validity of electrocution; *Davis v. Burke*, 179 U. S. 404, 45 L. ed. 252, 21 Sup. Ct. Rep. 210, place of execution.

¹²*Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583.

¹³So the writ should be denied or if granted, dismissed where the one seeking review claims some act of the State to be in violation of any of these ten amendments. *In re Kemmler*, 136 U. S. 447, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *O'Neil v. Vermont*, 144 U. S. 331, 36 L. ed. 450, 12 Sup. Ct. Rep. 693, as to cruel and unusual punishment. See *Winous, etc. v. Casperson*, 193 U. S. 189, 49 L. ed. 675, 24 Sup. Ct. Rep. 431.

¹⁴*Rockhold v. Rockhold*, 92 U. S. 130, 23 L. ed. 507; *Grame v. Mutual Ins. Co.* 112 U. S. 275, 28 L. ed. 716, 5 Sup. Ct. Rep. 150; *Dugger v. Bocoek*, 104 U. S. 601, 26 L. ed. 846; *Kenney v. Effenger*, 115 U. S. 577, 29 L. ed. 498, 6 Sup. Ct. Rep. 185.

decision as to insufficiency of notice to indorser within the Confederate lines at the time.¹⁵

A State court cannot, however, defeat the right of review in the Supreme Court by resting decision on a non-Federal ground, where a Federal claim is duly set up and, if allowed, would have required a different judgment.¹⁶

[d] Claim must be made in timely and specific manner.

The record must show that the Federal question was set up at the proper time and in the proper way.¹⁸ The requirement of R. S. § 709 is specific on this point, especially in cases where a Federal right title or privilege is set up. The party claiming a Federal right must do so in clear terms;¹⁹ though no particular form of words is necessary.²⁰ It must appear that the attention of the State court was called to the particular clause of the Constitution on which a party relies.¹ Objection that evidence is incompetent and irrelevant will not raise a Federal question.² The alleged invalidity of a law under the Federal Constitution must be distinctly stated.³ Objection that act is "unconstitutional and void" raises question of validity under State, and not under Federal Constitution.⁴ Objection that an act is in contravention of the Federal Constitution, treaties and laws is insufficient.⁵ Objection that court acted without jurisdiction or color of authority, is too vague to raise the question of due process of law.⁶ So also is an allegation that some of parties to decree were dead, and others not duly served.⁷ An assignment of error that a State decision is against the Fourteenth Amendment is too vague;⁸ so also is an allegation on motion for new trial, that judgment is "contrary to law."⁹

¹⁵*Bank v. McVeigh*, 98 U. S. 333, 25 L. ed. 110; *Allen v. McVeigh*, 107 U. S. 435, 27 L. ed. 572, 2 Sup. Ct. Rep. 558.

¹⁶*Chicago, etc. Ry. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341. See *infra*, note [j].

¹⁸*Texas, etc. Ry. v. Southern P. Co.* 137 U. S. 53, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Schuyler Nat. Bank v. Bollong*, 150 U. S. 90, 37 L. ed. 1010, 14 Sup. Ct. Rep. 24; *Bobb v. Jamison*, 155 U. S. 416, 39 L. ed. 206, 15 Sup. Ct. Rep. 357; *Sayward v. Denny*, 158 U. S. 183, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

¹⁹*Union Mut. L. I. Co. v. Kirkshoff*, 169 U. S. 107, 42 L. ed. 677, 18 Sup. Ct. Rep. 260.

²⁰*Green Bay, etc. Co. v. Patten P. Co.* 172 U. S. 67, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

¹*Oxley Stave Co. v. Butler Co.* 166 U. S. 655, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Columbia Water P. Co. v. Street Ry. Co.* 172 U. S. 480, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Hulbert v.*

Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617.

²*Farney v. Towle*, 1 Black, 350, 17 L. ed. 216; *Hoyt v. Sheldon*, 1 Black, 521, 17 L. ed. 65; *Brooks v. Missouri*, 124 U. S. 395, 31 L. ed. 454, 8 Sup. Ct. Rep. 443. But see *Bridge Prop. v. Hoboken Co.* 1 Wall 142, 17 L. ed. 571.

³*Levy v. Superior Court*, 167 U. S. 177, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

⁴*Porter v. Foley*, 24 How. 420, 16 L. ed. 740; *Miller v. Cornwall R. R.* 168 U. S. 134, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

⁵*Messenger v. Mason*, 10 Wall. 510, 19 L. ed. 1028.

⁶*Hanford v. Davies*, 163 U. S. 279, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

⁷*Oxley S. Co. v. Butler Co.* 166 U. S. 660, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

⁸*Clark v. McDade*, 165 U. S. 172, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

⁹*Capitol Bank v. Cadiz Bank*, 172

The question may be raised in the pleadings, or in a petition for removal;¹⁰ or in motion to set aside an order sustaining a demurrer;¹¹ or in a request for instructions.¹² It is enough if the record clearly shows that trial court clearly understood that the unsuccessful party was relying on a Federal claim¹³

Where the Federal question is first raised in the State trial court after remand from the highest State court, and is a attempt to relitigate questions concluded by the appeal and not permissible under the State practice, the Supreme Court will also hold it to be too late and dismiss writ of error presented to the State judgment on the second appeal.¹⁴

But in many cases the Federal question may be first raised in the appellate State court, and where it is there decided adversely, error will lie;¹⁵ even though by reason of the State practice in States like New York and Massachusetts, the writ is directed to a lower court which has the record and in which the Federal question may not have been raised.¹⁶ It must however, be raised before final judgment.¹⁷ It is too late when first raised in the petition for writ of error.¹⁸ It is too late when first raised in petition for rehearing, if the petition is not granted, and there is no denial of the contention in the refusal to grant it.¹⁹ It is too late when raised after denial of rehearing in application for oral argument,²⁰ or in motion for transfer to court in bank.¹ But where the State court in grant-

U. S. 431, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

¹⁰Gibson v. Mississippi, 162 U. S. 587, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

¹¹Meyer v. Richmond, 172 U. S. 91, 43 L. ed. 374, 19 Sup. Ct. Rep. 106.

¹²National Bldg. etc. Assoc. v. Braham, 193 U. S. 635, 49 L. ed. 823, 24 Sup. Ct. Rep. 532.

¹³Lavaguino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716.

¹⁴Union M. L. I. Co. v. Kirchoff, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260; Yazoo & M. V. R. R. v. Adams, 180 U. S. 8, 45 L. ed. 401, 21 Sup. Ct. Rep. 240; Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724.

¹⁵Sully v. American Nat. Bank, 178 U. S. 298, 44 L. ed. 1076, 20 Sup. Ct. Rep. 935.

¹⁶Rothschild v. Knight, 184 U. S. 339, 46 L. ed. 573, 22 Sup. Ct. Rep. 391. See supra, note.^[b]

¹⁷Boller v. Nebraska, 176 U. S. 92, 44 L. ed. 385, 20 Sup. Ct. Rep. 287; Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; Morrison v. Watson, 154 U. S. 115, 38 L. ed. 927, 14 Sup. Ct. Rep. 995;

Fowler v. Lamson, 164 U. S. 255, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; California Nat. Bank v. Stateler, 171 U. S. 446, 43 L. ed. 233, 19 Sup. Ct. Rep. 6; Scudder v. Comptroller of N. Y. 175 U. S. 36, 44 L. ed. 62, 20 Sup. Ct. Rep. 26.

¹⁸Leeper v. Texas, 139 U. S. 467, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; California P. Works v. Davis, 151 U. S. 393, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Wabash R. R. v. Flannigan, 192 U. S. 29, 49 L. ed. 328, 24 Sup. Ct. Rep. 224; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617.

¹⁹Susquehanna B. Co. v. Branch B. Co. 110 U. S. 58, 28 L. ed. 69, 3 Sup. Ct. Rep. 438; Texas, etc. Ry. v. Southern P. Co. 137 U. S. 54, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; Loeber v. Schroeder, 149 U. S. 585, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Turner v. Richardson, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 295; Heirs of Poydras v. Treasurer of La. 18 How. 196, 15 L. ed. 350; McMillen v. Ferrum M. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533.

²⁰Butler v. Gage, 138 U. S. 61, 34 L. ed. 869, 11 Sup. Ct. Rep. 235.

¹Duncan v. Missouri, 152 U. S.

ing or denying the rehearing actually passes adversely on the Federal contention, error may lie.² Where the Federal question involves some action of the trial court in the admission of evidence or general conduct of the trial it must have been set up in the trial court, and by familiar rules cannot be first raised on appeal.³ As is elsewhere seen a State decision that a party has lost his right to have a question passed upon by failure to except or appeal, is not reviewable.⁴ Where the Federal question is first raised after decision in an intermediate appellate court, but the final State court ignores it, it must affirmatively appear that this was not due to the failure to raise it earlier.⁵

The Supreme Court decides for itself, uncontrolled by the opinion of the State court, whether the Federal question was sufficiently pleaded or brought to the State court's attention.⁶

[e] Certificate of State chief justice that Federal question raised.

In the absence of anything in the record to show that a Federal question was raised, the certificate of the chief justice of the State court that it was, is insufficient evidence.⁸ It cannot supply a want of evidence to that effect in the record and of itself give jurisdiction.⁹ The judgment of the State court, and not the certificate determines the question;¹⁰ although the latter is entitled to great weight in case of doubt.¹¹ Its purpose is to make more certain that which is too general or indefinite in the record and not to originate the question or to overthrow a conclusion obvious from the face of the record.¹² In the absence of an opinion it may be resorted to, to show that a law alleged to impair contracts was upheld,¹³ though it cannot give jurisdiction when failing to state the statute so questioned.¹⁴ It is not a technical part of the record;¹⁵ and it does not

333, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

²Mallett v. North Carolina, 181 U. S. 592, 45 L. ed. 1018, 21 Sup. Ct. Rep. 730; Missouri, etc. Ry. v. Elliott, 184 U. S. 534, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

³Spies v. Illinois, 123 U. S. 181, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22.

⁴Infra, note [h]-[i]

⁵Chicago, etc. R. R. v. McGuire, 196 U. S. 129, 49 L. ed. 413, 25 Sup. Ct. Rep. 200.

⁶Erie R. R. v. Purdy, 185 U. S. 152, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

⁸Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 23 Sup. Ct. Rep. 84, and cases cited. Railroad Co. v. Rock, 4 Wall. 180, 18 L. ed. 381; Lawler v. Walker, 14 How. 154, 14 L. ed. 364; Henkel v. Cincinnati, 177 U. S. 171, 44 L. ed. 721, 20 Sup. Ct. Rep. 573.

⁹Felix v. Scharnweber, 125 U. S. 59, 31 L. ed. 687, 8 Sup. Ct. Rep. 759; Sayward v. Denny, 158 U. S. 183, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

¹⁰Powell v. Brunswick Co. 150 U. S. 439, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

¹¹Caperton v. Bowyer, 14 Wall. 234, 20 L. ed. 882; Rector v. City Dep. Bank, 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289.

¹²Dibble v. Bellingham Bay, etc. Co. 163 U. S. 70, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

¹³Gulf, etc. R. R. v. Hewes, 183 U. S. 69, 46 L. ed. 86, 22 Sup. Ct. Rep. 26. See Armstrong v. Athens Co. 16 Pet. 286, 10 L. ed. 965.

¹⁴Lawler v. Walker, 14 How. 152, 14 L. ed. 364; Yazoo, etc. R. R. v. Adams, 180 U. S. 48, 45 L. ed. 418, 21 Sup. Ct. Rep. 256.

¹⁵Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 23 Sup. Ct. Rep. 84.

restrict the Supreme Court's power to determine for itself whether a Federal question was involved.¹⁶ A certificate by an associate State justice, not shown to be acting chief justice, is valueless.¹⁷ A certificate by the whole court would seem to be subject to the same rules.¹⁸

[f] Federal question raised must not be wholly fictitious or without merit.

Since the adoption of the Fourteenth Amendment it has been possible to raise a plausible Federal question in a very large number of State cases, and the Supreme Court has endeavored to guard against the practice of invoking its jurisdiction merely for purposes of delay. Hence the rule that the bare averment of a Federal question is not in all cases sufficient. It must be at least colorable and not wholly without merit.¹ It must be real and not fictitious.² It must be such that its mere mention does not show it to be destitute of merit.³ If the claim be wholly without merit the writ will be dismissed. It must be some question, not explicitly foreclosed by prior Federal decisions.⁴

[g] Party must make Federal claim on his own behalf.

A party setting up a Federal right or title must do so on his own behalf in order to obtain a review of an adverse State decision thereon.⁵ Hence it does not bring a case within R. S. § 709 where a party in ejectment alleges an outstanding title in a third person which is based upon Federal treaty or laws;⁶ or an outstanding title in the United States.⁷ The setting up of a Federal right or title in a third person under whom plaintiff in error does not claim, will not confer a right of review.⁸ To entitle

¹⁶Newport L. Co. v. Newport, 151 U. S. 536, 38 L. ed. 259, 14 Sup. Ct. Rep. 429; Dibble v. Bellingham B. Co. 163 U. S. 69, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

¹⁷Havnor v. New York, 170 U. S. 409, 411, 42 L. ed. 1087, 18 Sup. Ct. Rep. 631.

¹⁸Rector v. City Dep. Bank, 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289.

¹Millingar v. Hartuppee, 6 Wall. 258, 18 L. ed. 829; New Orleans v. Water Works, 142 U. S. 79, 87, 35 L. ed. 946, 12 Sup. Ct. Rep. 142; Wilson v. North Carolina, 169 U. S. 595, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Illinois C. R. R. v. Chicago, 176 U. S. 656, 44 L. ed. 626, 20 Sup. Ct. Rep. 509; Sawyer v. Piper, 189 U. S. 157, 47 L. ed. 759, 23 Sup. Ct. Rep. 633.

²Hamblin v. Western L. Co. 147 U. S. 532, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; St. Louis, etc. Ry. v. Missouri, 156 U. S. 483, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; St. Joseph, L. ed. 264.

etc. R. R. v. Steele, 167 U. S. 662, 42 L. ed. 315, 17 Sup. Ct. Rep. 925.

³New Orleans Works v. Louisiana. 185 U. S. 345, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

⁴Leonard v. Vicksburg, etc. R. R. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750.

⁵Wynn v. Morris, 20 How. 5, 15 L. ed. 800.

⁶Owings v. Norwood, 5 Cranch, 348, 3 L. ed. 120; Verden v. Coleman, 1 Black, 474, 17 L. ed. 161; Henderson v. Tennessee, 10 How. 323, 13 L. ed. 434.

⁷Long v. Converse, 91 U. S. 114, 23 L. ed. 233; Miller v. Lancaster Bank, 106 U. S. 544, 27 L. ed. 289, 1 Sup. Ct. Rep. 536; Giles v. Little, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; Ludeling v. Chaffer, 143 U. S. 305, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; Texas, etc. Ry. v. Johnson, 151 U. S. 98, 38 L. ed. 81, 14 Sup. Ct. Rep. 250.

⁸Hale v. Gaines, 22 How. 160, 16 L. ed. 264.

a party to review the Federal title or right denied must be directly in issue affecting plaintiff in error and not a third person only.⁹ One not privy to a contract cannot assert its impairment so as to give the Supreme Court jurisdiction on error.¹⁰ A party having actual notice is not entitled to writ of error to review a statute claimed to work a deprivation by providing only constructive notice.¹¹

[h] Necessity that State decision be adverse to the Federal claim or right set up.

A State decision sustaining a Federal right, title or exemption is not reviewable,¹² nor one sustaining a claim under the ordinance of 1787;¹³ or sustaining a tax exemption;¹⁴ or sustaining an authority exercised by an officer of land or treasury department;¹⁵ or sustaining validity of bankruptcy proceedings;¹⁶ or dismissing a claim attacking a Federal right.¹⁷ Where plaintiff in error is the one denying the validity of a Federal law, his suit will be dismissed.¹⁸ A decision that a State law is invalid upon Federal grounds is not reviewable;¹⁹ neither is a decision that a Federal law is valid;²⁰ nor a State decision upholding the jurisdiction of a provost court;¹ nor one evading a decision of the point that a later law attempted to alter an earlier contract;² nor a decision in favor of a title resting upon an act of Congress;³ nor a decision in favor of the right of the court of Alabama claims to disbar an attorney.⁴ A decision sustaining a contention that a contract violated the interstate commerce law is not reviewable in the Supreme Court.⁵ As appears plainly from the wording of R. S. § 709, the Federal statute, authority, right or title, must not only be drawn in question, but the decision must be against the right claimed.⁶

⁹Conde v. York, 168 U. S. 648, 42 L. ed. 611, 18 Sup. Ct. Rep. 234.

¹⁰Pinney v. Sheppard, etc. Trustees, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573.

¹¹Tyler v. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

¹²Missouri v. Andriano, 138 U. S. 499, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; Gordon v. Coldeluegh, 3 Cranch, 269, 2 L. ed. 436; Strader v. Baldwin, 9 How. 262, 13 L. ed. 130; Swope v. Leffingwell, 105 U. S. 4, 26 L. ed. 939.

¹³Menard v. Aspasia, 5 Pet. 517, 8 L. ed. 207.

¹⁴Tyler v. Cass Co. 142 U. S. 290, 35 L. ed. 1016, 12 Sup. Ct. Rep. 225.

¹⁵Hale v. Gaines, 22 How. 160, 16 L. ed. 264; Bartlett v. Lockwood, 160 U. S. 368, 40 L. ed. 455, 16 Sup. Ct. Rep. 334.

¹⁶Linton v. Stanton, 12 How. 426, 13 L. ed. 1050.

¹⁷Reddall v. Bryan, 24 How. 422, 16 L. ed. 740.

¹⁸Congdon, etc. Co. v. Goodman, 2 Black, 575, 17 L. ed. 257.

¹⁹Bank of Kentucky v. Griffith, 14 Pet. 58, 10 L. ed. 352.

²⁰Roosevelt v. Meyer, 1 Wall. 517, 12 L. ed. 500.

¹Mechanics' Bank v. Union Bank, 22 Wall. 297, 22 L. ed. 871.

²Kreiger v. Shelby R. Co. 125 U. S. 46, 31 L. ed. 675, 8 Sup. Ct. Rep. 752.

³Fulton v. McAfee, 16 Pet. 152, 10 L. ed. 918; Burke v. Gaines, 19 How. 390, 15 L. ed. 655; Scott v. Jones, 5 How. 375, 12 L. ed. 181; Verden v. Coleman, 1 Black, 474, 17 L. ed. 161.

⁴Manning v. French, 133 U. S. 192, 33 L. ed. 582, 10 Sup. Ct. Rep. 258.

⁵Kizer v. Texarkana, etc. Ry. 179 U. S. 201, 45 L. ed. 152, 21 Sup. Ct. Rep. 100.

⁶Fulton v. McAfee, 16 Pet. 152, 10 L. ed. 918; Brown v. Colorado, 106 U. S. 97, 27 L. ed. 132, 1 Sup. Ct. Rep. 175; Winter v. City Council of

It need not appear that that decision was erroneous to enable the Supreme Court to take jurisdiction, though of course it must be shown erroneous to justify a reversal.⁷ A decision that a matter became *res adjudicata* in a State court prior to a Federal decree does not deny effect to that decree.⁸ Where a State decision does not deal with a question of evidence as a Federal question the Supreme Court will not do so.⁹

But it is not always necessary that the State court refer to the Federal contention if they necessarily have decided against it.¹¹ It is not essential that the State court should specifically notice the Federal contention in its opinion.¹² It must appear either that a Federal question was decided, or that judgment as rendered could not have been given without deciding it.¹³ An adverse decision of the Federal question must have been necessarily involved in the adjudication.¹⁴ The test is: could the judgment as rendered, have been given without deciding a Federal question.¹⁵ It is not every decision against a party raising a Federal question that is reviewable, for the decision may go against the party on many grounds without touching the merits of the Federal question raised. Thus the appellate State court may rest its affirmance of the judgment below on some question of practice or pleading or may dismiss the suit for want of jurisdiction and such a decision is not adverse to a Federal right or claim.¹⁶ Or it may find that the party has waived the right to set up the Federal claim;¹⁷ or it may decide that judgment should go against

Montgomery, 156 U. S. 386, 39 L. ed. 460, 15 Sup. Ct. Rep. 649; California v. Holladay, 159 U. S. 417, 40 L. ed. 202, 16 Sup. Ct. Rep. 53; Harrison v. Morton, 171 U. S. 47, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Weatherly v. Bowie, 131 U. S. 227, 25 L. ed. 606; Powell v. Brunswick Co. 150 U. S. 440, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Avery v. Popper, 179 U. S. 314, 45 L. ed. 207, 21 Sup. Ct. Rep. 94.

⁷Furman v. Nichol, 8 Wall. 56, 19 L. ed. 370.

⁸Northern P. R. R. v. Ellis, 144 U. S. 465, 36 L. ed. 504, 12 Sup. Ct. Rep. 724.

⁹Mallett v. North Carolina, 181 U. S. 601, 45 L. ed. 1020, 21 Sup. Ct. Rep. 730.

¹¹Yazoo, etc. Ry. v. Adams, 180 U. S. 15, 45 L. ed. 404, 21 Sup. Ct. Rep. 240; Railroad v. Maryland, 21 Wall. 469, 22 L. ed. 678.

¹²Arrowsmith v. Harmoning, 118 U. S. 195, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023.

¹³Brown v. Atwell, 92 U. S. 329, 22 L. ed. 511; Detroit Ry. v. Guthard,

114 U. S. 136, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; Marrow v. Brinkley, 129 U. S. 181, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; Hagar v. California, 154 U. S. 639, 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186; Chicago, etc. Ry. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341.

¹⁴Chicago, etc. Ins. Co. v. Needles, 113 U. S. 579, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Williams v. Bruffy, 96 U. S. 184, 24 L. ed. 716.

¹⁵Walter A. Wood Co. v. Skinner, 139 U. S. 295, 35 L. ed. 193, 11 Sup. Ct. Rep. 528.

¹⁶Matheson v. Bank of Mobile, 7 How. 261, 12 L. ed. 692; Sample v. Hagar, 4 Wall. 434, 18 L. ed. 402; Chippell Chem. Co. v. Sulphur, etc. Co. 172 U. S. 473, 43 L. ed. 520, 19 Sup. Ct. Rep. 268; Semple v. Hagar, 4 Wall. 434, 18 L. ed. 402; Smith v. Adsit, 16 Wall. 188, 21 L. ed. 310; Commercial Bank v. Rochester, 15 Wall. 642, 21 L. ed. 117; Chouteau v. Gibson, 111 U. S. 201, 28 L. ed. 400, 4 Sup. Ct. Rep. 340.

¹⁷Infra, note.¹¹

the party on the merits upon broad principles of law which do not involve any consideration of the Federal question.¹⁸

[i] State decision that right to raise Federal question is lost by estoppel, waiver, or defect of procedure.

In a number of cases decision has gone against a party raising a Federal question, not because the contention was itself deemed without merit but because the party was, for technical reasons, not competent to raise it and procure a decision on the merits. Such a decision is not adverse to the Federal question but merely to the power of the party to raise it. Hence a decision that a party is estopped to question the validity of a statute on Federal grounds, or has waived a Federal right, is not a decision denying a Federal claim or right, and is not reviewable.¹ Neither is a decision that a party is estopped to deny the validity of a mining location.² Where a party has claimed a right of removal to the Federal court, and the trial court has decided adversely he will not have a right of writ of error to the highest State court where he fails to take a proper and timely appeal;³ or where the appellate court finds that he failed to note an exception to the adverse ruling and so loses a right to have it reviewed.⁴ When the State court treats the Federal contention as abandoned by the party raising it, there is no right of review.⁵ A failure to except to refusal to allow amendment of pleading will forfeit a right to review.⁶ A State decision declining to pass upon a Federal question because not properly raised below, is not reviewable.⁷ When by the settled State practice the State supreme court is justified in refusing to pass on a Federal question either because not assigned or not argued or urged, there is no right to writ of error.⁸

[j] State decision sustainable on non-Federal ground not reviewable.

Since it is a decision against the Federal right or claim and not against the party raising it, that is reviewable, writ of error will not lie where the State decision is sustainable upon non-Federal grounds. Hence where the record shows a Federal and a non-Federal question, and the case was disposed of below on the latter there is no right of review;⁹ or if it might

¹⁸Infra, note.[3]

¹Eustis v. Bolles, 150 U. S. 369, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Electric Co. v. Dow, 166 U. S. 492, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; Pierce v. Somerset Ry. 171 U. S. 648, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Hale v. Lewis, 181 U. S. 480, 45 L. ed. 963, 21 Sup. Ct. Rep. 677; Western E. Co. v. Abbeville, etc. Co. 197 U. S. 299, 49 L. ed. 765, 25 Sup. Ct. Rep. 481.

²Lowry v. Silver City M. Co. 179 U. S. 198, 45 L. ed. 152, 21 Sup. Ct. Rep. 104.

³Tripp v. Santa Rosa St. R. R. 144 U. S. 130, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

⁴Fashnacht v. Frank, 23 Wall. 419, 23 L. ed. 81.

⁵Weatherby v. Bowie, 131 U. S. cxcv. 25 L. ed. 606.

⁶Kiple v. Illinois, 170 U. S. 187, 42 L. ed. 998, 18 Sup. Ct. Rep. 550.

⁷Erie R. R. v. Purdy, 185 U. S. 154, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

⁸Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617.

⁹Kennebec v. Portland R. R. 14 Wall. 26, 20 L. ed. 850; Adams Co. v.

have been so disposed of.¹⁰ Moreover if the record does not show that the decision below was on the non-Federal ground yet error will not lie if a non-Federal ground is apparent upon which the decision might be rested;¹¹ so that the decision would have been the same if no Federal question had been raised.¹² The cases go even further and hold that where the decision rests on grounds broad enough to sustain judgment irrespective of the Federal question the Supreme Court will not take jurisdiction though the Federal question was wrongly decided.¹³ And if a decision sustains a State law questioned on Federal grounds, error will not lie if the judgment in fact went on another ground which left the statute inapplicable.¹⁴ A hypothetical discussion and adverse opinion on a Federal question give no right to writ of error.¹⁵ Other cases extract from these principles the rule that where it does not appear that the case was necessarily decided in the State court on the question of Federal cognizance, or that the proposition was essential to the judgment, error will not lie.¹⁶

It results that where there are grounds of local law upon which the State court rests its opinions, the case is not reviewable on error even although the losing party has set up some Federal right or claim.¹⁸ So where the State court rests its decision upon general principles of law broad enough to determine the case, quite apart from any consideration of the Federal right claimed, there is no such adverse decision of a Federal

Burlington, etc. R. R. 112 U. S. 128, 23 L. ed. 678, 5 Sup. Ct. Rep. 77; Hammond v. Johnston, 142 U. S. 78, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; Dower v. Richards, 151 U. S. 666, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Moran v. Horsky, 178 U. S. 208, 44 L. ed. 1039, 20 Sup. Ct. Rep. 856; Hale v. Lewis, 181 U. S. 484, 45 L. ed. 963, 21 Sup. Ct. Rep. 677; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; Leonard v. Vicksburg, etc. R. R. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750.

¹⁰Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622.

¹¹Railroad Co. v. Rock, 4 Wall. 181, 18 L. ed. 381; Klinger v. Missouri Co. 13 Wall. 263, 20 L. ed. 635; Steines v. Franklin Co. 14 Wall. 23, 20 L. ed. 846; Johnson v. Risk, 137 U. S. 307, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Walter A. Wood Co. v. Skinner, 139 U. S. 297, 35 L. ed. 193, 11 Sup. Ct. Rep. 528.

¹²Williams v. Oliver, 12 How. 125, 13 L. ed. 915.

¹³Hale v. Akers, 132 U. S. 564, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Delaware City Co. v. Reybold, 142 U. S.

643, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290; California P. Works v. Davis, 151 U. S. 393, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Pierce v. Somerset Ry. 171 U. S. 648, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Chappell Chem. Co. v. Sulphur, etc. Co. 172 U. S. 471, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; Eagan v. Hart, 165 U. S. 191, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

¹⁴Missouri, etc. Ry. v. Ferris, 179 U. S. 605, 45 L. ed. 339, 21 Sup. Ct. Rep. 231.

¹⁵Central P. R. R. v. California, 162 U. S. 115, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; Smith v. Adsit, 23 Wall. 373, 23 L. ed. 114.

¹⁶Gibson v. Chouteau, 8 Wall. 318, 19 L. ed. 317; Bolling v. Lersner, 91 U. S. 595, 23 L. ed. 366; Chapman v. Goodnow, 123 U. S. 548, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Powell v. Brunswick Co. 150 U. S. 440, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; California P. Works v. Davis, 151 U. S. 393, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182.

¹⁸Matheson v. Bank of Mobile, 7

right or claim as will give a right to review on error;¹⁹ even upon the theory that there is a want of due process of law.²⁰ A State decision resting upon general principles of State public policy as respects a contract is not reviewable;¹ and it is said that the application by a State court of principles of public policy and estoppel is not reviewable.²

[k] State decision against validity of Federal treaty or statute.

If the State decision upholds the Federal law, writ of error will not lie.⁴ Nor if it merely applies or construes a law without questioning its validity.⁵ But a State decision against the validity of an act of Congress is reviewable.⁶ A decision that a state of facts does not bring a party within the terms of an act of Congress, does not deny its validity;⁷ nor does a decision which misconstrues it.⁸ An agreement between two States, sanctioned by act of Congress is not a Federal statute in this sense.⁹

[l] State decision against validity of an authority exercised under the United States.

This has generally been deemed to refer to an authority exercised by a public officer of the United States; and the word "authority" is inapplicable as describing water rights arising upon the public domain, upon compliance with R. S. § 2339;¹¹ or an implied license to occupy public mineral lands.¹² A State decision against the validity of an authority

B. Co. v. Henderson, 141 U. S. 689, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; Chever v. Horner, 142 U. S. 127, 35 L. ed. 959, 12 Sup. Ct. Rep. 184; Yesler v. Washington H. L. Comrs. 146 U. S. 657, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; Remington P. Co. v. Watson, 173 U. S. 451, 43 L. ed. 762, 19 Sup. Ct. Rep. 456. See also *supra*, note.[cc]

¹⁹West Tennessee Bank v. Citizens' Bank, 13 Wall. 433, 20 L. ed. 514; Tennessee Bank v. Bank of Louisiana, 14 Wall. 10, 20 L. ed. 514; New York L. I. Co. v. Hendren, 92 U. S. 287, 23 L. ed. 709; United States v. Thompson, 93 U. S. 589, 23 L. ed. 982; New Orleans v. New Orleans W. Works, 142 U. S. 84, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Gillis v. Shierfield, 159 U. S. 660, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

²⁰Marrow v. Brinkley, 129 U. S. 181, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; Sayward v. Denny, 158 U. S. 186, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

¹Delmas v. Insurance Co. 14 Wall. 666, 20 L. ed. 757; Tarver v. Keach, 15 Wall. 68, 21 L. ed. 82.

²Isreal v. Arthur, 152 U. S. 362, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

⁴Roosevelt v. Meyer, 1 Wall. 517, 17 L. ed. 500.

⁵Cameron v. United States, 146 U. S. 536, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; Kennard v. Nebraska, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879; Missouri Pac. R. v. Fitzgerald, 160 U. S. 576, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

⁶Pickering v. Lomax, 145 U. S. 314, 36 L. ed. 716, 12 Sup. Ct. Rep. 860; Trebilcock v. Wilson, 12 Wall. 692, 20 L. ed. 460.

⁷Crary v. Devlin, 154 U. S. 619, 23 L. ed. 510, 14 Sup. Ct. Rep. 1199.

⁸Montgomery v. Hernandez, 12 Wheat. 132, 6 L. ed. 575.

⁹People v. Central, etc. R. R. 12 Wall. 456, 20 L. ed. 458. But see as to Virginia compact and act of admission of Kentucky. Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 24 Sup. Ct. Rep. 322.

¹¹Telluride P. T. Co. v. Rio Grande W. Co. 175 U. S. 645, 44 L. ed. 305, 20 Sup. Ct. Rep. 247.

¹²Mining Co. v. Boggs, 3 Wall. 310, 18 L. ed. 245.

derived from the secretary of the treasury is within this clause;¹³ or denying the authority of government officers sued as trespassers on land.¹⁴ A State decision against a right to sell liquor under Federal license, is reviewable on error;¹⁵ so is a State decision against the claim of a United States marshal to property taken from his possession.¹⁶ Where a marshal is sued for trespass arising from improper levy of process and justifies under the Federal writ of attachment, decision against that defense is reviewable under this section.¹⁷ Admission of land entry in evidence, over objection that it was cancelled by department, does not question departmental authority.¹⁸ But a decision against a deed of Indian lands approved by the President, questions the validity of a Federal authority,¹⁹ so also a decision against the authority of the Federal district court to make a particular order.²⁰ The act of 1867, which first introduced the provision, found in the present law, as to a right, title or privilege claimed under an "authority exercised under the United States,"¹ broadened the scope of the statute considerably and probably made cases reviewable on error which had been held outside the scope of the clause as to denial of the validity of a Federal authority.² The old law did not permit review where the mere existence and not the validity of a Federal authority was denied.³ There is a plain distinction between a denial of a Federal authority and of a right, title, privilege or immunity claimed under it.⁴

[m] State decisions upholding State law or authority questioned upon Federal grounds.

It is well settled that, on error to a State court, the Supreme Court will not adjudge the repugnancy of a State law to the State constitution.⁶ The decision of the State court as to the validity of a law under the State constitution, and as to its proper meaning, application and construction,⁷

¹³Neilson v. Logan, 7 How. 775, 12 L. ed. 908.

¹⁴Stanley v. Schwalby, 147 U. S. 519, 37 L. ed. 269, 13 Sup. Ct. Rep. 418.

¹⁵McGuire v. Com. 3 Wall. 385, 18 L. ed. 164.

¹⁶Clements v. Berry, 11 How. 408, 13 L. ed. 745.

¹⁷Buck v. Colbath, 3 Wall. 340, 18 L. ed. 257; Etheridge v. Sperry, 139 U. S. 267, 35 L. ed. 171, 11 Sup. Ct. Rep. 565. But there is no review where the authority of a marshal to make levy is not questioned. Day v. Gallup, 2 Wall. 106, 17 L. ed. 855.

¹⁸Cook Co. v. Calumet, etc. Co. 138 U. S. 652, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

¹⁹Pickering v. Lomax, 145 U. S. 314, 36 L. ed. 716, 12 Sup. Ct. Rep. 860.

²⁰O'Brien v. Weld, 92 U. S. 85, 23 L. ed. 675.

¹Infra, note.[v]

²E. g. Mining Co. v. Boggs, 3 Wall. 310, 18 L. ed. 245.

³Millingar v. Hartupee, 6 Wall. 262, 18 L. ed. 829.

⁴Baltimore, etc. R. R. v. Hopkins, 130 U. S. 210, 223, 32 L. ed. 913, 9 Sup. Ct. Rep. 503; Abbott v. Tacoma Nat. Bank, 175 U. S. 413, 44 L. ed. 217, 20 Sup. Ct. Rep. 154, 155.

⁶Calder v. Bull, 3 Dall. 392, 1 L. ed. 648; Pennsylvania College Cases, 13 Wall. 212, 20 L. ed. 550; Amey v. Mayor, 24 How. 375, 16 L. ed. 614; Miller v. Cornwall R. R. 168 U. S. 134, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

⁷Commercial Bank v. Buckingham, 5 How. 342, 12 L. ed. 169; Louisville, etc. R. R. v. Louisville, 166 U. S. 715, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725.

will be accepted by the Federal Supreme Court.⁸ R. S. § 709 requires that the validity of the law be challenged upon Federal grounds and that the State decision be adverse to the Federal claim.⁹ It will not do to show merely that the statute may be so construed as to violate the constitution.¹⁰ If the State court sustain the Federal claim and declare the statute void, no writ of error lies;¹¹ neither will it lie if the State court declines to pass upon the Federal question because not properly raised below.¹² But the fact that the State court was correct in overruling the Federal claim does not defeat the writ.¹³ When the invalidity is alleged and directly involved the State court is bound to pass thereon and decision against the contention is reviewable.¹⁴ The writ lies in criminal cases challenging a State statute, as well as in civil.¹⁵

Any State enactment though not by the State legislature, enforced as law in a State, is a law within R. S. § 709 giving writ of error where upheld though challenged on Federal grounds.¹⁶ A confederate enactment adopted and enforced is such a law.¹⁷ But the State law questioned must be an enactment of one of the States of the Union. Territorial laws are not comprehended by the act;¹⁸ nor the alleged laws of a body not organized or admitted to the Union.¹⁹ An objection that a legislature is not organized under acts of Congress and the Constitution, is not an objection to the validity of a State law on Federal grounds.²⁰

A decision upholding a State election law challenged on Federal grounds is reviewable on error;¹ so also is a decision upholding a railroad law compelling trains to stop at county seats, when challenged as interference with the transmission of mails;² and a decision denying a contention that

⁸Nesmith v. Sheldon, 7 How. 818, 12 L. ed. 925; Gill v. Oliver, 11 How. 546, 13 L. ed. 799; Marshall v. Ladd, 131 U. S. xc, 19 L. ed. 153; Glenn v. Garth, 147 U. S. 369, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; Powell v. Brunswick Co. 150 U. S. 442, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Bacon v. Texas, 163 U. S. 225, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023. See ante, § 12.[b]

⁹Weston v. City Council, 2 Pet. 464, 7 L. ed. 481; McKinney v. Carroll, 12 Pet. 70, 9 L. ed. 1002; McPherson v. Blacker, 146 U. S. 23, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

¹⁰Castillo v. McConico, 168 U. S. 680, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

¹¹Walker v. Taylor, 5 How. 68, 12 L. ed. 52; Boyd v. Alabama, 94 U. S. 649, 24 L. ed. 302.

¹²Erie R. R. v. Purdy, 185 U. S. 154, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

¹³Chicago, etc. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681.

¹⁴Railroad v. Maryland, 21 Wall. 469, 22 L. ed. 678.

¹⁵Ward v. Maryland, 12 Wall. 423, 20 L. ed. 449.

¹⁶Williams v. Bruffy, 96 U. S. 183, 24 L. ed. 716.

¹⁷Ford v. Surget, 97 U. S. 603, 24 L. ed. 1018.

¹⁸Miners Bank of Dubuque v. Iowa, 12 How. 7, 13 L. ed. 867. State decision upholding territorial law is not covered by R. S. § 709; Mason v. Messenger, 10 Wall. 510, 19 L. ed. 1028.

¹⁹Scott v. Jones, 5 How. 378, 12 L. ed. 181.

²⁰Scott v. Jones, 5 How. 376, 12 L. ed. 181.

¹McPherson v. Blacker, 146 U. S. 23, 36 L. ed. 869, 13 Sup. Ct. Rep.

²Illinois C. R. R. v. Illinois, 163

a State legislature has no power to regulate the duties of a national bank cashier.³

The Fourteenth Amendment has been the basis of a Federal claim in many cases challenging a State law as invalid thereunder,⁴ as well as in cases alleging that some proceeding or action of a State or its officers other than a statute, has denied rights arising therefrom.⁵ A State decision that a statute providing ex parte court proceedings in organizing irrigation districts is not a deprivation of property under that Amendment is reviewable.⁶

There seem to be no cases in which review on error has been sought respecting a State decision sustaining an authority exercised under a State, questioned upon Federal grounds. It has been held that the authority of a State court to determine its cases is not the authority here referred to.⁷

[mm]—statutes alleged to impair obligation of contracts.

In many cases claim has been made in a State court that a statute violated some prior contract right of the party, and the writ will lie if the claim is denied,⁸ although the State court justifies under some general rule of law,⁹ or declares there never was any valid contract, or any contract at all,¹⁰ or that the statute in question has not the effect of violating it.¹¹ The impairment must be by some law, not merely by a State decision;¹² and mere refusal of State to perform its contract or dec-

U. S. 153, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096.

³Waite v. Dowley, 94 U. S. 532, 24 L. ed. 181.

⁴Yesler v. Washington Harbor L. Comrs. 146 U. S. 656, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; Covington, etc. Co. v. Sandford, 164 U. S. 580, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Wheeler v. New York, etc. R. R. 178 U. S. 323, 44 L. ed. 1086, 20 Sup. Ct. Rep. 949; Spencer v. Merchant, 125 U. S. 358, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Walston v. Nevin, 128 U. S. 583, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Tregla v. Undesto Irrig. Dist. 164 U. S. 185, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

⁵infra, note.[n]

⁶Tregea v. Undesto Irrig. Dist. 164 U. S. 186, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

⁷Bethel v. Demaret, 10 Wall. 540, 19 L. ed. 1007.

⁸Richmond, etc. R. R. v. Louisiana R. R. 13 How. 80, 14 L. ed. 55; Piqua Bank v. Knoop, 16 How. 391, 14 L. ed. 977; Delmas v. Insurance Co. 14 Wall. 667, 20 L. ed. 757; The Bing-

hamton Bridge, 3 Wall. 72, 18 L. ed. 137; Home Ins. Co. v. City Council, 93 U. S. 121, 23 L. ed. 825; Williams v. Bruffy, 96 U. S. 183, 24 L. ed. 716; Illinois C. R. A. v. Chicago, 176 U. S. 656, 44 L. ed. 626, 20 Sup. Ct. Rep. 509; Yazoo, etc. R. R. v. Thomas, 132 U. S. 184, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; New Orleans v. Benjamin, 153 U. S. 424, 38 L. ed. 764, 14 Sup. Ct. Rep. 905.

⁹Given v. Wright, 117 U. S. 656, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907;

¹⁰Columbia Water Power Co. v. Street Ry. 172, U. S. 489, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Wilson v. Standefer, 184 U. S. 411, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; Walsh v. Columbus, etc. R. R. 176 U. S. 476, 44 L. ed. 452, 20 Sup. Ct. Rep. 393; University v. People, 99 U. S. 321, 25 L. ed. 387; Mobile, etc. R. R. v. Tennessee, 153 U. S. 495, 38 L. ed. 793, 14 Sup. Ct. Rep. 968. But see Bacon v. Texas, 163 U. S. 219, 41 L. ed. 132, 16 Sup. Ct. 1023.

¹¹See ante, § 12.[1]

¹²Railroad Co. v. Rock, 4 Wall. 181, 18 L. ed. 381; Winona, etc. R. R.

laration of intent to violate it, without any actual impairment thereof, is not reviewable.¹³ Where a State decision denies the existence of any contract obligation upon grounds independent of the law claimed to impair the same, there is no right to writ of error.¹⁴ A State decision at variance with construction given to law by earlier case is not therefore reviewable.¹⁵ A decision admitting the validity of charter tax exemption, but declaring certain property not within the intent of the law, is not reviewable.¹⁶ And where the State decision holds no contract ever existed because of failure to comply with original statute, and gives judgment without reference to the alleged impairing contract, error will not lie.¹⁷ It must appear that the State court gave effect to an impairing statute;¹⁸ and has not merely misconstrued an admittedly valid statute.¹⁹ But a decision may be actually in support of an impairing statute and therefore reviewable without referring to it.²⁰ Where there is no impairing statute subsequent to the time the alleged contract arose, there can be no right to writ of error.¹ A decision against the claim that a constitutional amendment,² or a grant of a franchise³ impaired a contract is deemed one upholding a statute challenged on Federal grounds.

[n] State decision against a title, right, privilege or immunity claimed under Federal Constitution, treaties or laws—in general.

The act of 1867 introduced a change in this clause by substituting the word "immunity" for "exemption."⁵ In some cases both parties to a suit may claim title under Federal law, and in others what one claims as a right under Federal law may in the converse be asserted by the other as an immunity under that same law. Hence it follows that there

v. Plainview, 143 U. S. 393, 36 L. ed. 191, 12 Sup. Ct. Rep. 530; Knox v. Exchange Bank, 12 Wall. 383, 20 L. ed. 414; Lehigh W. Co. v. Easton, 121 U. S. 392, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; St. Paul, etc. Ry. v. Todd Co. 142 U. S. 287, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281.

¹³Brown v. Colorado, 106 U. S. 98, 27 L. ed. 132, 1 Sup. Ct. Rep. 175; St. Paul Gas Co. v. St. Paul, 191 U. S. 151, 45 L. ed. 793, 21 Sup. Ct. Rep. 575.

¹⁴New Orleans Works v. Louisiana, S. Co. 125 U. S. 38, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

¹⁵Hopkins v. McLure, 133 U. S. 386, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; Bacon v. Texas, 163 U. S. 220, 40 L. ed. 132, 16 Sup. Ct. Rep. 1023.

¹⁶St. Paul, etc. Ry. v. Todd Co. 142 U. S. 287, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281.

¹⁷Bacon v. Texas, 163 U. S. 219, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

¹⁸Kreiger v. Shelby R. R. 125 U. S. 44, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; Bacon v. Texas, 163 U. S. 219, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

¹⁹Central L. Co. v. Laidley, 159 U. S. 109, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

²⁰McCullough v. Virginia, 172 U. S. 116, 43 L. ed. 382, 19 Sup. Ct. Rep. 134, Houston, etc. R. R. v. Texas, 177 U. S. 77, 44 L. ed. 680, 20 Sup. Ct. Rep. 545.

¹Turner v. Wilkes Co. 173 U. S. 463, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

²Williams v. Louisiana, 103 U. S. 639, 26 L. ed. 595.

³Wright v. Nagle, 101 U. S. 794, 25 L. ed. 921.

⁵See *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 437, where the acts of 1789 and 1867 are compared as to this section.

are many cases under this clause of R. S. § 709, which are reviewable in the Supreme Court no matter which way the State court decides.⁶ In either event it decides against a Federal right or immunity, and the Supreme Court is enabled to insure a uniform construction of Federal laws.⁷ It was early decided that a State case where both parties claim title under an act of Congress is reviewable in the Supreme Court.⁸ The same is true where both parties claim a right under an act of Congress.⁹ Allegation that State decision of an election contest violates guaranty of republican government, gives no right to writ of error where all departments of State government are peacefully operating according to fundamental law.¹⁰ A State decision that an assessor is not personally liable for damages for erroneous assessment of national bank stock raises no Federal question.¹¹ It is held also that state injunction against suit in a Federal court involves no Federal question.¹² Error will not lie to State disbarment decision based upon vituperative language used in a Federal court pleading.¹³ Where the contention is that the Federal Constitution, or a Federal treaty, or law, is violated otherwise than by a State law, as, for instance by a contract,¹⁴ or court proceeding,¹⁵ or by some threatened State or municipal acts,¹⁶ the right to review depends upon this clause and not upon the clause respecting State decisions upholding State laws.¹⁷ Where a State court denies a Federal right by excluding Africans from a jury, writ of error will lie;¹⁸ as also where a proceeding for street assessment is claimed to be without due process;¹⁹ or a State tax on telegraph messages is claimed to

⁶See *McCormick v. Market Nat. Bank*, 165 U. S. 538, 40 L. ed. 817, 17 Sup. Ct. Rep. 433. So a State decision sustaining a Federal authority may reject a Federal title; *Maguire v. Tyler*, 1 Black, 203, 17 L. ed. 137. A State decision that a carrier has the right to shift the burden of the war tax to a customer denies the right of the customer under the law to have the carrier pay. *Amer. Exp. Co. v. Maynard*, 177 U. S. 407, 44 L. ed. 824, 20 Sup. Ct. Rep. 695.

⁷*Matthews v. Zane*, 4 Cranch, 383, 2 L. ed. 654.

⁸*Matthews v. Zane*, 4 Cranch, 383, 2 L. ed. 654; *Ross v. Barland*, 1 Pet. 664, 7 L. ed. 302; *Mobile v. Esclava*, 16 Pet. 242, 10 L. ed. 948; *Silver v. Ladd*, 6 Wall. 440, 18 L. ed. 828; *Wallace v. Parker*, 6 Pet. 687, 8 L. ed. 543.

⁹*Buel v. Van Ness*, 8 Wheat. 324, 5 L. ed. 624.

¹⁰*Taylor v. Beckham*, 178 U. S. 580, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009.

¹¹*Williams v. Weaver*, 100 U. S. 548, 25 L. ed. 708.

¹²*In re Craft*, 124 U. S. 374, 31 L. ed. 449, 8 Sup. Ct. Rep. 509.

¹³*In re Green*, 141 U. S. 326, 35 L. ed. 765, 12 Sup. Ct. Rep. 11.

¹⁴*Railroad v. Richmond*, 15 Wall. 7, 21 L. ed. 118.

¹⁵*Hanford v. Davies*, 163 U. S. 279, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Backus v. Fort Street, etc. Co.* 169 U. S. 575, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Bohanan v. Nebraska*, 118 U. S. 231, 30 L. ed. 71, 6 Sup. Ct. Rep. 1049.

¹⁶*Walla Walla v. Water Co.* 172 U. S. 11, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Taylor v. Beckham*, 178 U. S. 575, 44 L. ed. 1199, 20 Sup. Ct. Rep. 890, 1009.

¹⁷*Supra*, note.[m]

¹⁸*Neal v. Delaware*, 103 U. S. 393, 26 L. ed. 567.

¹⁹*Bellingham Bay, etc. Co. v. New Whatcom*, 172 U. S. 317, 43 L. ed. 460, 19 Sup. Ct. Rep. 873.

violate a Federal law.²⁰ Writ of error has also been held allowable where the decision was adverse to contentions based upon the Federal commerce power;¹ or upon the war power and its exercise;² or adverse to a right of removal claimed;³ or adverse to a claim of Federal citizenship.⁴

[nn] Decisions against Federal right privilege or immunity, in general.

A State decision adverse to a right to sell liquor asserted under Federal revenue license is against a Federal right and reviewable on error;⁵ so also is a decision against an immunity conferred by act of Congress;⁷ and adverse to an exemption from liability claimed under the Federal Constitution;⁸ and against a right derived from act of Congress and the decision of the land department;⁹ and adverse to a Federal receiver's contention that he is privileged from suit in the State court;¹⁰ and adverse to the contention that United States obligations are not taxable.¹¹ Rights and immunities claimed under revenue laws and denied by a State decision create a right to writ of error.¹² A State decision against a right to damages for libelous matter in a Federal court pleading, is reviewable because against a Federal right, where the decision is claimed to be a deprivation of plaintiff's property right to his reputation.¹³ A State decision that a municipality authorized to borrow "money" exceeded its powers by promising to pay "in gold coin of the United States," has been held to deny a right claimed under the Federal Constitution and laws.¹⁴ A decision denying riparian rights under a Federal grant is reviewable on error.¹⁵ A State

²⁰Western U. T. Co. v. Alabama, 132 U. S. 473, 33 L. ed. 409, 10 Sup. Ct. Rep. 161.

¹Hennington v. Georgia, 163 U. S. 302, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Edwards v. Elliott, 21 Wall. 550, 22 L. ed. 487.

²Mathews v. McStea, 20 Wall. 649, 22 L. ed. 448; Bond v. Moore, 93 U. S. 594, 23 L. ed. 983.

³Kanouse v. Martin, 14 How. 24, 14 L. ed. 310; Oakley v. Goodnow, 118 U. S. 44, 30 L. ed. 61, 6 Sup. Ct. Rep. 944; Missouri P. Ry. v. Fitzgerald, 160 U. S. 582, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Missouri, etc. Ry. v. Commissioners, 183 U. S. 58, 46 L. ed. 78, 22 Sup. Ct. Rep. 18. But error will not lie where adverse ruling not excepted to; Fashrecht v. Frank, 23 Wall. 419, 23 L. ed. 81; or where no appeal to the State supreme court was prosecuted. Tripp v. Santa Rosa St. R. R. 144 U. S. 130, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

⁴Boyd v. Nebraska, 143 U. S. 161, 36 L. ed. 103, 12 Sup. Ct. Rep. 375. But not where State decides a party

to be a citizen of a certain State. Hunt v. Hunt, 131 U. S. CLXVI, 24 L. ed. 1109.

⁶McGuire v. Com. 3 Wall. 385, 13 L. ed. 164.

⁷Stewart v. Kahn, 11 Wall. 502, 20 L. ed. 176.

⁸Daniels v. Tearney, 102 U. S. 418, 26 L. ed. 187.

⁹Cunningham v. Ashley, 14 How. 389, 14 L. ed. 462.

¹⁰McNulta v. Lockridge, 141 U. S. 331, 35 L. ed. 796, 12 Sup. Ct. Rep. 11.

¹¹Banks v. Mayor, 7 Wall. 22, 19 L. ed. 57.

¹²The Collector v. Hubbard, 12 Wall. 9, 20 L. ed. 272; Hall v. Jordan, 15 Wall. 395, 21 L. ed. 72; Ruckman v. Bergholz, 131 U. S. CXLIV., 23 L. ed. 1008.

¹³Abbott v. Tacoma Nat. Bank, 175 U. S. 413, 44 L. ed. 217, 20 Sup. Ct. Rep. 153.

¹⁴Woodruff v. Mississippi, 162 U. S. 299, 40 L. ed. 973, 16 Sup. Ct. Rep. 820.

¹⁵French-Glenn Co. v. Springer, 185 U. S. 53, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.

decision is reviewable if adverse to the sufficiency of Federal confiscation proceedings;¹⁷ and against a water right claimed under act of Congress and contract with government;¹⁸ and against a right of action or defense based upon an act of Congress;¹⁹ or a claim depending upon an act of Congress;²⁰ or a mortgage priority by recording lien against vessel;²¹ or a right based on contract with the United States.²² A State decision conforming to a compromise of the parties, but contrary to the Supreme Court's decision on error will not be deemed a denial of a Federal right.²³ Discretionary refusal of liquor license violates no Federal right.²⁴ Refusal of State court to acquiesce in circuit court decision, is no ground for error.²⁵ One alleging himself the owner of land for thirty years does not set up any Federal title, right, privilege or immunity.²⁶ A State court deciding against a corporation created under Federal laws does not necessarily decide against a Federal right or immunity.¹ Construction of an agreement to procure a railroad right of way over public lands does not involve a decision against a Federal right.²

[o] Decisions denying full faith and credit.

In a number of cases the Federal right claimed and denied in the State court has been based on the clause requiring State courts to accord full faith and credit to judgments of sister States.⁴ Error will not lie where the State judgment does not deny full faith and credit;⁵ or where the judgment set up is that of a foreign country;⁶ or where the decision merely

¹⁷Phoenix Bank v. Risley, 111 U. S. 126, 28 L. ed. 374, 4 Sup. Ct. Rep. 322.

¹⁸Green Bay, etc. Co. v. Potter P. Co. 172 U. S. 66, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

¹⁹Anderson v. Carkins, 135 U. S. 486, 34 L. ed. 272, 10 Sup. Ct. Rep. 905.

²⁰Talbot v. First Nat. Bank, 185 U. S. 180, 46 L. ed. 857, 22 Sup. Ct. Rep. 612.

²¹Walton v. Cotton, 19 How. 356, 15 L. ed. 658; Aldrich v. Aetna Ins. Co. 8 Wall. 495, 19 L. ed. 473.

²²Green Bay Co. v. Patten P. Co. 172 U. S. 66, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

²³Mills Co. v. Chicago, etc. R. R. Co. 107 U. S. 567, 27 L. ed. 578, 2 Sup. Ct. Rep. 654.

²⁴Crowley v. Christensen, 137 U. S. 94, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

²⁵Winona, etc. R. R. v. Plainview, 143 U. S. 390, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

²⁶Yesler v. Washington H. L. Com. L. ed. 499, 2 Sup. Ct. Rep. 312.

146 U. S. 654, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

¹Texas, etc. Ry. v. Johnson, 151 U. S. 98, 38 L. ed. 81, 14 Sup. Ct. Rep. 250.

²Missouri Pac. R. R. v. Fitzgerald, 160 U. S. 577, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

⁴Green v. Van Buskirk, 5 Wall. 310, 18 L. ed. 599; Carpenter v. Strange, 141 U. S. 103, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Winona, etc.

R. R. v. Plainview, 143 U. S. 390, 36 L. ed. 191, 12 Sup. Ct. Rep. 530;

Huntington v. Attrill, 146 U. S. 666, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224;

Fancock Nat. Bank v. Farnum, 176 U. S. 642, 44 L. ed. 620, 20 Sup. Ct. Rep. 506; Jacobs v. Marks, 182 U. S.

587, 45 L. ed. 1244, 21 Sup. Ct. Rep. 865; Howlander v. Feckheimer, 162 U. S. 325, 40 L. ed. 985, 16 Sup. Ct. Rep. 795; Crapo v. Kelly, 16 Wall. 621, 21 L. ed. 430.

⁵Lynde v. Lynde, 181 U. S. 186, 45 L. ed. 814, 21 Sup. Ct. Rep. 555.

⁶Roth v. Ehman, 107 U. S. 319, 27

construes and does not deny.⁷ No Federal law or constitutional right is affected by a State court's decision as to the conclusiveness of a prior judgment in the same State.⁸ Where a State court fails to give effect to a valid Federal judgment, error will lie.⁹ But there is no right of review where the State decision is in favor of the circuit court's jurisdiction in another case;¹⁰ or where the Federal judgment was not between the same parties.¹¹ A decision that a matter was first *res adjudicata* in the State court does not deny effect to a Federal decree.¹²

[p]—decision against Federal titles.

In many cases writ of error has been allowed to review State decisions adverse to land titles claimed under United States patent;¹⁴ or adverse to entry of land allowed by land department;¹⁵ or against the title of the United States as proprietor;¹⁶ or against title conferred by Federal government;¹⁷ or adverse to other rights claimed under Federal land laws.¹⁸ But State decisions respecting titles derived from Mexican grants, where no Federal law is involved; are not reviewable.¹⁹ A State decision adverse to title to personalty derived from Federal execution sale;²⁰ or

⁷*Barholzer v. New York L. I. Co.* 178 U. S. 406, 44 L. ed. 1126, 20 Sup. Ct. Rep. 972.

⁸*San Francisco v. Itself*, 133 U. S. 66, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; *California v. Holladay*, 159 U. S. 417, 40 L. ed. 202, 16 Sup. Ct. Rep. 53; *Phenix F. Ins. Co. v. Tennessee*, 161 U. S. 184, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Newport L. Co. v. Newport*, 151 U. S. 539, 38 L. ed. 259, 14 Sup. Ct. Rep. 429.

⁹*Embry v. Palmer*, 107 U. S. 9, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Crescent L. S. Co. v. Butchers Union, etc. Co.* 120 U. S. 146, 31 L. ed. 614, 7 Sup. Ct. Rep. 472; *Central Nat. Bank v. Stevens*, 169 U. S. 460, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Pendleton v. Russell*, 144 U. S. 644, 36 L. ed. 574, 12 Sup. Ct. Rep. 743; *Dowell v. Applegate*, 152 U. S. 346, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Werlein v. New Orleans*, 177 U. S. 396, 44 L. ed. 817, 20 Sup. Ct. Rep. 682.

¹⁰*Abbott v. Tacoma Bank of Commerce*, 175 U. S. 412, 44 L. ed. 217, 20 Sup. Ct. Rep. 153.

¹¹*Giles v. Little*, 134 U. S. 649, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623.

¹²*Northern Pac. R. R. v. Ellis*, 144 U. S. 465, 36 L. ed. 504, 12 Sup. Ct. Rep. 724.

¹⁴*Bell v. Hearne*, 19 How. 263, 15

L. ed. 614; *Cousin v. Labatut*, 19 How. 207, 15 L. ed. 601; *Reichart v. Felps*, 6 Wall. 165, 18 L. ed. 849; *Johnson v. Trosley*, 13 Wall. 80, 20 L. ed. 485; *Baldwin v. Stark*, 107 U. S. 464, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; *Doolan v. Carr*, 125 U. S. 620, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Shively v. Bowlby*, 152 U. S. 9, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

¹⁵*Lytle v. Arkansas*, 22 How. 203, 16 L. ed. 306.

¹⁶*Stanley v. Schwalby*, 162 U. S. 278, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

¹⁷*Berthold v. McDonald*, 22 How. 339, 16 L. ed. 318.

¹⁸*Moore v. Robbins*, 96 U. S. 531, 24 L. ed. 848; *Husman v. Durham*, 165 U. S. 147, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; *Minnesota v. Bachilder*, 1 Wall. 116, 17 L. ed. 551; *Northern Pac. R. R. v. Colburn*, 164 U. S. 386, 41 L. ed. 479, 17 Sup. Ct. Rep. 98.

¹⁹*Kennedy v. Hunt*, 7 How. 593, 12 L. ed. 829; *San Francisco v. Scott*, 111 U. S. 769, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *Phillips v. Mound City Assn.* 124 U. S. 611, 31 L. ed. 588, 8 Sup. Ct. Rep. 657; *California Powder Wks. v. Davis*, 151 U. S. 395, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

²⁰*Gregory v. McVeigh*, 23 Wall. 307, 23 L. ed. 156.

depending upon act of Congress,²¹ is reviewable. It is immaterial whether a State denies validity to a Federal title upon a question of fact or one of law.²² If a title set up under Federal laws is rejected, the writ will lie, even though the decision rejecting the title does so by sustaining an authority exercised by the surveyor general.²³ A State decision denying riparian rights under a Federal grant gives right to writ of error.²⁴

A State decision upon land titles involving only the State land laws is not reviewable.¹ Neither is a decision in an action to correct a name in a Federal confirmation of title.² A State decision against a particular survey is not against a Federal grant where the act of Congress respecting the grants recognized their validity but not the validity of any particular survey.³ A decision refusing prohibition against State harbor commissioners improperly locating harbor lines, is not against any Federal right or title or littoral owners.⁴ The crop raised on land by pre-emptors' labor and expense does not affect a question of title.⁵ Decision that the statute of limitations runs from accrual of right to patent and not from issuance violates no Federal right or title;⁶ neither does the converse holding.⁷ The question whether a Federal survey would constitute a technical eviction so as to justify suit, is not Federal.⁸ No Federal question can be deemed involved in a suit to recover purchase price paid at tax sale, from fact that exemption of such property from taxation is of Federal origin.⁹

A partition suit between parties who have taken patent from the United States as tenants in common, is not reviewable;¹⁰ nor a boundary dispute between patentees.¹¹ Nor is a controversy between parties claiming from a common grantor whose title from the United States is not disputed.¹² And a State decision refusing to aid either of two claimants to land which the Supreme Court has declared belongs to the United States, is not review-

²¹Atherton v. Fowler, 91 U. S. 145, 23 L. ed. 265.

²²Lyle v. Arkansas, 22 How. 193, 16 L. ed. 306.

²³Maguire v. Tyler, 1 Black, 203, 17 L. ed. 137.

²⁴French-Glenn Co. v. Springer, 185 U. S. 53, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.

¹Galveston, etc. Ry. v. Texas, 170 U. S. 241, 42 L. ed. 1017, 18 Sup. Ct. Rep. 603; Michigan v. Flint, etc. R. E. 152 U. S. 368, 38 L. ed. 478, 14 Sup. Ct. Rep. 586; Shaffer v. Sard-day, 19 How. 21, 15 L. ed. 592; Cook Co. v. Calumet, etc. Co. 138 U. S. 651, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

²Carpenter v. Williams, 9 Wall. 786, 19 L. ed. 827.

³McDonough v. Millandon, 3 How. 707, 11 L. ed. 787.

⁴Yesler v. Washington H. L. Comrs. 146 U. S. 654, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

⁵Martin v. Thompson, 120 U. S. 376, 30 L. ed. 679, 7 Sup. Ct. Rep. 586.

⁶Dibble v. Bellingham Bay, etc. Co. 163 U. S. 73, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

⁷Carothers v. Mayer, 164 U. S. 327, 41 L. ed. 453, 17 Sup. Ct. Rep. 106.

⁸Keene v. Clark, 10 Pet. 292, 9 L. ed. 429.

⁹Tyler v. Cass Co. 142 U. S. 291, 35 L. ed. 1016, 12 Sup. Ct. Rep. 225.

¹⁰Downes v. Scott, 4 How. 502, 11 L. ed. 1075.

¹¹Moreland v. Page, 20 How. 523, 15 L. ed. 1009; Lanfear v. Hunley, 4 Wall. 209, 18 L. ed. 325; Sweringen v. St. Louis, 185 U. S. 45, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

¹²Romie v. Casanova, 91 U. S. 381, 23 L. ed. 374; Hastings v. Jackson, 112 U. S. 237, 28 L. ed. 712, 5 Sup. Ct. Rep. 113.

able.¹³ In a number of cases the Supreme Court has disclaimed jurisdiction on error, over suits respecting lands and other property rights,¹⁴ and foreclosure suits,¹⁵ because the questions were purely local and no Federal right or title was involved or denied.¹⁶

[q]—decisions affecting mining titles or claims.

While mines and mining claims very generally involve rights or titles resting upon Federal law, there are many questions respecting them, even controversies between rival claimants,¹⁸ that may be decided by State courts without creating a right to writ of error. It has been held that no Federal question is involved in deciding that abandonment for fourteen years bars a right to a mining claim;¹⁹ in deciding against lessee's right to relocate;²⁰ in holding party estopped to deny validity of location;²¹ in holding that cotenant relocating, became trustee for the others;²² and that patent bars right to antecedent defenses in ejectment.²³ But if a state court deny effect to a relocation of a forfeited claim, error will lie.²⁴

[r]—titles or claims under treaty.

In a number of cases State decisions against title claimed under a treaty,¹ and against other claims under a treaty,² have been reviewed on error. But the party must claim under a treaty in his own behalf and not set up a title thereunder in a third person and in which he has no interest;³ or set up a right against the treaty.⁴ If the decision rests

¹³Gaines v. Hale, 93 U. S. 4, 23 L. ed. 782.

¹⁴See Maney v. Porter, 4 How. 58, 11 L. ed. 873; Cornell Univ. v. Fiske, 136 U. S. 174, 34 L. ed. 427, 10 Sup. Ct. Rep. 775; Almover v. Kenton, 9 How. 9, 13 L. ed. 21; Long v. Bulard, 117 U. S. 621, 29 L. ed. 1004, 6 Sup. Ct. Rep. 917; Bushnell v. Croke M. Co. 148 U. S. 689, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; Turner v. New York, 168 U. S. 95, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; Columbia W. P. Co. v. Columbia St. Ry. 172 U. S. 492, 43 L. ed. 521, 19 Sup. Rep. 247.

¹⁵Wood v. Brady, 150 U. S. 23, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; French v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; Avery v. Popper, 179 U. S. 315, 45 L. ed. 207, 21 Sup. Ct. Rep. 94.

¹⁶See also supra note.[c]

¹⁸Blackburn v. Portland, etc. Co. 175 U. S. 579, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

¹⁹Moran v. Horsky, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 856.

²⁰Lowry v. Silver City Min. Co. 179

U. S. 198, 45 L. ed. 152, 21 Sup. Ct. 104.

²¹Speed v. McCarthy, 181 U. S. 275, 45 L. ed. 858, 21 Sup. Ct. Rep. 613.

²²Speed v. McCarthy, 181 U. S. 276, 45 L. ed. 859, 21 Sup. Ct. Rep. 613.

²³Carothers v. Mayer, 164 U. S. 327, 41 L. ed. 453, 17 Sup. Ct. Rep. 106.

²⁴Lavaguino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716.

¹Martin v. Hunter, 1 Wheat. 352, 4 L. ed. 97; Henderson v. Tennessee, 10 How. 323, 13 L. ed. 434.

²Ker v. Illinois, 119 U. S. 441, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; Burthe v. Denis, 133 U. S. 520, 33 L. ed. 768, 10 Sup. Ct. Rep. 335; Worcester v. Georgia, 6 Pet. 541, 8 L. ed. 483.

³Owings v. Norwood, 5 Cranch, 348, 3 L. ed. 120; Henderson v. Tennessee, 10 How. 323, 13 L. ed. 434; Verden v. Coleman, 1 Black, 474, 17 L. ed. 161. See supra, note.[e]

⁴United States v. Old Settlers, 148

upon other ground such as the statute of limitations there is no right of review;⁵ nor where the State court merely settles conflicting claims to the amount of a treaty award;⁶ or to a grant recognized by treaty.⁷

[s]—decisions affecting rights, titles or privileges under bankruptcy laws.

Error will lie to a State decision against a claim that a sale or transfer was fraudulent under the bankrupt law;¹⁰ or against any other claim set up under the bankrupt law;¹¹ or against a title based on such law;¹² or against a claim of immunity set up by a bankrupt under his discharge.¹³

But the legal effect of a new promise to pay after discharge,¹⁵ or of presentation of a check as an equitable transfer two months before bankruptcy;¹⁶ or the question whether a bankrupt is really trustee for a client as to certain property,¹⁷ or has no title to property in question,¹⁸ have all been held to give no right to review on error to a State court.¹⁹ A State court's decision as to what should be deemed sufficient evidence of fraud in a conveyance or its application of the rule laid down to the facts of the case at hand, gives no right to Federal review where no Federal right, title or privilege is denied.²⁰ A decision in favor of the immunity claimed under a bankruptcy discharge is not reviewable.²¹ A State decision refusing to set aside a bankruptcy discharge because of laches, does not deny a Federal right.²²

[t]—under patent laws.

A State decision merely construing and enforcing a contract respecting

U. S. 468, 37 L. ed. 509, 13 Sup. Ct. Rep. 650.

⁵*Seneca Nation v. Christy*, 162 U. S. 289, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

⁶*Gill v. Oliver*, 11 How. 547, 13 L. ed. 799.

⁷*McDonough v. Willandon*, 3 How. 707, 11 L. ed. 787.

¹⁰*Sharpe v. Doyle*, 102 U. S. 688, 26 L. ed. 277; *Factors Ins. Co. v. Murphy*, 111 U. S. 741, 28 L. ed. 582, 4 Sup. Ct. Rep. 679.

¹¹*Mays v. Fritton*, 131 U. S. CXV., 21 L. ed. 127; *Williams v. Heard*, 140 U. S. 535, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; *Dushane v. Beall*, 161 U. S. 518, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; *Jenkins v. Loewenthal*, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; *Trallo v. Clews*, 115 U. S. 534, 29 L. ed. 467, 6 Sup. Ct. Rep. 155.

¹²*New Orleans, etc. R. R. v. Delaware*, 114 U. S. 506, 29 L. ed. 244 5 Sup. Ct. Rep. 1009.

¹³*Dimock v. Revere C. Co.* 117 U. S. 564, 29 L. ed. 994, 6 Sup. Ct. Rep. 355; *Winchester v. Heiskell*, 119 U.

S. 453, 30 L. ed. 462, 7 Sup. Ct. Rep. 281; *Palmer v. Hussey*, 119 U. S. 98, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; *Roby v. Colehorn*, 146 U. S. 160, 36 L. ed. 922, 13 Sup. Ct. Rep. 47. But see *Smalley v. Langemour*, 196 U. S. 93, 49 L. ed. 400, 25 Sup. Ct. Rep. 216.

¹⁵*Linton v. Stanton*, 12 How. 426, 13 L. ed. 1050.

¹⁶*Boatmans Bank v. State Sav. Assn.* 114 U. S. 268, 29 L. ed. 174, 5 Sup. Ct. Rep. 878.

¹⁷*Roby v. Colehour*, 146 U. S. 161, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

¹⁸*Scott v. Kelly*, 22 Wall. 59, 22 L. ed. 729.

¹⁹*McKenna v. Simpson*, 129 U. S. 511, 32 L. ed. 771, 9 Sup. Ct. Rep. 365.

²⁰*Strader v. Baldwin*, 9 How. 262, 13 L. ed. 130.

²¹See *Smalley v. Langemour*, 196 U. S. 93, 49 L. ed. 400, 25 Sup. Ct. Rep. 216, also note, 20.

²²*Calcutt v. Stanton*, 18 How. 245, 15 L. ed. 348.

a patent,¹ or rescinding such a contract,² or deciding between two claimants to ownership of a patent and that one of them is estopped,³ is not reviewable on error where no question is made of any right, title or immunity under the patent laws.⁴ The question when a case is deemed to arise under the patent laws is elsewhere discussed.⁵

[u]—decisions under national bank laws.

A State court's decision that the making of a lease was not permissible as an incidental preliminary matter which a national bank is authorized to do before receiving its authorization to do business from the controller, is reviewable on error.⁷ So also is a decision where powers of a national bank are called in question;⁸ or an exemption claimed under the national bank law;⁹ or a liability to pay notes issued while national bank was a State bank;¹⁰ or a liability to pay assessment on savings bank stock on ground of ultra vires.¹¹

But there is no right to writ of error to review a decision allowing an exemption claimed;¹² nor where a case involves merely questions governed by the laws of a State and no right, title or immunity under the national bank laws, such, for instance, as the validity of gift of bank shares;¹³ or whether funds in a bank's hands belong to plaintiff;¹⁴ or whether transferee of shares is liable for failure to fill in an indorsement in blank of the shares.¹⁵ A State decision refusing to enforce a usurious contract of a national bank involves no Federal question;¹⁶ nor one holding that claim for breach of lease is an existing claim against a bank at time of insolvency.¹⁷

¹Marsh v. Nichols, 140 U. S. 354, 35 L. ed. 417, 11 Sup. Ct. Rep. 798.

²Wade v. Lawder, 165 U. S. 627, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

³Pittsburgh, etc. Co. v. Cleveland, etc. Co. 178 U. S. 279, 44 L. ed. 1068, 20 Sup. Ct. Rep. 931.

⁴Wade v. Lawder, 165 U. S. 627, 41 L. ed. 851, 17 Sup. Ct. Rep. 425;

Pratt v. Paris Gas Co. 168 U. S. 259, 42 L. ed. 458, 18 Sup. Ct. Rep. 62.

⁵See ante § 15; post § 126.

⁷McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Seeberger v. McCormick, 175 U. S. 278, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

⁸Swope v. Leffingwell, 105 U. S. 4, 26 L. ed. 939; California Nat. Bank v. Kennedy, 167 U. S. 365, 42 L. ed. 198, 17 Sup. Ct. Rep. 831.

⁹Logan Co. Bank v. Townsend, 139 U. S. 72, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

¹⁰Metropolitan Nat. Bank v. Clagget, 141 U. S. 526, 35 L. ed. 841, 12 Sup. Ct. Rep. 60.

¹¹California Nat. Bank v. Kennedy, 167 U. S. 366, 42 L. ed. 198, 17 Sup. Ct. Rep. 831.

¹²Bank of Commerce v. Tennessee, 161 U. S. 145, 40 L. ed. 645, 16 Sup. Ct. Rep. 456.

¹³Leyson v. Davis, 170 U. S. 39, 42 L. ed. 939, 18 Sup. Ct. Rep. 500.

¹⁴Capital Bank v. First Nat. Bank of Cadiz, 172 U. S. 432, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

¹⁵Le Sassier v. Kennedy, 123 U. S. 524, 31 L. ed. 262, 8 Sup. Ct. Rep. 244.

¹⁶Union Nat. Bank v. Louisville, etc. Ry. 163 U. S. 331, 41 L. ed. 177, 16 Sup. Ct. Rep. 1039.

¹⁷Chemical Bank v. Hartford, etc. Co. 161 U. S. 10, 40 L. ed. 595, 16 Sup. Ct. Rep. 439.

[v] State decision against a title, right, privilege or immunity claimed under a Federal commission or authority.

The act of 1867 substituted the word "immunity" for "exemption" in this clause, and added after "commission" the words "or authority exercised under" the United States.²⁰ A State decision declaring a liability for attorney's fees on Federal injunction bond is reviewable on error, where it is contended that by the Federal practice an attorney fee is not an element of damages.²¹ Denial by a State court of a claim that a proceeding was barred by an order of the circuit court, is reviewable on error.²² But it is not a denial of a Federal right for a State court to proceed with a cause over which the circuit court has refused jurisdiction.²³ Where a Federal attachment suit has been abandoned, a State court's decision that it had control of the property garnished, involves no Federal question.²⁴ A decision against a claim that Federal foreclosure proceedings had discharged a lien, is against a right claimed under Federal authority;²⁵ so also is a decision against the validity of Federal execution sale.²⁶

§ 39. From circuit court of appeals.

In all cases not hereinbefore, in this section, made final[i. e. in cases appealable to the circuit court of appeals other than cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States, and other than cases arising under the patent laws, under the revenue laws, and under the criminal laws, and other than admiralty cases¹] there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.

Part of § 6 act March 3, 1891, c. 517, 26 Stat. 828, U. S. Comp. Stat. 1901, p. 550.

[a] Cross references to other parts of the section.

Other portions of § 6 confer upon the circuit court of appeals a certain appellate jurisdiction over district and circuit courts;³ authorize the cer-

²⁰Compare the two in *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 437. 160 U. S. 582, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

²¹*Tullock v. Mulvane*, 184 U. S. 504, 46 L. ed. 663, 22 Sup. Ct. Rep. 372; *Missouri, etc. Ry. v. Elliott*, 184 U. S. 539, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

²²*Texas, etc. Ry. v. Johnson*, 151 U. S. 99, 38 L. ed. 81, 14 Sup. Ct. Rep. 250.

²³*Missouri Pac. Ry. v. Fitzgerald*,

²⁴*Missouri Pac. Ry. v. Fitzgerald*, 160 U. S. 578, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

²⁵*Pittsburgh, etc. R. R. v. Loan, etc. Co.* 172 U. S. 507, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

²⁶*Erwin v. Lowry*, 7 How. 179, 12 L. ed. 655.

¹See post, § 77.

³Post, § 77.

tifying of questions to the Supreme Court;⁴ and provide for review of the circuit court of appeals decisions by certiorari from the Supreme Court at the discretion of the latter.⁵

[b] Scope of appellate jurisdiction under this section.

It is obvious that appellate jurisdiction conferred on the Supreme Court by this section is to be determined by ascertaining the extent of the appellate jurisdiction granted to the circuit court of appeals⁶ and eliminating therefrom the cases made final in that court.⁷ Cases arising under laws of the United States other than the patent, revenue, admiralty or criminal laws, involving the construction but not the validity of such laws, would seem to be the chief class of cases in which an appeal lies to the Supreme Court from the circuit court of appeal.⁸ There are certain cases in which the aggrieved party has a choice of appeal to the circuit court of appeals or to the Supreme Court direct.⁹

As cases to which a Federal corporation is party are deemed to arise under the Federal laws, they are appealable from the circuit court of appeals to the Supreme Court, although in no other respect involving a Federal question or law.¹⁰ So an action to which a national bank receiver appointed by the comptroller, is party, is one arising under Federal laws and thus cognizable in the Supreme Court;¹¹ and an action against a Federal marshal for acts officially done by him, even though other parties were joined as to whom jurisdiction rested upon diverse citizenship;¹² and an action for infringement of a trademark under the act of 1881.¹³ Appeal lies to the Supreme Court from the circuit court of appeals in an action involving the interpretation of "mineral lands" excepted from a railroad land grant;¹⁴ also in a suit to cancel a patent as that is not deemed to arise under the patent laws or to be therefore finally cognizable in the circuit court of appeals.¹⁵ But an action upon common law right of literary property and not under the copyright laws is not appealable from the circuit court of appeals.¹⁶ Even though a suit is one arising under the patent or revenue laws and ordinarily final in the circuit courts of appeals, yet if, in plaintiff's original statement of his case, it also shows a constitutional question of the kind appealable direct from the circuit to the Supreme Court,¹⁷ the circuit court of appeals judgment may

⁴Post, § 40.

⁵Post, § 41.

⁶Post, § 77.

⁷Post, § 77.[c]

⁸Florida, etc. R. R. v. Bell, 176 U. S. 327, 44 L. ed. 490, 20 Sup. Ct. Rep. 399.

⁹See post, § 42.[d]-[dd]

¹⁰Northern Pac. R. R. v. Amato, 144 U. S. 472, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Union Pac. Ry. v. Harris, 158 U. S. 327, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843.

¹¹Auten v. United States Nat. Bank, 174 U. S. 141, 43 L. ed. 920, 10 Sup. Ct. Rep. 628.

¹²Sonnentheil v. Christian, etc. Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233.

¹³Warner v. Searle, etc. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79.

¹⁴Northern Pac. Ry. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365.

¹⁵United States v. American B. T. Co. 159 U. S. 554, 40 L. ed. 255, 16 Sup. Ct. Rep. 69.

¹⁶Press Port Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40.

¹⁷Post, § 42.

be appealed to the Supreme Court.¹⁸ This is only so, however, if the constitutional question relied on to sustain the second appeal is decided against appellant and not in his favor.¹⁹ A controversy between a citizen and a foreign state not being made final in the circuit court of the United States, may go to the Supreme Court.²⁰ A habeas corpus case is not one in which the matter in controversy has a money value;¹ and where the case is such that appeal properly lay from the circuit court to the circuit court of appeals, it is not again appealable to the Supreme Court.² Suits against the United States brought in the circuit court are in the absence of special constitutional or jurisdictional questions, of the class appealable first to the circuit court of appeals.³

[c] Cases made final in the circuit court of appeals.

A suit to limit liability of shipowners is deemed an admiralty cause and final in the circuit court of appeals;⁴ so also is a suit to review an appraiser's decision, because arising under the revenue laws.⁵ If, originally as shown by the original pleadings, the jurisdiction depended entirely on diverse citizenship, no appeal can lie from the circuit court of appeals to the Supreme Court.⁶ In such a case if a constitutional question arose at the trial permitting appeal direct to the Supreme Court, yet if the party has elected to go to the circuit court of appeals its decision is final, and he cannot then appeal on the constitutional question to the Supreme Court.⁷ And where the Federal question arising is not such as to permit a direct appeal from the circuit to the Supreme Court judgment is final in the circuit court of appeals notwithstanding the Federal question.⁸ Where plaintiff relied on general principles of law and nowhere asserts a right that would

¹⁸*Spreckels S. R. Co. v. McClain*, 192 U. S. 409, 48 L. ed. 499, 24 Sup. Ct. Rep. 376.

¹⁹*Empire, etc. Co. v. Hanley*, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691.

²⁰*Columbia v. Cauca Co.* 190 U. S. 524, 47 L. ed. 1159, 23 Sup. Ct. Rep. 704.

¹*Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584.

²*Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 344, 12 Sup. Ct. Rep. 517. See *infra*, note.[e]

³*Ogden v. United States*, 148 U. S. 390, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *United States v. Countert*, 73 Fed. 505, 19 C. C. A. 543; *United States v. Harsha*, 172 U. S. 567, 43 L. ed. 556, 19 Sup. Ct. Rep. 294; *United States v. American B. Tel. Co.* 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69.

⁶*Oregon R. R. Co. v. Balfour*, 179 U. S. 56, 45 L. ed. 84, 21 Sup. Ct. Rep. 28.

⁷*Anglo California Bank v. United States*, 175 U. S. 37, 44 L. ed. 64, 20 Sup. Ct. Rep. 19.

⁸*Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Pope v. Louisville, etc. Ry.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Colorado, etc. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Borgemeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174. See also § 77.[e]

⁹*Cary Mfg. Co. v. Acme, etc. Co.* 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211.

¹⁰*Third St. Ry. v. Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; *Ayres v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196. See also § 77.[e]

be sustained by one construction of the Federal Constitution or laws and defeated by another, the jurisdiction of the circuit court of appeals must be deemed to have rested upon diverse citizenship.¹¹ Where jurisdiction of a case rests upon the fact that it is ancillary to another case in which Federal jurisdiction rests upon diverse citizenship, decision in the ancillary suit is also final in the circuit court of appeals.¹² Where citizens of different states claim under land grants of different states the jurisdiction rests on diverse citizenship exclusively. The same is true where a cause is removed for local prejudice;¹³ or where a suit brought by a national bank, rests on diverse citizenship.¹⁴ An affirmance by the circuit court of appeals of a judgment dismissing an assignee's suit for failure to show assignor's citizenship is final and non-appealable.¹⁵

[d] Only final judgments reviewable—certified questions.

Interlocutory orders or decrees are not appealable to the Supreme Court;¹⁷ but the judgment must be final.¹⁸ A decree reversing and specifically directing the decree which the circuit court is to enter, is final;¹⁹ but a reversal with directions to the circuit court to remand a removed case to the State court is not a final judgment, but merely a refusal to adjudge.²⁰ Reversal for further proceedings below is not final.¹

[e] Necessity for \$1,000 value in dispute.

A clause conferring appellate jurisdiction only where a certain value is in dispute is uniformly recognized as a denial of appellate jurisdiction over certain classes of cases where the matter is in dispute is not susceptible of pecuniary measurement. Thus on habeas corpus, where the dispute is a question of individual freedom, or even whether a fine shall be paid, or a question of both fine and imprisonment there is no value in dispute and no right of appeal under this section.² This matter is also discussed in the annotation of other similar provisions.³

¹¹Bankers, etc. Co. v. Minneapolis, etc. R. R. 192 U. S. 371, 48 L. ed. 484, 24 Sup. Ct. Rep. 325. See also Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

¹²Stevenson v. Fain, 195 U. S. 165, 49 L. ed. 142, 25 Sup. Ct. Rep. 6. See ante, § 3.[i]

¹³Cochran v. Montgomery Co. 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58.

¹⁴Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54.

¹⁵Benjamin v. New Orleans, 169 U. S. 161, 42 L. ed. 700, 18 Sup. Ct. Rep. 298.

¹⁷Kirwan v. Murphy, 170 U. S. 208, 42 L. ed. 1009, 18 Sup. Ct. Rep. 592.

¹⁸MacLeod v. Graven, 79 Fed. 84, 24 C. C. A. 449.

¹⁹Merrill v. National Bank, 173 U. S. 134, 43 L. ed. 640, 19 Sup. Ct. Rep. 360.

²⁰German Nat. Bank v. Speckert, 181 U. S. 409, 45 L. ed. 927, 21 Sup. Ct. Rep. 688.

¹United States v. Krall, 174 U. S. 385, 43 L. ed. 1017, 19 Sup. Ct. Rep. 712.

²Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584; Law Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 344, 12 Sup. Ct. Rep. 517.

³Post, § 45, [c]; 48 [c].

§ 40. Questions certified up by circuit court of appeals for instruction.

In every such subject within its appellate jurisdiction [i. e., in every case in which the judgment or decree of the circuit court of appeals is made final],⁷ the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.^{[a]-[b]}

Part of § 6 of act Mar. 3, 1891, chap. 517, 26 Stat. 828, U. S. Comp. Stat. 1901, p. 550.

[a] Other parts of section and cross-references.

The other portions of § 6 of the act of 1891, and their place in the text are stated elsewhere.⁸

[b] Construction of clause as to certifying questions.

It is said that the foregoing clause is to be interpreted in the light of similar provisions in earlier laws regarding certified questions from the circuit court.⁹ The questions certified must each contain a definite independent point of law clearly stated and without an admixture of facts.¹⁰ Each question must be stated as a distinct point, answerable without reference to other issues of law in the case and a certificate which necessitates an answer to questions not propounded must be dismissed.¹¹ Only questions of gravity and importance should be sent up.² And if the cause is appealable, the circuit court of appeals has no power to certify questions.³ A question certified may be answered although the certificate

⁷See post, § 77.

⁸Ante, § 39 [a].

⁹Graver v. Faurot, 162 U. S. 437, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799.

¹⁰Emsheimer v. New Orleans, 186

U. S. 46, 46 L. ed. 1042, 22 Sup. Ct.

Rep. 770; Felsenheld v. United States,

186 U. S. 134, 46 L. ed. 1085, 22 Sup.

Ct. Rep. 740; Graver v. Faurot, 162

U. S. 437, 40 L. ed. 1030, 16 Sup. Ct.

Rep. 799; McHenry v. Alford, 168 U.

S. 600, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

¹¹United States v. Union Pac. Ry. 168 U. S. 512, 42 L. ed. 559, 18 Sup.

Ct. Rep. 167.

²Lau Ow Bew, Petitioner, 141 U. S.

587, 35 L. ed. 868, 12 Sup. Ct. Rep.

43.

³Texas & P. Ry. v. Gentry, 57 Fed.

422, 6 C. C. A. 413.

has been recalled where the result in any event is the dismissal of a writ of error from the circuit court of appeals.⁴

The circuit court of appeals has refused a certificate where the questions of law and fact were not new and were so mixed that the former could not be segregated without sending up the whole case;⁵ and has refused merely because a proposed question was novel;⁶ or because a supreme court decision of the only point seemed ill-considered.⁷ It will certify only when in doubt and upon its own motion.⁸ Where the circuit court of appeals certifies the question of jurisdiction to the Supreme Court, it should suspend decision upon the merits until the jurisdictional question is determined;⁹ but perhaps will not generally withhold a decision if another question is sent up.¹⁰

The whole case must not be brought up by splitting it into questions.¹² Nor is a general question which is capable of being separated into specific queries, a proper one.¹³ The certificate should contain a sufficient statement of the facts on which the questions depend and not merely refer to the record.¹⁴ The court must not be compelled to search all through the record.¹⁵ Less than a quorum of the court cannot certify a question.¹⁶ The certificate must further show that an answer to the questions is necessary to a decision because the judges are in doubt or differ in their opinions thereon.¹⁷ Hence a certificate prior to argument in the circuit court of appeals is properly refused.¹⁸ So also a certificate which shows that the judges are unanimous in their opinion but differ from the views and decision in another circuit must be dismissed.¹⁹ A certificate reciting a conflict between prior decisions of the Supreme Court and asking ad-

⁴*Good Shot v. United States*, 179 U. S. 87, 45 L. ed. 101, 21 Sup. Ct. Rep. 33.

⁵*Fabre v. Cunard, etc. Co.* 59 Fed. 500, 8 C. C. A. 199.

⁶*The Majestic*, 69 Fed. 844, 13 C. C. A. 676.

⁷*Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 344, 12 Sup. Ct. Rep. 517.

⁸*Andrews v. National, etc. Co.* 77 Fed. 774, 23 C. C. A. 454. The certifying of a question is discretionary and cannot be demanded as of right; *Cella v. Brown*, 144 Fed. 742, — (C. C. A.) —.

⁹*United States v. Jahn*, 155 U. S. 114, 39 L. ed. 87, 15 Sup. Ct. Rep. 39.

¹⁰*Sigafus v. Porter*, 84 Fed. 430, 28 C. C. A. 443.

¹²*Del Monte M. Co. v. Last Chance Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; *Emsheimer v. New Orleans*, 186 U. S. 42, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; *Cross v. Evans*, 167 U. S. 62, 42 L. ed. 77, 17 Sup.

Ct. Rep. 733; *German Ins. Co. v. Hearne*, 118 Fed. 134, 55 C. C. A. 84; *Warner v. New Orleans*, 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892.

¹³*McHenry v. Alford*, 168 U. S. 660, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

¹⁴*Cincinnati, etc. R. R. v. McKeen*, 149 U. S. 261, 37 L. ed. 725, 13 Sup. Ct. Rep. 840. This means the fundamental and not the evidential facts: *Sigafus v. Porter*, 85 Fed. 689, 29 C. C. A. 391.

¹⁵*Felsenheld v. United States*, 186 U. S. 134, 46 L. ed. 1085, 22 Sup. Ct. Rep. 740.

¹⁶*Cincinnati, etc. R. R. v. McKeen*, 149 U. S. 261, 37 L. ed. 725, 13 Sup. Ct. Rep. 840.

¹⁷*German Ins. Co. v. Hearne*, 118 Fed. 134, 55 C. C. A. 84.

¹⁸*Louisville, etc. Ry. v. Pope*, 74 Fed. 1, 20 C. C. A. 253.

¹⁹*Columbus W. Co. v. Robbins*, 148 U. S. 269, 37 L. ed. 445, 13 Sup. Ct. Rep. 594.

vice as to which to follow is not good and will be dismissed.²⁰ The same is true of a question asking whether a certain prior case is applicable to the one in hand.¹

§ 41. Review by certiorari of decisions made final in the circuit court of appeals.

In any such case as is hereinbefore made final in the circuit court of appeals [i. e., cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States, cases arising under patent, revenue and criminal laws, and admiralty cases¹¹] [a]-[c] it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Part of § 6, act Mar. 3, 1891, chap. 517, 26 Stat. 826, U. S. Comp. Stat. 1901, p. 550.

[a] Other parts of section and cross-references.

The other portions of § 6 of the act of 1891 and their place in the text, are stated elsewhere.¹² When questions are certified up by the circuit court of appeals the Supreme Court may issue certiorari to bring up the whole record.¹³ R. S. § 716, empowers the Federal courts to issue certiorari in aid of their jurisdiction.¹⁴

[b] Issuance of writ.

The power to bring up final decrees for review by certiorari "or otherwise" means other writs similar thereto, and does not include appeals.¹⁵ The power to issue certiorari is entirely discretionary, and the Supreme court has declared that it should be exercised only in cases of gravity and importance, or in order to secure uniformity of decision.¹⁶ It is an

²⁰Graver v. Eaurot, 162 U. S. 438, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799.

¹Warner v. City of New Orleans, 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892.

¹¹Post, § 77.

¹²Ante, § 39.[a]

¹³Ante, § 40.

¹⁴Post, § 841.

¹⁵Huguley Mfg. Co. v. Galetton C. Mills, 184 U. S. 294, 46 L. ed. 546, 22 Sup. Ct. Rep. 452, refusing to use it to perfect a defective record in a case not properly appealable.

¹⁶American Const. Co. v. Jacksonville, Tampa & Key West, 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; Forsythe v. Hamond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; United States v. Three Friends, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; In re John Woods, 143 U. S. 202, 36 L. ed. 125, 12 Sup. Ct. Rep. 417; Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; Smith v. Vulcan Iron Works, 165 U. S. 513, 41 L. ed. 810, 17 Sup. Ct. Rep. 407.

appropriate remedy if the lower court erred or its judgment is void.¹⁷ This power may be exercised regardless of the status of the case in the circuit court of appeals,¹⁸ at any stage of the proceedings and in advance of judgment;¹⁹ though ordinarily, not until after final judgment.²⁰ It may issue after the mandate has gone down, if a transcript of the record is still in the circuit court of appeals.¹ But it will not issue to require sending up of case over which circuit court of appeals has no jurisdiction, where it has not rendered a decision.² Certiorari sought nearly three years after the judgment below, has been refused.³ Error in dissolving receivership,⁴ or in dismissing instead of affirming an appeal,⁵ and decisions on questions of local State law,⁶ do not warrant issuance of the writ. But questions of national or international importance do.⁷ Where the record is before the Supreme Court on return to rule on petition for mandamus, or otherwise, the court will, if it decides that certiorari is proper, issue the writ and let the record sent up in response to the rule, stand as a return to the certiorari.⁸ It is only cases made final in the circuit court of appeals that may be taken up on certiorari.⁹ Habeas corpus cases which involve no question giving a right of direct appeal from the circuit to the Supreme Court and which are therefore appealed to the circuit court of appeals belong to the class of cases made final there and may be taken by certiorari to the Supreme Court.¹⁰ It seems that the writ may be applied for any time within one year of the judgment below, by analogy to the time allowed for writ of error.¹¹

[c] Effect of writ and scope of review.

The awarding of certiorari suspends action in the circuit court of ap-

¹⁷In the majority of cases the writ is refused. At the October term 1900, 76 applications were refused and 27 granted.

¹⁸*Aspen M. Co. v. Billings*, 150 U. S. 37, 37 L. ed. 986, 14 Sup. Ct. Rep. 4.

¹⁹*Forsyth v. Hammond*, 166 U. S. 513, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

²⁰*United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; *American C. Co. v. Jacksonville, etc. Ry.* 148 U. S. 383, 37 L. ed. 486, 13 Sup. Ct. Rep. 758. It has been refused where the judgment below was not final. *Chicago, etc. Ry. v. Osborne*, 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

¹*The Conqueror*, 166 U. S. 113, 41 L. ed. 937, 17 Sup. Ct. Rep. 510.

²*Goodshot v. United States*, 179 U. S. 89, 45 L. ed. 101, 21 Sup. Ct. Rep. 33.

³*Bonin v. Gulf Co.* 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608.

⁴*American Con. Co. v. Jacksonville, etc. Ry.* 148 U. S. 385, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

⁵*Smith v. Vulcan I. Works*, 165 U. S. 526, 41 L. ed. 810, 17 Sup. Ct. Rep. 407.

⁶*In re Woods*, 143 U. S. 206, 36 L. ed. 125, 12 Sup. Ct. Rep. 417.

⁷*United States v. Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495.

⁸*American S. R. Co. v. New Orleans*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 646.

⁹*United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495.

¹⁰*Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 344, 12 Sup. Ct. Rep. 517.

¹¹*The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510.

peals; but where that court's mandate has already gone to the trial court, the latter has no power to set aside orders made in obedience to that mandate.¹² The Supreme Court has power to examine the entire case on certiorari including the action of the circuit court of appeals on a former appeal;¹³ but it will confine itself to the errors assigned by petitioner.¹⁴

§ 42. Appeals from circuit and district courts direct to Supreme Court.

Appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:^[a]

In any case in which the jurisdiction of the court is in issue;^[b] in such cases the question of jurisdiction alone^[c] shall be certified to the Supreme Court from the court below for decision.^{[c]-[a]}

From the final sentences and decrees in prize causes.^[e]

In cases of conviction of a capital crime.^[f]

In any case that involves the construction or application of the Constitution of the United States.^[g]

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.^[h]

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.^[i]

§ 5 of act Mar. 3, 1891, chap. 517, 26 Stat. 827, as amended, 29 Stat. 492, U. S. Comp. Stat. 1901, p. 549.

[a] Cross-references and enactments repealed or superseded by above.

Other cases are appealable to the circuit court of appeals.¹ The general effect of the circuit court of appeals act on Federal appellate jurisdiction is elsewhere considered.² A right of direct appeal also exists in a few other cases.³ A previous act of Feb. 25, 1889,⁴ governing appeals from the circuit court is superseded by the act of 1891. So also R. S. § 695, as to appeal in prize cases from the district to the Supreme Court, is superseded. R. S. § 651 and § 698, as to certificates of division of opinion in the circuit court are superseded by this section.⁵ The provision of the commerce act of 1887 giving an appeal from the circuit to the Supreme Court is also super-

¹²Louisville, etc. Ry. v. Trust Co. 78 Fed. 659.

¹³Panama R. R. v. Napier, etc. Co. 166 U. S. 284, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572.

¹⁴Hubbard v. Tod, 171 U. S. 494, 43 L. ed. 246, 19 Sup. Ct. Rep. 14.

¹Post, § 77.

²Ante, § 37.

³Post, §§ 60, 62.

⁴25 Stat. 693.

⁵United States v. Rider, 163 U. S. 139, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

seded,⁶ though afterwards restored.⁷ The time for taking an appeal or writ of error under this section, and the procedure on appeal⁸ are discussed elsewhere.

[b] When circuit courts' jurisdiction deemed in issue.

The meaning of this clause has frequently been misunderstood. It is necessary to distinguish between power to take jurisdiction, and its exercise; between power in the court under admitted facts, and whether certain facts create a case within admitted powers. The lower Federal courts possess only the jurisdiction granted by Congress, and the purpose of the provision here under consideration would seem to be to afford a speedy and authoritative construction of such Congressional grant. It is not designed to permit review of questions of the propriety of relief given or denied in the exercise of jurisdiction, or questions of the existence or non-existence of facts, which, when once established, leave no room for doubt as to the powers of the court. The jurisdictional question must be one arising in the pending suit and not a question of the courts jurisdiction to render a decree in a prior cause.⁹ It must be a question of the circuit or district court's power as a Federal court, and not merely the question whether any court of equity would have the power challenged or denied.¹⁰ The question whether a state court or the circuit court had priority of possession and the resulting right of exclusive control is not a question of jurisdictional power which may be certified.¹¹ The question of a district court's power to punish for contempt where it had admitted jurisdiction over party and subject-matter is one of the merits, and not jurisdictional;¹² and the same is true of its determination respecting bankruptcy exemptions.¹³ Dismissal of a removed case for want of jurisdiction in the State court does not involve a jurisdictional question that may be certified.¹⁴

Questions of the power of a circuit or district court as a Federal court may involve questions of the competency of parties under the Federal laws,¹⁵ or of the existence of a subject-matter of Federal cognizance,¹⁷

⁶Interstate Commerce Com. v. Atchison, etc. Ry. 149 U. S. 264, 37 L. ed. 727, 13 Sup. Ct. Rep. 837.

⁷Post §§ 62, 63.

⁸Post § 1902, et seq.

⁹Carey v. Houston v. T. C. R. R. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

¹⁰Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Mexican C. R. R. v. Eckman, 187 U. S. 432, 47 L. ed. 247, 23 Sup. Ct. Rep. 211; Louisville T. Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15; Courtney v. Pradt, 196 U.

S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

¹¹Louisville T. Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119.

¹²O'Neal v. United States, 190 U. S. 36, 47 L. ed. 946, 23 Sup. Ct. Rep. 776.

¹³Lucius v. Cawthon-C. Co. 196 U. S. 149, 49 L. ed. 425, 25 Sup. Ct. Rep. 214.

¹⁴Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

¹⁵E. g. Mexican C. R. R. v. Eckman, 187 U. S. 432, 47 L. ed. 247, 23 Sup. Ct. Rep. 211.

¹⁷E. g. Excelsior W. P. Co. v. Pacific B. Co. 185 U. S. 284, 46 L. ed. 913, 22 Sup. Ct. Rep. 681.

within the meaning of those laws. But where there is no question of the competency of parties or sufficiency of subject-matter, under the Federal laws, the jurisdiction attaches, and a judgment of dismissal for want of equity or otherwise is one in the exercise of jurisdiction and does not authorize direct appeal. It is not a denial of power to take cognizance, but an exercise of that power.¹⁸ So a dismissal of a petition in bankruptcy because petitioner is a farmer not entitled to the benefits of the law is not a denial of jurisdictional power, but an exercise thereof.¹⁹ In passing upon an objection to suit by a stockholder on a corporation's behalf because the matters required by the 94th equity rule have not been complied with, the court is exercising jurisdiction and does not pass upon a question of jurisdictional power.²⁰ The right of direct appeal because of a jurisdictional question is in the party aggrieved by its decision. Hence if the decision below is in favor of the jurisdiction, the plaintiff cannot take the case to the Supreme Court on that question but must go to the circuit court of appeals.¹

A question whether the jurisdictional value in dispute required by act of 1891 existed;² or whether a separate controversy existed removable under the Federal statute;³ or whether the summons whereby jurisdiction over defendant was claimed was validly framed or served;⁴ or whether the citizenship of the guardian or of the ward is controlling;⁵ all go to the jurisdictional power of the court and may be certified. So also is the question whether a given case is one arising under the patent laws;⁶ or whether a Federal district court had power to decree in rem against a vessel in a State court receiver's possession, for a maritime lien.⁷ The

¹⁸World's Col. Exp. v. U. S. 56 169 U. S. 97, 42 L. ed. 674, 18 Sup. Fed. 654, 6 C. C. A. 58; Smith v. Ct. Rep. 264.

McKay, 161 U. S. 355, 40 L. ed. 731, ⁴Remington v. Central P. R. R. 16 Sup. Ct. Rep. 490; Blythe v. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Hinckley, 173 U. S. 501, 43 L. ed. Rep. 577; Shepard v. Adams, 168 U. 783, 19 Sup. Ct. Rep. 497; Building S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. & L. Assn. v. Price, 169 U. S. 46, 42 214; St. Louis C. C. Co. v. American C. Co. 125 Fed. 199, 60 C. C. A. 80; Courtney v. Pradt, 196 U. S. 89, 49 Conley v. Mathieson A. Works, 190 L. ed. 398, 25 Sup. Ct. Rep. 208. U. S. 406, 47 L. ed. 1113, 23 Sup. Ct.

¹⁹Denver First Nat. Bank v. Rep. 728; Chicago Bd. of T. v. Ham- Klug, 186 U. S. 202, 46 L. ed. 1127, mond E. Co. 198 U. S. 424, 49 L. ed. 22 Sup. Ct. Rep. 899. 1111, 25 Sup. Ct. Rep. 740; Kendall

²⁰Illinois, etc. R. R. v. Adams, 180 v. American A. L. Co. 198 U. S. 477, U. S. 34, 45 L. ed. 412, 21 Sup. Ct. 49 L. ed. 1133, 25 Sup. Ct. Rep. 768. Rep. 251.

¹United States v. Jahn, 155 U. S. ⁵Mexican C. R. R. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. 112, 39 L. ed. 88, 15 Sup. Ct. Rep. Rep. 211.

39; Evans Co. v. McCaskill, 101 Fed. ⁶Excelsior W. P. Co. v. Pacific B. Co. 185 U. S. 284, 46 L. ed. 913, 22 658, 41 C. C. A. 577. Sup. Ct. Rep. 681.

²Wetmore v. Rymer, 169 U. S. 118, ⁷The Resolute, 168 U. S. 440, 42 42 L. ed. 682, 18 Sup. Ct. Rep. 293. L. ed. 533, 18 Sup. Ct. Rep. 112.

³Powers v. Chesapeake & O. R. R. L. ed. 533, 18 Sup. Ct. Rep. 112.

clause authorizes the review of a jurisdictional question on certificate, only after final judgment,⁸ and not before a decision.⁹

[c] Necessity for, and sufficiency of certificate.

The statute requires that the jurisdictional question be certified up, and nothing else.¹² Except in cases where the only question involved and decided is one of jurisdiction,¹³ it is necessary that a certificate of the jurisdictional question be made and otherwise the appeal will be dismissed.¹⁴ The word certify need not be formally used; but there must be a plain declaration that the single matter which is by the record sent up to the Supreme Court, is a question of jurisdiction, and no mere suggestion of that fact will answer.¹⁵ Where a question of former adjudication as well as of jurisdiction is raised by a demurrer, it is not a case involving only jurisdiction and dispensing with a certificate.¹⁶ Prayer for appeal though stating that it is on jurisdiction, is insufficient as a certificate, where it specifies no jurisdictional question;¹⁷ and gives no hint of the specific objection to the jurisdiction.¹⁸ An assignment of errors after term, but filed nunc pro tunc, is insufficient as a certificate.¹⁹ But prayer for appeal upon the ground that court erred in taking jurisdiction, and asking that that question be certified is sufficient where the certificate is given.²⁰ The absence of a certificate cannot be helped out by resort

⁸Gates v. Bucki, 53 Fed. 961, 4 C. C. A. 116; United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

⁹McLish v. Roff, 141 U. S. 668, 35 L. ed. 893, 12 Sup. Ct. Rep. 120; Bards v. Hawarden Bank, 178 U. S. 526, 44 L. ed. 1177, 20 Sup. Ct. Rep. 1000.

¹²Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Shields v. Coleman, 157 U. S. 177, 39 L. ed. 663, 15 Sup. Ct. Rep. 570.

¹³In such cases the record and decree below showing such fact are sufficient without formal certificate. Excelsior W. P. Co. v. Pacific B. Co. 185 U. S. 284, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; Petri v. Creelman L. Co. 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; Chappell v. United States, 160 U. S. 507, 40 L. ed. 512, 16 Sup. Ct. Rep. 397; Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; In re Lehigh M. Co. 156 U. S. 327, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; Interior C. Co. v. Gibney, 160 U. S. 219, 40 L. ed. 401, 16 Sup. Ct. Rep. 272.

¹⁴Maynard v. Hecht, 151 U. S. 328, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Chappell v. United States, 160 U. S. 509, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Moran v. Hagerman, 151 U. S. 333, 38 L. ed. 181, 14 Sup. Ct. Rep. 354; Davis v. Geissler, 162 U. S. 291, 40 L. ed. 972, 16 Sup. Ct. Rep. 796; United States v. Jahn, 155 U. S. 112, 39 L. ed. 87, 15 Sup. Ct. Rep. 39.

¹⁵Shields v. Coleman, 157 U. S. 177, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; Arkansas v. Schlierholz, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; Van Wagenon v. Sewall, 160 U. S. 373, 40 L. ed. 460, 16 Sup. Ct. Rep. 370; Huntington v. Laidley, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526.

¹⁶Van Wagene v. Sewall, 160 U. S. 373, 40 L. ed. 460, 16 Sup. Ct. Rep. 370.

¹⁷The Bayoune, 159 U. S. 693, 40 L. ed. 306, 16 Sup. Ct. Rep. 185.

¹⁸McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

¹⁹The Bayoune, 159 U. S. 693, 40 L. ed. 306, 16 Sup. Ct. Rep. 185.

²⁰Smith v. McKay, 161 U. S. 357, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

to the petition for the writ of error, or the assignment of error.¹ Where other than jurisdictional questions are also involved the party electing to appeal to the Supreme Court on the jurisdictional question must do so during the term.² But if there is nothing else involved, an appeal may be taken any time within two years.³ It is said that the certificate required by this clause, as well as that from the circuit court of appeals,⁴ is governed by the rules as to the form of certificates of division, formerly allowed.⁵

[d] Effect of electing forum of appeal on jurisdictional questions.

Where a cause contains other questions⁷ besides that of jurisdiction, the party aggrieved by the circuit or district court's decision has an election of remedies. He may go to the Supreme Court on the jurisdictional question alone, as already shown; or he may go to the circuit court of appeals with the entire case. If the latter, that court has power to decide the jurisdictional questions as well as the others;⁸ and in the cases made final in the circuit court of appeals, the jurisdictional question cannot be further reviewed⁹ unless the circuit court of appeals certify it for instructions,¹⁰ or the Supreme Court issue certiorari.¹¹ The aggrieved party cannot have two appeals, one to the circuit court of appeals and the other to the Supreme Court, and the latter will be dismissed if taken while the other is pending.¹² But if an appeal is first taken to the Supreme court on a jurisdictional or constitutional question, the circuit court of appeals will not dismiss a subsequent appeal taken to it, because the other is pending; but will hold it in abeyance that the party may not lose all right of review in case the Supreme Court decide that the case is not one directly appealable and dismiss the first appeal.¹⁴

¹Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 180, 14 Sup. Ct. Rep. 353.

²Colvin v. Jacksonville, 158 U. S. 457, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866.

³Excelsior W. P. Co. v. Pacific B. Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681.

⁴Ante, § 40.[b]

⁵United States v. Rider, 163 U. S. 139, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

⁷But if the jurisdictional question is the only one he must go to the supreme court. Excelsior P. W. Co. v. Pacific B. Co. 109 Fed. 497, 48 C. A. 349.

⁸King v. McLean Asylum, 64 Fed. 325, 12 C. C. A. 139; Evans, etc. Co. v. McCaskill, 101 Fed. 658, 41 C. C. A. 577; McLish v. Roff, 141 U. S. 668, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Maynard v. Hecht, 151 U. S. 326, 38 L. ed. 179, 14 Sup. Ct. Rep. 353;

United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; Wirgman v. Persons, 126 Fed. 455, 62 C. C. A. 63; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343. Contra see United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299; Sun P. Co. v. Edwards, 121 Fed. 826, 58 C. C. A. 162; Fisheries Co. v. Lennen, 130 Fed. 534, 65 C. C. A. 79; Halpin v. American, 138 Fed. 548.

⁹Loeb v. Columbia Twp. 179 U. S. 478, 45 L. ed. 285, 21 Sup. Ct. Rep. 174.

¹⁰Ante, § 40. In the second circuit this course is pursued. Sun P. Co. v. Edwards, 121 Fed. 826, 58 C. C. A. 162.

¹¹Ante, § 41.

¹²Columbus C. Co. v. Crane Co. 174 U. S. 601, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721.

¹⁴See Pullman's P. P. Co. v. Cen-

It would be improper for it to hear and determine such appeal while the one to the Supreme Court is pending.¹⁵ Where the trial court decides in favor of its jurisdiction and then against plaintiff on the merits, he is not aggrieved by the decision on the jurisdictional point and cannot because it is in the record take an appeal to the Supreme Court.¹⁶

[dd] Election of forum of appeal in other cases.

There are also other cases in which an appellant has an election between the circuit court of appeals and the Supreme Court. Cases under the revenue and patent laws, etc., are appealable to the circuit court of appeals and its decision is final.¹⁸ But if in such cases plaintiff's statement of his case, also shows a constitutional question then the case is also appealable direct to the Supreme Court.¹⁹ An election of appeal to the circuit court of appeals would preclude subsequent appeal direct from the circuit to the Supreme Court,²⁰ but it would not preclude appeal from the circuit court of appeals to the Supreme Court.¹ If a party first appeals to the Supreme Court on a constitutional or jurisdictional question he may then take an appeal to the circuit court of appeals which will be held in abeyance until the other is decided.² In cases other than of conviction of a capital crime there is a similar right of election where a constitutional question is involved.³

[e] Prize cases.

R. S. § 695 as to appeals in prize cases is superseded by this enactment. Appeal lies to the Supreme Court from the final sentences and decrees in prize causes regardless of the amount in dispute and without any certificate of the district judges as to the importance of the particular case.⁵

[f] Cases of conviction of a capital crime.

As enacted in 1891 this clause read "In cases of conviction of a capital of otherwise infamous crime" the amendment making the section read as above was enacted by law of 1897.⁶ The present clause means cases of conviction of crime the punishment of which by law is, or may be, death.

tral T. Co. 76 Fed. 401, 22 C. C. A. 192 U. S. 407, 48 L. ed. 499, 24 Sup. 246; Evans, etc. Co. v. McCaskill, Ct. Rep. 376.

101 Fed. 658, 41 C. C. A. 577.

²⁰Ibid.

¹⁵Union & P. Bank v. Memphis,

¹Ibid.

189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

²See Pullman's P. P. Co. v. Central T. Co. 76 Fed. 401, 22 C. C. A.

¹⁶Evans S. B. Co. v. McCaskill, 101 Fed. 658, 41 C. C. A. 577. See

246; Evans, etc. Co. v. McCaskill, 101 Fed. 658, 41 C. C. A. 577.

also Field v. Barber Ashp. Co. 194 U. S. 620, 48 L. ed. 1153, 24 Sup. Ct. Rep. 784; United States v. Jahn,

³Motes v. United States, 178 U. S. 466, 44 L. ed. 1153, 20 Sup. Ct. Rep. 993.

155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39.

⁵The Paquete Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

¹⁸Post, § 77.

¹⁹Spreckels S. R. Co. v. McClain,

⁶Act Jan. 20, 1897, c. 68.

The test is not always the punishment imposed, but the punishment which may be imposed.⁷ Hence verdict of guilty of murder is no less a conviction of a capital crime where qualified with the proviso "without capital punishment."⁸ Yet the law does not specify cases of indictment for a capital crime but cases of conviction;⁹ and it would seem that one convicted of murder in the second degree the extreme punishment for which by law is life imprisonment is not convicted of a capital crime. Review in criminal cases under this clause must always be by error, and not appeal.¹⁰ Where a criminal case involves the construction or application of the Constitution there is the same right of direct appeal to the Supreme Court under the next clause of the above section, as in other cases.¹¹

[g] Cases involving construction or application of Federal Constitution.

A habeas corpus case in which it is claimed that the Constitution forbids deprivation of liberty under a mere executive department order, comes within this clause.¹² So also does a case involving a right to vote for member of Congress, as that is a right derived under the Constitution.¹⁴ A criminal case may come within this clause.¹⁵ A question of the privilege from arrest of a United States Senator involves the construction and application of the Constitution.¹⁶ A case may be said to involve the construction or application of the Constitution where a right, title, privilege or immunity¹⁷ is claimed under that instrument. It must be really and substantially involved. A definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be reversed on the ground of error in the disposal of such a claim by its decision.¹⁸ An attack upon the legality of contempt

⁷In *re* Claassen, 140 U. S. 205, 35 L. ed. 411, 11 Sup. Ct. Rep. 737; *Ex parte* Wilson, 114 U. S. 426, 29 L. ed. 92, 5 Sup. Ct. Rep. 935; *Fitzpatrick v. United States*, 178 U. S. 307, 44 L. ed. 1080, 20 Sup. Ct. Rep. 944.

⁸*Fitzpatrick v. United States*, 178 U. S. 307, 44 L. ed. 1080, 20 Sup. Ct. Rep. 944; *Goodshot v. United States*, 179 U. S. 88, 45 L. ed. 101, 21 Sup. Ct. Rep. 33.

⁹The difference is illustrated by *Davis v. United States*, 107 Fed. 753, 46 C. C. A. 619.

¹⁰*Bucklin v. United States*, 159 U. S. 681, 40 L. ed. 304, 16 Sup. Ct. Rep. 182; *Bessette v. W. B. Conkey Co.* 196 U. S. 638, 49 L. ed. 630, 25 Sup. Ct. Rep. 793.

¹¹*Motes v. United States*, 178 U. S. 466, 44 L. ed. 1153, 20 Sup. Ct. Rep. 993. So on habeas corpus. *Davis v. Burke*, 97 Fed. 501, 38 C. C. A. 299.

¹²*Boske v. Comingore*, 177 U. S. 465, 44 L. ed. 849, 20 Sup. Ct. Rep.

701; and see *McKane v. Durston*, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913; *Davis v. Burke*, 97 Fed. 501, 38 C. C. A. 299.

¹⁴*Wiley v. Sinkler*, 179 U. S. 61, 45 L. ed. 87, 21 Sup. Ct. Rep. 17.

¹⁵*Motes v. United States*, 178 U. S. 466, 44 L. ed. 1153, 20 Sup. Ct. Rep. 993.

¹⁶*Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243.

¹⁷One clause of the provision as to error to State courts is so worded. See ante, § 38.

¹⁸*Ansbro v. United States*, 159 U. S. 698, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Western U. T. Co. v. Ann Arbor Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Muse v. Arlington Hotel Co.* 168 U. S. 435, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Filhiol v. Maurice*, 185 U. S. 110, 46 L. ed. 827, 22 Sup. Ct. Rep. 560; *Lawpasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368.

proceedings,¹⁹ or upon the validity of a foreclosure decree collaterally involved²⁰ for want of jurisdiction or upon the mode of service of process,¹ does not raise a constitutional question in the sense here intended, upon the theory that there is a denial of due process of law. The fact that the court below directed a verdict does not raise a constitutional question of deprivation of right of jury trial.² Where a case is tried below upon the theory that its correct decision depends upon a question of chancery practice, it cannot be claimed that there is a right of direct appeal on a constitutional question.³ A question whether a foreign judgment is given due force and effect may merely present a question of construction of acts of Congress, and not of the constitutional provision.⁴ A plea seeking the dismissal of a suit for collusive joinder of parties, does not raise a question under the Constitution;⁵ nor does a contention as to legality of service upon the alleged agent of a foreign corporation.⁶ And where plaintiff in ejectment declares that he will rely on a treaty with France and the Fifth Amendment, but does not assert any right, title, privilege or immunity derived from either, there is no direct right of appeal.⁷ It makes no difference whether the right is sustained or denied; a right of direct appeal exists in either case in favor of the party aggrieved by the decision below upon that point;⁸ though not in favor of one aggrieved by the decision of other issues but who prevailed below upon the constitutional question.⁹ The judge of the lower court is not authorized to certify the existence of a constitutional question in the record, and such certificate is of no weight.¹⁰

[h] Cases involving constitutionality of Federal law or validity or construction of treaty.

Where the validity of a Federal law is drawn in question direct appeal lies to the Supreme Court.¹² A suit to establish a land claim under Spanish

¹⁹In re Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

²⁰Carey v. Houston & T. C. Ry. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

¹Cosmopolitan M. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489. But compare Fayerweather v. Riteh, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58.

²Treat Mfg. Co. v. Standard, etc. Co. 157 U. S. 674, 39 L. ed. 854, 15 Sup. Ct. Rep. 718.

³Cornell v. Green, 163 U. S. 79, 41 L. ed. 76, 16 Sup. Ct. Rep. 969.

⁴Merritt v. American S. B. Co. 75 Fed. 813, 21 C. C. A. 525.

⁵Merritt v. Bowdoin College, 169 U. S. 556, 42 L. ed. 850, 18 Sup. Ct. Rep. 415.

⁶Cosmopolitan M. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489.

⁷Muse v. Arlington H. Co. 168 U. S. 435, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

⁸Holder v. Aultman, 169 U. S. 88, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; Loeb v. Columbia T. Trustees, 179 U. S. 478, 45 L. ed. 285, 21 Sup. Ct. Rep. 174.

⁹Field v. Barber Asphalt Co. 194 U. S. 620, 48 L. ed. 1153, 24 Sup. Ct. Rep. 784; Anglo-American, etc. Co. v. Davis Co. 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 92.

¹⁰Cosmopolitan M. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489.

¹²Nishimura Ekin v. United States, 142 U. S. 651, 658, 659, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; Horner v. United States, 143 U. S. 576, 36 L.

treaty is within this clause.¹³ A habeas corpus proceeding which depends, at least in part, upon the meaning of a treaty, is reviewable under this provision even although also involving the construction of the act of Congress carrying the treaty into effect.¹⁴ But some right, title privilege or immunity must be set up and claimed before its construction and validity can be deemed involved.¹⁵ Where a suit respecting allotment of Indian lands involves merely the construction of a statute and no right or title under a treaty is claimed, it is not within this clause even although incidentally and remotely a treaty was involved.¹⁶ So a question whether in fact petitioner was seeking an asylum in the United States has been held to involve no question of treaty construction.¹⁷ An admiralty case involving the meaning of "foreign waters" in R. S. § 4370, does not involve the construction of a treaty although the waters in question were straits as to jurisdiction over which Great Britain and the United States had a treaty.¹⁸

[i] Cases in which State law or constitution claimed to violate Federal Constitution.

In such cases a direct appeal from circuit to Supreme Court is allowable.¹⁹ A city ordinance is a State law within this clause;²⁰ and direct appeal lies where an ordinance or statute is claimed to impair the obligation of a contract;¹ or to violate the Fourteenth Amendment.² Direct appeal lies under this section as much where the State law is declared invalid as in cases where it is upheld.³ But the right of appeal is in the party aggrieved by the decision, who, in the former case, is the party relying on the State law, and in the latter, the party raising the Federal claim. The party in whose favor the lower court ruled on the constitutional question cannot appeal directly from a decision against him on the merits because the record contains this decision of the constitutional question in his favor.⁴

ed. 266, 12 Sup. Ct. Rep. 522; *Carey v. Houston*, etc. Ry. 150 U. S. 179, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

¹³*Mitchell v. Furman*, 180 U. S. 428, 45 L. ed. 608, 21 Sup. Ct. Rep. 430.

¹⁴*Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *Pettit v. Walshe*, 194 U. S. 205, 48 L. ed. 938, 24 Sup. Ct. Rep. 657.

¹⁵*Muse v. Arlington H. Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

¹⁶*Sloan v. United States*, 193 U. S. 620, 48 L. ed. 817, 24 Sup. Ct. Rep. 570.

¹⁷*In re Newman*, 79 Fed. 615.

¹⁸*The Pilot*, 53 Fed. 11, 3 C. C. A. 392.

¹⁹*Fidelity M. L. Assn. v. Mettler*, 185 U. S. 315, 46 L. ed. 922, 22 Sup. Ct. Rep. 662.

²⁰*Penn M. L. Ins. Co. v. Austin*, 168 U. S. 695, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Macon v. Georgia P. Co.* 60 Fed. 781, 9 C. C. A. 262.

¹*Penn M. L. Ins. Co. v. Austin*, 168 U. S. 694, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Holder v. Autman*, 169 U. S. 88, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; *Indianapolis v. Central T. Co.* 83 Fed. 529, 27 C. C. A. 580.

²*Field v. Barber Asphalt Co.* 194 U. S. 620, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Hastings v. Ames*, 68 Fed. 726, 15 C. C. A. 628.

³*Loeb v. Columbia Twp. T.* 179 U. S. 472, 477, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Connolly v. Union S. P. Co.* 184 U. S. 544, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

⁴*Anglo-American P. Co. v. Davis* Co. 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 93.

[j] Scope of review under this section.

Where the appeal is by virtue of a jurisdictional question, only that question is certified and the review is confined to it, and will not extend to any question on the merits.⁶ Though where a habeas corpus case is appealed from the circuit court on jurisdictional grounds, the Supreme Court will proceed "to dispose of the party as law and justice require."⁷ Where a case involving a constitutional question is taken up by direct appeal under other clauses of the above section, the Supreme Court acquires jurisdiction of the entire case⁸ including any jurisdictional question.⁹

§ 43. Anti-trust and commerce suits by United States appealable direct from circuit to Supreme Court.

In every suit in equity pending or hereafter brought in any circuit court of the United States under any of said acts [i. e., the commerce act of 1887 or the anti-trust act of 1890, or any acts having a like purpose that hereafter may be enacted], wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof.

Part of § 2, Act Feb. 11, 1903, c. 544, 32 Stat. 823, U. S. Comp. Stat. 1905, p. 623.

The rest of the section contained a proviso applying to appeals then pending and was therefore temporary in its nature. The act also provides for certifying such cases to the Supreme Court on division of opinion.¹² The above provision is expressly made applicable to certain other commerce suits.¹³

§ 44. — such cases to be certified to Supreme Court on division of opinion.

In the event the judges sitting in such case¹⁵ [i. e. a suit in equity by the United States in the circuit court under anti-trust or commerce laws of 1887 or 1890 or similar laws hereafter enacted] shall

⁶Schunk v. Moline M. & S. Co. 147 U. S. 500, 37 L. ed. 256, 13 Sup. Ct. Rep. 416; The William M. Hoag, 168 U. S. 444, 42 L. ed. 537, 18 Sup. Ct. Rep. 114; The Resolute, 168 U. S. 440, 42 L. ed. 533, 18 Sup. Ct. Rep. 112; Greeley v. Lowe, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

⁷Storti v. Massachusetts, 183 U. S.

143, 46 L. ed. 120, 22 Sup. Ct. Rep. 72.

⁸Horner v. United States, 143 U.

S. 576, 36 L. ed. 266, 12 Sup. Ct. Rep.

522; Chappell v. U. S. 160 U. S. 509,

40 L. ed. 510, 16 Sup. Ct. Rep. 397;

Field v. Barber Asphalt Co. 194 U.

S. 620, 48 L. ed. 1153, 24 Sup. Ct.

Rep. 784.

⁹Scott v. Donald, 165 U. S. 71, 41

L. ed. 632, 17 Sup. Ct. Rep. 265.

¹²Post, § 44.

¹³Post, §§ 62 & 64.

¹⁵See ante, § 43.

be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided [i. e. by appeal to Supreme Court within sixty days.]

Part of § 1 Act Feb. 11, 1903, c. 544, 32 Stat. 823, U. S. Comp. Stat. 1905, p. 623.

The above section is given in full elsewhere.¹⁶ It is made applicable to suits by the Commission.¹⁷ The act from which it was taken was passed to expedite the hearing and determination of equity suits under the anti-trust and commerce laws. It provides for direct appeal from circuit to Supreme Court.¹⁸

§ 45. Appeal from Court of Appeals of District of Columbia.

Any final judgment or decree^[b] of the court of appeals [of the District of Columbia] may be re-examined and affirmed, reversed or modified by the Supreme Court of the United States, upon writ of error or appeal,^[a] in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner, and under the same regulations, as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February 9, 1893,^[c] and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.^[a]

Code Dist. Col. § 233, 31 Stat. 1227, c. 854.

[a] Prior laws superseded and cross-references.

R. S. §§ 705 and 706, provided for review of decisions of the supreme court of the District where the value exceeded \$1,000, in the same cases as in the Federal circuit courts. These provisions were superseded by an act of 1885¹ raising the jurisdictional limit to \$5,000 but permitting an appeal regardless of amount in controversy where a patent or copyright or the validity of a Federal treaty, statute, or authority was involved. The act of 1885 was superseded in 1893,² when the court of appeals of the District was created. The Code of the District adopted March 3, 1901, carried forward § 8 of the act of 1893, which was the same as § 233 of the Code, *supra*, except for slight changes of phraseology.³

¹⁶Post, § 1368.

¹⁷Post, § 62.

¹⁸Ante, § 43.

¹Act Mar. 3, 1885, c. 355.

²Act Feb. 9, 1893, c. 74 §§ 1-8.

³Sinclair v. District of Col. 192 U. S. 18, 43 L. ed. 324, 24 Sup. Ct. Rep. 212.

[b] Necessity for final judgment—mode of review.

The judgment below must be final to be reviewable.⁵ A decree making final disposition of a cause and leaving to the lower court the mere ministerial duty of entering an injunction in compliance with the mandate, is final.⁶ But a decree is not final when a cause is sent back for further proceedings,⁷ nor is a decree remanding a cause, final.⁸ Where the proceeding to be reviewed is legal and not equitable in character, error and not appeal is the proper form of review.⁹

[c] Jurisdictional amount as determining right of review.

The effect of the provision as to value in dispute is to limit the class of cases appealable, except where a Federal question is involved,¹¹ to cases in which the matter in dispute has a money value or is some right capable of reduction to an ascertained value.¹² A right involved, such as a right to freedom, may in fact, be priceless, yet cases involving merely that, do not involve a matter in dispute having pecuniary value. Hence habeas corpus cases have often been declared outside the scope of appellate powers where measured by a value in dispute.¹³ So also a right to the custody of a child is not capable of pecuniary estimate.¹⁴ Habeas corpus and criminal cases are for this reason not appealable from the court of appeals of the District;¹⁵ even though a fine is imposed which in a sense is a value in dispute.¹⁶ In an early case the dispute was between an alleged slave claiming his freedom and an alleged master; but there the right to freedom involved also the correlative property right of an owner in his slave, and the case was accordingly held to involve a matter capable of

⁵Hume v. Bowie, 148 U. S. 252, 37 L. ed. 433, 13 Sup. Ct. Rep. 582.

⁶Chesapeake, etc. T. Co. v. Manning, 186 U. S. 241, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

⁷Clarke v. Roller, 199 U. S. 541, 50 L. ed. 300, 26 Sup. Ct. Rep. 141.

⁸Warner v. Grayson, 200 U. S. 257, 50 L. ed. 470, 26 Sup. Ct. Rep. 240.

⁹Metropolitan R. R. v. MacFarland, 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28.

¹¹Then the value in dispute is immaterial. Parsons v. District of Col. 170 U. S. 49, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

¹²Cross v. Burke, 146 U. S. 88, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; Washington, etc. R. R. v. District of Col. 146 U. S. 231, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; South Carolina v. Seymour, 153 U. S. 357, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; Holzen-dorf v. Hay, 194 U. S. 373, 48 L. ed. 1025, 24 Sup. Ct. Rep. 681.

¹³Barry v. Mercein, 5 How. 103, 12

L. ed. 70; Kurtz v. Moffitt, 115 U. S. 495, 29 L. ed. 459, 6 Sup. Ct. Rep.

150; Pratt v. Fitzhugh, 1 Black, 271,

17 L. ed. 206; Cross v. Burke, 146 U. S. 88, 36 L. ed. 896, 13 Sup. Ct. Rep. 22.

¹⁴Perrine v. Slack, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79;

DeKrafft v. Barney, 2 Black, 704, 17 L. ed. 350.

¹⁵In re Schneider, 148 U. S. 162, 37 L. ed. 404, 13 Sup. Ct. Rep. 572;

Chapman v. United States, 164 U. S. 446, 41 L. ed. 504, 17 Sup. Ct. Rep.

76; Cross v. Burke, 146 U. S. 84, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; In

re Chapman, 156 U. S. 215, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; In re

Belt, 159 U. S. 100, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; Sinclair v. Dis-

trict of Columbia, 192 U. S. 18, 48 L. ed. 324, 24 Sup. Ct. Rep. 212.

¹⁶Sinclair v. District of Col. 192 U. S. 18, 20, 48 L. ed. 324, 24 Sup.

Ct. Rep. 212; United States v. Moore, 3 Cranch. 159, 2 L. ed. 397.

pecuniary estimate.¹⁷ The fact that an invention has a pecuniary value does not establish that there is a matter of pecuniary value in dispute where that matter is the question whether the invention is patentable.¹⁸ The matter in dispute must have more than a conjectural value and must represent a justiciable demand. Hence a right of one claiming damages from a foreign nation to have the State Department make appeal to the grace of a foreign country for a settlement is of merely conjectural value and a political rather than legal demand.¹⁹ A case involving a right to have a trademark registered, as distinguished from a right to the trademark, is not one having pecuniary value in dispute, at least in the absence of any evidence of value in the record.²⁰ A bill praying conveyance of land worth \$300, or rescission of a contract for purchase of larger tract for \$6,000 presents the necessary amount in controversy upon the alternative prayer.¹

In estimating the value in dispute, the collateral effect of the judgment in determining other suits or the validity or invalidity of other contracts, obligations or conveyances cannot be considered, but only the direct effect of the judgment upon the matter directly involved.²

[d] Cases involving validity of patent, copyright, Federal treaty, statute or authority.

This clause has been in the law governing appeals from the District without substantial change, since the act of 1885.⁴ There are similar provisions in other statutes respecting appeal.⁵ A suit to obtain the allowance of a patent is not one involving its validity and appealable under this clause.⁶ Whenever the power to enact a statute as it is or as it is construed, is fairly open to denial and is denied, the validity of the statute is drawn in question.⁷ A case involving the validity of a Federal statute as to jurisdiction of justices of the peace is appealable under this clause.⁸ But a decision that a Federal statute does or does not repeal a legislative assembly's tax is one involving construction and not validity.⁹ A decision as to the extent of a railroad's power under a statute does not question the statute's validity;¹⁰ nor does a decision as to the District's liability for

¹⁷Lee v. Lee, 8 Pet. 48, 8 L. ed. 860.

¹⁸Durham v. Seymour, 161 U. S. 239, 40 L. ed. 682, 16 Sup. Ct. Rep. 452.

¹⁹Holzendorf v. Hay, 194 U. S. 376, 48 L. ed. 1025, 24 Sup. Ct. Rep. 681.

²⁰South Carolina v. Seymour, 153 U. S. 358, 38 L. ed. 742, 14 Sup. Ct. Rep. 871.

¹Shapiro v. Goldberg, 192 U. S. 240, 48 L. ed. 419, 24 Sup. Ct. Rep. 259.

²Washington, etc. R. R. v. District of Col. 146 U. S. 232, 36 L. ed. 953, 13 Sup. Ct. Rep. 64.

⁴Supra, note. [a]

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⁵On error to State courts, see ante, § 38. On appeal from Territories see post, § 47.

⁶Durham v. Seymour, 161 U. S. 238, 40 L. ed. 683, 16 Sup. Ct. Rep. 454.

⁷Baltimore, etc. R. R. v. Hopkins, 130 U. S. 224, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

⁸Capital T. Co. v. Hof, 174 U. S. 4, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

⁹Washington, etc. R. R. v. District of Col. 146 U. S. 231, 36 L. ed. 951, 13 Sup. Ct. Rep. 64.

¹⁰Baltimore, etc. R. R. v. Hopkins, 130 U. S. 226, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

defective streets under the street laws.¹¹ A suit attacking the validity of a patent office rule of procedure involves the validity of a Federal authority.¹² But an error of the comptroller in allowing fees does not involve the validity of his authority.¹³ It is immaterial to the right of appeal whether the decision below was for or against the validity of the patent, statute or authority.¹⁴

§ 46. Certiorari from Supreme Court to court of appeals of District of Columbia.

In any case heretofore made final in the court of appeals of the District of Columbia it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Dist. Col. Code, § 234.

This provision was enacted in 1897¹ and carried forward into § 234 of the District Code. The provision as to certiorari from the circuit court of appeals will be found elsewhere.² In a number of cases certiorari has issued under this provision.³

§ 47. Appeal in cases relating to highways in District of Columbia.

From any judgment or order of said court of appeals [of the District of Columbia] involving any question as to the constitutionality of this act [an act of Mar. 2, 1893, to provide a permanent system of highways in that part of the District of Columbia lying outside of cities] or of any part thereof, any party aggrieved may, within thirty days after such judgment or order shall be entered, appeal to the Supreme Court of the United States. Said court shall determine only the questions of constitutionality involved in the case, and shall have power to make such special rules and

¹¹District of Col. v. Gannon, 130 U. S. 229, 32 L. ed. 922, 9 Sup. Ct. Rep. 508. appeal from the circuit court. Ante, § 42.[e]-[f]

¹²Steinmetz v. Allen, 192 U. S. 556, 48 L. ed. 555, 24 Sup. Ct. Rep. 416.

¹³United States v. Lynch, 137 U. S. 285, 34 L. ed. 700, 11 Sup. Ct. Rep. 114.

¹⁴Baltimore, etc. R. R. v. Hopkins, 130 U. S. 222, 32 L. ed. 908, 9 Sup. Ct. Rep. 503. The same is true on

¹Act March 3, 1897, c. 390, 29 Stat. 692, U. S. Comp. Stat. 1901, p. 574.

²Ante, § 41.

³See list of cases in 171 U. S. 686, et seq. Yeager v. United States, 178 U. S. 615, 44 L. ed. 1215, 20 Sup. Ct. Rep. 1031; Hartford F. I. Co. v. Wilson, 181 U. S. 617, 45 L. ed. 1030, 22 Sup. Ct. Rep. 945.

regulations applying to appeals under this act as may be proper to bring such cases to a speedy hearing and determination.

Part of act Jan. 21, 1896, c. 5, 29 Stat. 3.

§ 48. From supreme courts of Arizona and New Mexico.

Under the act of 1885, still partially in force, "no appeal or writ of error shall . . . be allowed from any judgment or decree in any suit at law or in equity . . . in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."^{[b]-[c]}¹⁷ This restriction does not apply, however, "to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; . . . in such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."^[a]¹⁸ Since 1891 the above provisions of the act of 1885 have been modified by the provision for appeal to the circuit court of appeals, and not to the Supreme Court, in cases where "the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws [other than capital cases]⁹ and in admiralty cases."¹⁰ In such cases and perhaps in certain others, the appeal is to the circuit court of appeals and its decision is final. In capital cases the decision of the territorial supreme court is nowhere reviewable, except that, upon habeas corpus proceedings in such a case, the decision of either the territorial district or supreme court is reviewable on appeal or error in the Supreme Court.^[a] These provisions now apply only to Arizona and New Mexico.

Author's section.

[a] Existing and prior provisions and cross-references.

R. S. § 702, provided for review by the Supreme Court of all cases where the value in dispute exceeded \$1,000. An act of 1885 contained the provisions quoted above, raising the requisite value to \$5,000 but permitting review regardless of value in cases involving the validity of a patent or copyright, Federal treaty, statute or authority. The circuit court of

⁸Act March 3, 1885, c. 355, § 2,
23 Stat. 443, U. S. Comp. Stat. 1901,
p. 572.

⁹Post, § 81.

¹⁰Ante, § 42, post, § 81.

appeals act of 1891 gave that court appellate jurisdiction over Territorial supreme courts in the class of cases in which its decisions upon appeal from the circuit and district courts, are made final;¹² and since 1891 such cases, as enumerated above, are not reviewable in the Supreme Court.¹³ The law governing appeals from the territories must therefore be sought in the statutes of 1885 and 1891, *supra*.¹⁴ One effect of the legislation of Congress on this subject is to make criminal cases other than capital appealable from the territorial supreme courts to the circuit court of appeals; while capital cases are appealable neither to that tribunal nor to the Supreme Court of the United States. As Congress has legislated specifically regarding the right of review in the Supreme Court, of cases from Oklahoma, Philippines, Hawaii, Porto Rico, Alaska and Indian Territory,¹⁵ the above general enactments as to appeals from the territories apply only to Arizona and New Mexico.

R. S. § 1909, provided that "writ of error or appeal shall be allowed to the Supreme Court of the United States from the decisions of the supreme courts created by this title [i. e. the organized Territories, including Arizona and New Mexico] or of any judge thereof, or of the District courts [in the Territories] created by this title, or of any judge thereof, upon writs of habeas corpus involving the question of personal freedom." The act of 1891 very plainly abolished this right of appeal on habeas corpus in criminal cases other than capital, since it substituted a right of appeal to the circuit courts of appeals. But in capital cases, and in civil cases not of the type appealable to the circuit court of appeals, R. S. § 1909, still applies; and appeal lies from the district or supreme courts of Arizona and New Mexico (which are the only remaining Territories among those there enumerated) upon habeas corpus proceedings "involving the question of personal freedom."¹⁶ Habeas corpus to determine the right to the custody of a child does not involve a question of personal freedom.^{16½}

Affirmative provision conferring right of appeal from a Territorial court must appear or no right exists.¹⁷ A Territorial statute cannot enlarge the right of appeal.¹⁸

[b] Only final judgment or decree appealable.

Although the statute does not now so specify, there can be no doubt that only a final Territorial judgment or decree is reviewable. An order dismissing an appeal because not in time, is not final,¹⁹ neither is an order

¹²Post, § 81.

¹³Shute v. Keyser, 149 U. S. 651, 37 L. ed. 884, 13 Sup. Ct. Rep. 960; Aztec M. Co. v. Ripley, 151 U. S. 81, 38 L. ed. 80, 14 Sup. Ct. Rep. 236.

¹⁴See Royal Ins. Co. v. Martin, 192 U. S. 156, 48 L. ed. 386, 24 Sup. Ct. Rep. 247, reviewing this legislation.

¹⁵Post, §§ 51 to 57.

¹⁶Gonzales v. Cunningham, 164 U. S. 621, 41 L. ed. 572, 17 Sup. Ct. Rep. 182; In re Snow, 120 U. S. 281, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Neil-

sen, Petitioner, 131 U. S. 176, 33 L. ed. 119, 9 Sup. Ct. Rep. 672; In re Delgado, 140 U. S. 586, 35 L. ed. 579, 11 Sup. Ct. Rep. 874.

^{16½}New York F. Hospital v. Gattie, 203 U. S. —, 51 L. ed. (adv. op. 53) 27 Sup. Ct. Rep. —.

¹⁷Clarke v. Bazadone, 1 Cranch, 212, 2 L. ed. 85.

¹⁸Kennon v. Gilmer, 131 U. S. 24, 33 L. ed. 110, 9 Sup. Ct. Rep. 696.

¹⁹Harrington v. Holler, 111 U. S. 797, 28 L. ed. 602, 4 Sup. Ct. Rep. 697.

setting aside a sheriff's return to an execution.²⁰ Where numerous issues of fact are left undisposed of and to be determined upon a new trial, there is no final reviewable judgment.¹ An affirmance of a judgment of dismissal below based upon the invalidity of a statute is final.²

[c] Amount in controversy and criminal cases.

A decree dismissing a husband's cross complaint for divorce and granting the wife \$6,000 alimony upon her complaint, involves the requisite jurisdictional value; but a mere decree granting or denying a divorce would not be reviewable because representing no matter of pecuniary value.⁴ Judgment against several defendants for \$5,000 each cannot be aggregated to make the necessary total.⁵ In a suit over possession the value of the land is not the measure of value.⁶ If the judgment in the Territorial supreme court, by adding the interest on a judgment below for less than the requisite sum, amounts to more than \$5,000, the necessary value is involved.⁷ A mandamus proceeding by a property owner to restrain the removal of the territorial seat of government does not involve a dispute capable of pecuniary estimate;⁸ neither does a suit to test the validity of a vote to move a county seat.⁹ A quo warranto proceeding ousting a county assessor does not involve a dispute of pecuniary value where the term had expired before the Territorial supreme court's decision.¹⁰ Where only part of a judgment is in dispute and that for less than \$5,000 an appeal will be dismissed.¹¹ The effect of the provision measuring appellate jurisdiction by an amount in controversy is to exclude review in criminal cases,¹² since the matter there in dispute is not susceptible of pecuniary estimate.¹³ Since 1891 criminal cases other than capital are appealable to the circuit court of appeals.¹⁴ But capital cases are not appealable at all except upon habeas corpus.¹⁵

²⁰Wells Fargo v. McGregor, 13 Wall. 188, 20 L. ed. 538.

¹Holcombe v. McKusick, 20 How. 552, 15 L. ed. 1020.

²Guthrie Nat. Bank v. Guthrie, 173 U. S. 539, 43 L. ed. 796, 19 Sup. Ct. Rep. 513.

⁴Simms v. Simms, 175 U. S. 169, 44 L. ed. 118, 20 Sup. Ct. Rep. 58.

⁵Wilson v. Kiesel, 164 U. S. 248, 41 L. ed. 422, 17 Sup. Ct. Rep. 124.

⁶McClung v. Penny, 189 U. S. 145, 47 L. ed. 754, 23 Sup. Ct. Rep. 589.

⁷Benson M. & S. Co. v. Alta M. & S. Co. 145 U. S. 428, 36 L. ed. 763, 12 Sup. Ct. Rep. 877; Guthrie Nat. Bank v. Guthrie, 173 U. S. 539, 43 L. ed. 796, 19 Sup. Ct. Rep. 513.

⁸Chumasero v. Potts, 92 U. S. 358, 23 L. ed. 499.

⁹Smith v. Adams, 130 U. S. 173, 32 L. ed. 895, 9 Sup. Ct. Rep. 566.

¹⁰Albright v. New Mexico, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210.

¹¹New Mexico v. Atchison, etc. Ry. 201 U. S. 41, 50 L. ed. 651, 26 Sup. Ct. Rep. 386.

¹²Ante, § 45.[c]

¹³United States v. Sanges, 144 U. S. 310, 320, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; Farnsworth v. Montana, 129 U. S. 111, 32 L. ed. 616, 618, 9 Sup. Ct. Rep. 253; Snow v. United States, 118 U. S. 347, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059; In re Lennon, 150 U. S. 393, 397, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; In re Belt, 159 U. S. 95, 100, 40 L. ed. 88, 15 Sup. Ct. Rep. 987.

¹⁴Post, §§ 77, 81.

¹⁵Supra.[a]

[d] Cases involving validity of patent or copyright, Federal statute treaty or authority.

A similar provision respecting appeal, from the District of Columbia is elsewhere considered.¹ A right of appeal to the Supreme Court might exist under this clause in cases otherwise within the class appealable to the circuit court of appeals. Presumably however the party would be obliged to take such a case to the Supreme Court. The act of 1885 allows appeal to the Supreme Court where the validity of a patent is in question and the act of 1891 makes a case arising under the patent laws appealable to the circuit court of appeals. If there are or might conceivably be cases involving the validity a patent which yet did not arise under the patent laws, such cases would still go to the Supreme Court notwithstanding the act of 1891.² A case involving the validity of a governor's appointment of a Territorial auditor involves the validity of an authority exercised under the United States.³ So also does a case involving the status of a body of persons as the legal Territorial legislature or as usurpers,⁴ and a case involving a contention that a territory had no authority to extend its tax laws to an Indian reservation.⁵ A case involving a dispute as to an act done under an authority as for instance the acts of an officer under the Territorial Code, does not necessarily call in question the validity of that authority.⁶

§ 49. When a territory becomes a state after judgment in Territorial court.

In all cases where the judgment or decree of any court of a territory might be reviewed by the Supreme Court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such territory has, after such judgment or decree, been admitted as a State; and the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires.

R. S. § 703, U. S. Comp. Stat. 1901, p. 572.

The above provision was originally enacted in 1858.¹⁰ The admission of a Territory as a State at once terminates the existence and powers of the territorial courts. They are no longer competent to discharge the functions even of Federal courts under the Constitution, unless Congress confers the authority and organizes them as respects the tenure of their judges and

¹ Ante, § 45.[d]

² See ante, § 15.

³ Clayton v. Utah, 132 U. S. 638, 33 L. ed. 455, 10 Sup. Ct. Rep. 190.

⁴ Clough v. Curtis, 134 U. S. 369, 33 L. ed. 945, 10 Sup. Ct. Rep. 573.

⁵ Maricopa & P. R. R. v. Arizona,

156 U. S. 351, 39 L. ed. 447, 15 Sup. Ct. Rep. 391.

⁶ Ferry v. King Co. 141 U. S. 673, 35 L. ed. 895, 12 Sup. Ct. Rep. 130.

¹⁰ Act June 12, 1858, c. 154, § 18, 11 Stat. 329.

otherwise, in conformity with the provisions of the Constitution.¹¹ As respects the records in cases pending at the time of admission and which are of appropriate Federal cognizance it is for Congress and not the new State to provide a custodian and for their transfer to the Federal court of the new State.¹² As respects pending cases of appropriate State cognizance concurrent action by Congress and the new State should be taken; Congress authorizing the transfer of the Territorial records to the new State court, and the State empowering its courts to take jurisdiction and determine the causes. This assent of Congress to a transfer of such Territorial records may, however, be presumed.¹³ Where a cause has been decided before admission, in the highest Territorial court even though an appeal to the Supreme Court has already been taken and the case is there pending, there must be legislation by Congress to preserve the right of appeal and the existing appeal, which would otherwise lapse by the admission of the new State;¹⁴ and further legislation by Congress to authorize the execution of the Supreme Court's mandate in the Federal court of the new State if the cause is Federal in character, and otherwise in the proper State tribunal. Such legislation is to be found in R. S. § 703, *supra*, so far as concerns cases decided prior to admission and not yet appealed. The section does not, however, preserve an existing appeal but only an existing right of appeal. Hence an appeal already taken at the time of admission would lapse,¹⁵ even though the record were actually in the Supreme Court at the time of the admission. A case transferred to the highest State court on petition for rehearing of decision of highest Territorial court, is not reviewable in the Supreme Court unless of Federal cognizance under the section respecting writ of error from a State court.¹⁶ Where a territory is admitted as two States the mandate will go to the supreme court of that State wherein lies the county of trial.¹⁷ It is customary now for Congress to provide with great particularity for transfers of causes and court records from Territorial courts to the new State and Federal courts, and for the maintenance of existing appeals and existing rights of appeal.¹⁸

§ 50. Review of judgments of district courts in cases transferred from territorial courts.

The judgments or decrees of any district court, in cases trans-

¹¹*Benner v. Porter*, 9 How. 244, 13 L. ed. 123. See *Forsythe v. United States*, 9 How. 573, 13 L. ed. 263.

¹²*Hunt v. Palao*, 4 How. 590, 11 L. ed. 1115.

¹³*Benner v. Porter*, 9 How. 246, 247, 13 L. ed. 124.

¹⁴*Hunt v. Palao*, 4 How. 590, 11 L. ed. 1115; *McNulty v. Batty*, 10 How. 78, 13 L. ed. 335; *Gordon v. United States*, 117 U. S. 704.

¹⁵See *McNulty v. Batty*, 10 How. 80, 13 L. ed. 333, 336, and see *Freeborn v. Smith*, 2 Wall. 160, 17 L. ed.

922. This seems to be an oversight on the part of Congress. But the act admitting Oklahoma remedies the omission: Act June 16, 1906, c. 3335, § 15, 34 Stat. 276.

¹⁶*Northern Pac. R. R. v. Holmes*, 155 U. S. 140, 39 L. ed. 99, 15 Sup. Ct. Rep. 28.

¹⁷*Elliott v. Chicago, etc. Ry.* 150 U. S. 249, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85.

¹⁸Act June 16, 1906, c. 3335, § 15, 34 Stat. 276.

ferred to it from the superior court of any territory, upon the admission of such territory as a State, under sections five hundred and sixty-seven and five hundred and sixty-eight¹, may be reviewed and reversed or affirmed upon writs of error sued out of, or appeals taken to, the Supreme Court, in the same manner as if such judgments or decrees had been rendered in said superior court of such territory. And the mandates and all writs necessary to the exercise of the appellate jurisdiction of the Supreme Court in such cases shall be directed to such district court, which shall cause the same to be duly executed and obeyed.

R. S. § 704, U. S. Comp. Stat. 1901, p. 572.

This section was enacted in 1847 and again in 1848.² It grew out of the decision in *Hunt v. Pala*,³ and referred at the time particularly to the causes in the Territory of Florida.⁴

§ 51. Appeals from Indian Territory direct to Supreme Court.

The legislation of Congress at its last session, for the admission of Oklahoma and Indian Territory as a State supersedes the various provisions for appeal from those territories, and renders them of value only for their bearing upon pending cases.

Author's section.

By an act of 1898⁵ it was provided that "Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases." That enactment governed the subject until 1905, where it was provided that "hereafter all appeals and writs of error shall be taken from the United States courts in the Indian Territory to the United States court of appeals in the Indian Territory, and from the United States court of appeals in the Indian Territory to the United States circuit court of appeals for the eighth circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the circuit courts of the United States to the

¹See post, § 213.

⁴See *Benner v. Porter*, 9 How. 245,

²See act Feb. 22, 1847, c. 17, § 13 L. ed. 124; *Forsythe v. United States*, 9 How. 573, 13 L. ed. 263.
³act Feb. 22, 1848, c. 12 § 2, 9 Stat. 212.

⁵Act July 1, 1898, c. 545, 30 Stat. 591.

⁴How. 589, 11 L. ed. 1115.

circuit court of appeals of the United States for the eighth "circuit."⁷ Decisions construing the superseded provisions will be found in a footnote.⁸

§ 52. From Alaska district court.

Appeals and writs of error may be taken and prosecuted from the final judgments of the district court of the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Part of § 504, Alaska Code, 31 Stat. 414, Act June 6, 1900, c. 786.

The balance of the section makes other cases, involving more than \$500, appealable to the circuit court of appeals.¹⁰ A proceeding to obtain a license for a vessel in Alaska waters is not one in which a final judgment can be rendered permitting appeal within this section.¹¹ The provision is similar to that permitting direct appeals from the circuit and district courts.¹²

§ 53. Questions certified in Alaska cases on which instructions desired.

Whenever the judges of the circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any case pending before the circuit court of appeals on writ of error to or appeal from the district court [of Alaska] judges¹⁴ may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the questions and propositions certified to it, and its instruction shall be binding upon the circuit court of appeals.

Part of § 505, Alaska Code, 31 Stat. 415, act June 6, 1900, c. 786.

⁷Act March 3, 1905, c. 1479, § 12, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. 33 Stat. 1081, U. S. Comp. Stat. 1905, Ct. Rep. 722.
p. 150.

⁸Brown v. United States, 171 U. S. 631, 43 L. ed. 312, 19 Sup. Ct. Rep. 56; Ansley v. Ainsworth, 180 U. S. 253, 45 L. ed. 517, 21 Sup. Ct. Rep. 364; Stephens v. Cherokee Nation, 11 Pacific S. W. Co. v. United States, 187 U. S. 447, 47 L. ed. 254, 23 Sup. Ct. Rep. 154.
¹²Ante, § 42.
¹⁴So in the printed statutes.

§ 54. Appeals from Territory of Hawaii.

The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.

Part of § 86 of act April 30, 1900, c. 339, 31 Stat. 158.

By the act of 1900 organizing the Territory of Hawaii, Congress departed from its previous policy as to the territorial judiciary, and created a dual system of courts in analogy to the State and Federal courts found in the several states. It established a district court having the powers and jurisdiction of the Federal circuit and district courts. It adopted the existing courts of the old republic of Hawaii and left their jurisdiction intact, and then provided by the above enactment, that as between the Federal district court having jurisdiction of matters within the scope of the Federal judicial power, and the territorial courts having jurisdiction similar to State courts, the laws governing the right of review in and removal to Federal courts in the several States should apply.¹⁵ Final judgments of the Hawaiian district court are reviewable in the circuit court of appeals and in the Supreme Court, as in the case of any other district or circuit court.¹⁶ Final judgments of the Hawaiian Territorial courts are reviewable on error as in the case of State tribunals, and the procedure, scope of review and disposition of the cause in the Supreme Court will be the same as on error to a State court.¹⁷

§ 55. Appeals from Porto Rico supreme and district courts.

Writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States or a treaty thereof, or an act of Congress, is brought in question, and the right claimed thereunder is denied. . . .

Part of § 35 of act April 12, 1900, c. 191, 31 Stat. 85.

The cases in the Supreme Courts of the Territories which are reviewable in the Federal Supreme Court are enumerated in sections of the law already

¹⁵See *Wilders S. J. Co. v. Hind*, S. 197, 47 L. ed. 1016, 23 Sup. Ct. 108 Fed. 113, 47 C. C. A. 243; *Ex Rep.* 787.

parte Wilders S. S. Co. 183 U. S. 545, 46 L. ed. 321, 22 Sup. Ct. Rep. 225. ¹⁷*Equitable L. Assur. Soc. v. Brown*, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

¹⁶See *Hawaii v. Mankichi*, 190 U.

considered.¹ In similar cases when decided in the Porto Rico district or supreme courts, there exists a similar right of review. Hence a Porto Rico case involving more than \$5,000 and not within the class made appealable to the circuit court of appeals if arising in Arizona or New Mexico, is appealable to the supreme court;² though no Federal right is involved.³ A right under an act of Congress is denied within the meaning of the provision for appeal, where motion in arrest of judgment based on a claim that the grand jury was not summoned as provided by the Federal statute, is denied.⁴ A claim that an indictment did not set forth an offense under Federal statutes is too vague as an assertion of a Federal claim.⁵ The Supreme Court has intimated that no cases are appealable from the Porto Rico courts to any circuit court of appeals.⁶ Hence the class of cases appealable to the circuit court of appeals if arising in Arizona or New Mexico, could not, if arising in Porto Rico, be appealable to any court unless constituting a denial of a right under the Federal Constitution, treaties or laws, under the latter portion of the above provision. A case denying a right in respect to the selection or qualifications of grand jurors under the Federal laws, comes within such latter clause.⁷

§ 56. Error and appeal from supreme court of Philippines.

The Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far

¹Ante, § 48.

²Royal Ins. Co. v. Martin, 192 U. S. 159, 160, 48 L. ed. 388, 24 Sup. Ct. Rep. 247; Hijo v. United States, 194 U. S. 320, 48 L. ed. 995, 24 Sup. Ct. Rep. 727.

³Amado v. United States, 195 U. S. 173, 49 L. ed. 145, 25 Sup. Ct. Rep. 13.

⁴Rodriguez v. United States, 198

U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617.

⁵Amado v. United States, 195 U. S. 172, 49 L. ed. 145, 25 Sup. Ct. Rep. 13.

⁶Royal Ins. Co. v. Martin, 192 U. S. 160, 48 L. ed. 385, 24 Sup. Ct. Rep. 247.

⁷Crowley v. United States, 194 U. S. 466, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731.

as applicable, as the final judgments and decrees of the circuit courts of the United States.

§ 10 of act July 1, 1902, c. 1369, 32 Stat. 695, U. S. Comp. Stat. 1905, p. 154.

Provisions measuring appellate jurisdiction by an amount in dispute, are also contained in the law conferring a right of appeal from other territories¹⁰ and the District of Columbia¹¹ and the cases bearing upon them are applicable to this enactment. While a question of divorce is not one susceptible of pecuniary estimate, yet if alimony in excess of \$25,000 is involved the case is appealable.¹²

§ 57. — from Oklahoma Territory.

The admission of Oklahoma and Indian Territory as a State has superseded the legislation respecting appeals except as to pending cases. The effect of the admission of a State upon pending cases is elsewhere considered.¹⁴

Author's section.

The original provision for appeal from Oklahoma Territory was as follows: "Writs of error and appeals from the final decisions of said supreme court [i. e. the supreme court of Oklahoma] shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed five thousand dollars."¹⁵ This provision was modified by § 15 of the circuit court of appeals act of 1891,¹⁶ authorizing appeal to that court from Territorial supreme courts in the cases therein made final.¹⁷ Some of the decisions bearing upon the old law are given in a footnote.¹⁸

§ 58. Appeals from Court of Claims.

An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims ad-

¹⁰Ante, § 48.[c]

¹¹Ante, § 45.[c]

¹²*De La Rama v. De La Rama*, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485.

¹⁴Ante, § 49.

¹⁵Part of § 9, act May 2, 1890, c. 182, 26 Stat. 86.

¹⁶Post, § 81.

¹⁷See ante, § 48, as to other territories.

¹⁸*McClung v. Penny*, 189 U. S. 145, 47 L. ed. 753, 23 Sup. Ct. Rep. 589; *Guthrie v. Guthrie Nat. Bank*, 173

U. S. 533, 43 L. ed. 798, 19 Sup. Ct. Rep. 513; *New v. Oklahoma*, 195 U. S. 252, 49 L. ed. 182, 25 Sup. Ct. Rep. 68; *Queenan v. Oklahoma*, 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762; *Comstock v. Eagleton*, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210; *Oklahoma City v. McMaster*, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324; *Guss v. Nelson*, 200 U. S. 298, 50 L. ed. 489, 26 Sup. Ct. Rep. 260; *New v. Oklahoma*, 195 U. S. 252, 49 L. ed. 182, 25 Sup. Ct. Rep. 68.

verse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine.^{[a]-[b]}

R. S. § 707, U. S. Comp. Stat. 1901, p. 574.

[a] History of section, collateral provisions and cross-references.

This provision was originally enacted in 1863 and again in 1868.¹ The reference to R. S. § 1089, is intended for R. S. § 1086, providing forfeiture of a claim for fraud in the proof, statement, establishment or allowance thereof. The present law governing suits against the United States was passed in 1887.² It provides by § 4, for a continuance of the laws in force as to jurisdiction and right of appeal except as therein modified. In § 9 it provides that "the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes." An act of 1891³ respecting the jurisdiction of the Court of Claims over claims for Indian depredations provided in § 10 that "the claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceeding brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects, as near as may be, to the statutes and rules of court governing appeals in other cases." Claims under the captured and abandoned property act have been held reviewable in the supreme court under the above section, although the statute made no specific provision therefor.⁴ The law conferring jurisdiction on appeals from the court of private land claims is omitted because temporary in its character and purposes. The time for taking appeal,⁵ and procedure on appeal⁶ are considered elsewhere.

[b] The section construed.

The section as enacted in the law of 1863 was declared legally ineffective to confer jurisdiction in the Supreme Court, for the reason that its de-

¹Act March 3, 1863, c. 92, §§ 5, 11, 853, U. S. Comp. Stat. 1901, p. 763.
12 Stat. 766, 767; act June 25, 1868, 4Ex parte Zellner, 9 Wall. 246, 19
c. 71 § 1, 15 Stat. 75. L. ed. 665; United States v. O'Grady,

²Act. March 3, 1887, c. 359, 24 Stat. 22 Wall. 646, 22 L. ed. 772.

³Act. March 3, 1887, c. 359, 24 Stat. 22 Wall. 646, 22 L. ed. 772.

⁴Act. March 3, 1887, c. 359, 24 Stat. 22 Wall. 646, 22 L. ed. 772.

⁵Act. March 3, 1887, c. 359, 24 Stat. 22 Wall. 646, 22 L. ed. 772.

⁶Act. March 3, 1887, c. 359, 24 Stat. 22 Wall. 646, 22 L. ed. 772.

⁵Post, §§ 1907-1909.

⁶Post, §§ 1937-1939.

cisions were subject to discretionary action on the part of the executive and therefore would constitute an exercise of a function in subordination to the executive.⁸ The objectionable feature of the act of 1863 was repealed in 1866,⁹ and since then the Supreme Court has taken jurisdiction on appeal and affirmed its jurisdiction, in a large number of cases.¹⁰ A right of appeal in a particular case must be conferred by law or it does not exist.¹¹ Hence where an act of Congress as to payment of a certain French spoliation claim did not provide for an appeal as to the party entitled to payment, none will lie.¹² It does not exist since the act of 1887, where the amount is less than \$3,000; and no regulations of the executive department, or certificate and pro forma decision below for the purpose of procuring a review, can be permitted to impair the force of the legislative enactment on the subject.¹³ Where a controverted claim in the executive department is by consent referred to the court of claims under § 12 of the act of 1887, supra, for its findings, such findings do not constitute a judgment from which appeal may be taken.¹⁴ But where the value exceeds \$3,000 appeal is matter of right.¹⁵ A claim for services rendered Indians under R. S. §§ 2103-2105 is not a claim against the United States within the section under consideration.¹⁶ A suit authorized by Congress before the Court of Claims, to determine the question of fraud in the obtaining of an award against Mexico is a "case" and not merely an advisory proceeding; and the final decision of the Court of Claims may be reviewed by the Supreme Court.¹⁷ Appeal and not writ of error is the appropriate mode of review.¹⁸

§ 59. Writ of error on conviction of capital crime.

Hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ

⁸Gordon v. United States, 2 Wall. 561, 17 L. ed. 921. See 117 U. S. 702.

⁹Act Mar. 17, 1866, c. 19, 14 Stat. 9.

¹⁰United States v. Alire, 6 Wall. 577, 18 L. ed. 948; United States v. Jones, 119 U. S. 477, 30 L. ed. 440, 7 Sup. Ct. Rep. 283; United States v. O'Grady, 22 Wall. 641, 22 L. ed. 772; Langford v. United States, 101 U. S. 344, 25 L. ed. 1012.

¹¹United States v. Atocha, 17 Wall. 439, 21 L. ed. 696.

¹²United States v. Gilliat, 164 U. S. 42, 41 L. ed. 344, 17 Sup. Ct. Rep. 16.

¹³United States v. Gleeson, 124 U.

S. 255, 31 L. ed. 421, 8 Sup. Ct. Rep. 502. Contra under earlier laws: United States Alire, 6 Wall. 577, 18 L. ed. 947.

¹⁴In re Sanborn, 148 U. S. 222, 37 L. ed. 429, 13 Sup. Ct. Rep. 577.

¹⁵United States v. Adams, 6 Wall. 107, 18 L. ed. 792.

¹⁶In re Sanborn, 148 U. S. 227, 37 L. ed. 429, 13 Sup. Ct. Rep. 577.

¹⁷La Abra S. M. Co. v. United States, 175 U. S. 423, 44 L. ed. 223, 20 Sup. Ct. Rep. 168.

¹⁸United States v. Young, 94 U. S. 259, 24 L. ed. 153.

of error, under such rules and regulations as said court may prescribe.

Part of § 6, act Feb. 6, 1889, c. 113, 25 Stat. 656, U. S. Comp. Stat. 1901, p. 569.

As respects appeal from the circuit and district courts within the several States, the foregoing provision is unquestionably repealed by the act of 1891.¹ The various territorial courts are not "courts of the United States" in the sense of being courts invested with the judicial power of the United States created by Congress under its power to establish inferior courts, and whose judges possess the Constitutional tenure of office.² Statutory references to courts of the United States have generally been held not to include such courts, although there are exceptions where the intent of Congress to apply the provision also to the territorial tribunals and the courts of the District of Columbia was deemed plain.³ The words "any court of the United States" are very broad and the nature of an enactment may show that other than technical Federal courts are included.⁴ It has been decided, however, that § 6 of the act of 1889, *supra*, does not apply to the District of Columbia,⁵ or to the Indian territory.⁶ It has never been deemed applicable to organized Territories such as Arizona and New Mexico.⁷ It contemplates a direct appeal from the trial to the Supreme Court, a proceeding which is inconsistent with the organization and distribution of jurisdiction in the courts of Arizona, New Mexico, Oklahoma and Indian Territory. And the provisions respecting review from Porto Rico, Hawaii, Alaska and the Philippines are complete in themselves and not subject to qualification or extension by reference to earlier general laws. It seems clear therefore that the foregoing provision is no longer in force, although it is, out of caution, inserted here.

§ 60. Direct appeal in suits for failure to alter bridge obstructing navigation.

In any case arising under the provisions of this section [for the recovery of a penalty upon failure to alter a bridge obstructing navigation, after notice from the Secretary of War] an appeal or writ of error may be taken from the district courts or from the exist-

¹Ante, § 42.[c]

S. 571, 36 L. ed. 821, 12 Sup. Ct.

²Benner v. Porter, 9 How. 244, 13 L. ed. 123; McAllister v. United States, 141 U. S. 174, 35 L. ed. 696, 11 Sup. Ct. Rep. 949; Good v. Martin, 95 U. S. 95, 24 L. ed. 343; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 246; City of Panama, 101 U. S. 460, 25 L. ed. 1064. See ante, § 8.[c]

Rep. 844; Brown v. United States, 171 U. S. 636, 43 L. ed. 312, 19 Sup. Ct. Rep. 56.

⁵Cross v. United States, 145 U. S. 571, 36 L. ed. 821, 12 Sup. Ct. Rep. 844.

⁶Brown v. United States, 171 U. S. 631, 43 L. ed. 312, 19 Sup. Ct. Rep. 56.

³See Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268.

⁷Ante, § 48.[c]

⁴See Cross v. United States, 145 U.

ing circuit courts direct to the Supreme Court either by the United States or by the defendants.

Part of § 18, act of Mar. 3, 1899, c. 425, 30 Stat. 1153, U. S. Comp. Stat. 1901, p. 3546.

The general statute governing direct appeal appears elsewhere.⁸

§ 61. Appeal in bankruptcy cases.

The Supreme Court has an appellate jurisdiction in bankruptcy conferred by act of July 1, 1898, and considered elsewhere.⁹

Author's Section.

§ 63. Appeal in proceedings brought in name of commerce commission.

The provisions of an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled, 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted, approved February 11, 1903," [which provides, among other things, for direct appeal to the Supreme Court], shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

Part of § 3, act Feb. 19, 1903, c. 708, 32 Stat. 848, U. S. Comp. Stat. 1905, p. 601.

The act of 1903 above referred to, provides for direct appeal¹¹ from the circuit court and certificate of division of opinion¹² and for precedence in hearing, and the number of judges to sit, in the circuit court.¹³ This provision is not expressly repealed by the commerce act of 1906, although perhaps superseded by other provisions enlarging the class of cases in which appeal lies.

§ 63. — in proceedings by petition to enforce Commission's orders.

From any action upon such petition [i. e. to compel obedience to orders of the Commerce Commission other than for the payment of money¹⁴] an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except

⁸Ante, § 42.

⁹See post, § 2163, et seq.

¹¹Ante, § 43.

¹²Ante, § 44.

¹³Post, § 1368.

¹⁴See post, § 1372, et seq.

criminal causes, but such appeal shall not vacate or suspend the order appealed from.

Part of § 16 of act Feb. 4, 1887, 24 Stat. 376, as amended June 29, 1906, c. 3591, § 5, 34 Stat. 592.

The act of 1906 also makes the provisions of the expediting act of 1903 applicable to proceedings to enforce orders of the Commerce Commission.¹⁵

§ 64. — in suits against the Commission to suspend orders, etc.

The provisions of "An act to expedite the hearing and determination of suits in equity, and so forth," approved February 11, 1903, [which provides among other things, for direct appeal to the Supreme Court¹⁶] shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce approved February 4, 1887, and all acts amendatory thereof or supplemental thereto.

Part of § 16, act Feb. 4, 1887, 24 Stat. 376, as amended by § 5, act June 29, 1906, c. 3591, 34 Stat. 592.

The paragraph from which the above is taken is given in full in a subsequent code section.¹⁷

§ 65. Certiorari to review trademark cases.

Writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this act in the same manner as provided for patent cases by the act creating the circuit court of appeals.

§ 18, act Feb. 20, 1905, c. 592, 33 Stat. 729, U. S. Comp. Stat. 1905, p. 675.

The provisions for certiorari in patent and other cases in which the decision of the circuit court of appeals is final, is given elsewhere.¹⁸

§ 66. Appeals in cases from court in China.

Appeals and writs of error may be taken from the judgments or decrees of the said circuit court of appeals [i. e. for the ninth circuit²⁰] to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said court of appeals in cases coming from

¹⁵Post, § 64.

¹⁶See ante, § 43.

¹⁷Post, § 1372.

Fed. Proc.—18.

¹⁹Ante, § 41.

²⁰See post, § 87, where the section appears in full.

district and circuit courts of the United States. . . . Said courts are hereby empowered to hear and determine appeals and writs of error so taken.

Part of § 3, act June 30, 1906, c. 3934, 34 Stat. 815.

CHAPTER 3.

THE CIRCUIT COURT OF APPEALS.

- § 69. References to other code sections and matters not herein treated.
- § 70. Creation and organization.
- § 71. Seal, writs, process and procedure.
- § 72. Power to establish rules.
- § 73. Judges who may constitute the court.
- § 74. What judge shall preside.
- § 75. When district judges may serve.
- § 76. Judge trying cause below, disqualified.
- § 77. Appellate jurisdiction of circuit court of appeals.
- § 78. Appeal from interlocutory receivership or injunction orders or decrees.
- § 79. Appeals from circuit court decisions reviewing revenue decisions of the board of general appraisers.
- § 80. Appeal from appellate court of Indian Territory.
- § 81. Appeals from Territorial supreme courts.
- § 82. Appeal from district court of Alaska.
- § 83. — from interlocutory injunction orders of Alaska district court.
- § 84. Decision on appeal from Alaska final.
- § 85. Appeals from Hawaii district court.
- § 86. Appellate jurisdiction in bankruptcy.
- § 87. In trademark cases.
- § 88. Appeal from United States court in China.

§ 69. References to other code sections and matters not herein treated.

Elsewhere in this code will be found provisions respecting the clerks and marshals of the circuit court of appeals;¹ provisions as to terms of court and where held;² and as to the nine circuits;³ as to costs⁴ and fees;⁵ as to time for taking appeal;⁶ as to expenses of judges;⁷ as to court rooms for circuit courts of appeals;⁸ and as to election of forum of review between Supreme Court and circuit court of appeals.⁹

Author's section.

¹Post, §§ 563, 616.

²Post, § 309, et seq.

³Post, § 255.

⁴Post, §§ 1848, 1854, et passim.

⁵Post, §§ 709, 710.

⁶Post, §§ 1905, 1906.

⁷Post, § 474.

⁸Post, § 312.

⁹Ante, § 42.[d1]-[dd]

§ 70. Creation and organization.

There is hereby created in each circuit a Circuit Court of Appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established.

Part of § 2, act Mar. 3, 1891, c. 517, 26 Stat. 826, U. S. Comp. Stat. 1901, p. 547.

The remaining portion of the above section is contained in the next code section.¹¹ The circuit court of appeals act of 1891 effected a radical change in the scheme of Federal appellate jurisdiction. By § 4 it abolished the appellate powers formerly exercised by the circuit court over the district court. It made complete provision for a distribution of Federal appellate jurisdiction over the Federal trial courts by dividing it between the Supreme Court and the new tribunal. The old laws governing appeal from the district and circuit courts were altogether superseded and questions of appellate jurisdiction from those courts are governed by the law of 1891.¹² Circuit courts of appeals were established to facilitate the prompt disposition of cases in the Supreme Court and to relieve it from the oppressive burden of general litigation, which impeded the examination of cases of public concern, and operated to the delay of suitors.¹³ The circuit court of appeals is not a court in or for any district, but for the entire circuit, and is not made such by fact that a pending case is from a particular district of the circuit.¹⁴ It has no extraterritorial jurisdiction to issue habeas corpus or other writ outside of the circuit.¹⁵ Its jurisdiction is exclusively appellate.¹⁶

§ 71. Seal, writs, process and procedure.

Such court [the circuit court of appeals] shall prescribe the form and style if its seal and the form of writs, and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law.

Part of § 2, act Mar. 3, 1891, c. 517, 26 Stat. 826, U. S. Comp. Stat. 1901, p. 547.

The other portion of the above provision is contained in the preceding code section.¹⁷ By § 12 of the same act the court is given the powers specified in R. S. § 716, as to the issue of writs.¹⁸ By rule two of the circuit court of appeals rules it is provided that "the seal shall contain the

¹¹Post, § 71.

¹²Ante, § 37.

¹³In re Woods, 143 U. S. 202, 36 L. ed. 125, 12 Sup. Ct. Rep. 417; Lau Ow Bew v. United States, 144 U. S. 55, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

¹⁴United States v. Winston, 170 U.

S. 524, 42 L. ed. 1130, 18 Sup. Ct. Rep. 701.

¹⁵In re Boles, 48 Fed. 75, 1 C. C. A. 48.

¹⁶Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 534.

¹⁷Ante, § 70.

¹⁸See post, § 842.

words "United States" on the upper part of the outer edge, and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right, and the words "——— Circuit" in two lines, in the center, with a dash beneath.¹⁹

§ 72. Power to establish rules.

The [circuit] court [of appeals] shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

Part of § 2, act Mar. 3, 1891, c. 517, 26 Stat. 826, U. S. Comp. Stat. 1901, p. 547.

The power of courts to establish rules and the provisions or law governing its exercise are discussed elsewhere.²⁰ A set of rules for the circuit courts of appeals was promulgated by the supreme court after the creation of the new tribunal, which is still with modifications, the basis of the rules in the different circuits.¹

§ 73. Judges who may constitute the court.

The chief justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided.

Part of § 3, act Mar. 3, 1891, c. 517, 26 Stat. 827, U. S. Comp. Stat. 1901, p. 548.

The portion of the above provision following the foregoing is contained in the next code section.³ The provision requiring an assignment of the Supreme Court justices to the several circuits is given elsewhere.⁴ This provision does not permit a circuit or district judge to act as member of the court in any other circuit than that for which he is appointed.

§ 74. Which judge shall preside.

In case the chief justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the chief justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

Part of § 3, act Mar. 3, 1891, c. 517, 26 Stat. 827, U. S. Comp. Stat. 1901, p. 548.

¹⁹See rules as printed in the Appendix.

²⁰Post, §§ 801-804.

¹See post, p. 804.

³Post, § 74.

⁴Post, § 101.

The next preceding portion of the above provision is contained in the preceding code section.⁵ In recent year the justices of the Supreme Court have participated very much less frequently than formerly, in the deliberations of the inferior Federal courts.

§ 75. When district judges may serve.

In case the full court at any time shall not be made up by the attendance of the chief justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court.

Part of § 3, act Mar. 3, 1891, c. 517, 26 Stat. 827, U. S. Comp. Stat. 1901, p. 548.

The remainder of the above clause is contained in the next code section.⁷ There are now three or more circuit judges in every circuit except the fourth.⁸ It is generally customary to call upon one or more district judges to attend at a session of the circuit court of appeals, calling first the one having seniority of appointment and thereafter the others in turn. It is competent for three regularly designated district judges to hold the circuit court of appeals in the absence of Supreme and circuit court judges.⁹

§ 76. Judge trying cause below, disqualified.

No justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

Part of § 3, act Mar. 31, 1891, c. 517, 26 Stat. 827, U. S. Comp. Stat. 1901, p. 548.

The purpose of this enactment was to require the circuit court of appeals to be constituted of judges uncommitted and uninfluenced by having formed or expressed an opinion in the court of first instance.¹¹ A judge who has heard a cause below on the merits is clearly disqualified from hearing upon review any question in that cause involving in any degree, matter upon which he had occasion to pass below. Not only does the provision disqualify from sitting in direct review of a decision below, but also probably disqualifies a judge who has once heard the cause upon law or fact from sitting in review of any question arising in that same cause.¹² Where a

⁵Ante, § 73.

⁷Post, § 76.

⁸Post, § 102.

⁹Peters v. Hanger, 136 Fed. 181, 69 C. C. A. 197. In the fifth circuit there is a provision in C. C. A. Rule xxxvi for the assignment of dis-

trict judges to hold the court. See rules in appendix.

¹¹Moran v. Dillingham, 174 U. S. 153, 43 L. ed. 930, 19 Sup. Ct. Rep. 620.

¹²Moran v. Dillingham, 174 U. S. 153, 43 L. ed. 930, 19 Sup. Ct. Rep.

disqualified judge sits in the circuit court of appeals, certiorari to review that decision and quash it if the disqualification is established,¹³ or an order to show cause why certiorari should not issue,¹⁴ is a more appropriate and decorous form of relief than mandamus to the trial court to disregard the mandate from the circuit court of appeals. R. S. § 614¹⁵ which governed the conduct of a district judge upon appeal to the circuit court from his decision and which is no longer in force since the appellate powers of the circuit court have been abolished, permitted the district judge to assign the reasons for his decision, but not to vote.

§ 77. Appellate jurisdiction of circuit court of appeals.

The circuit courts of appeals established by this act shall exercise appellate jurisdiction to review^[a] by appeal or by writ of error^[b] final decision^[c] in the district court and the existing circuit courts in all cases^[e] other than those provided for in the preceding section of this act, [i. e. in all cases except where the jurisdiction of the court is in issue, prize and capital cases, cases involving construction or application of the Federal Constitution, validity of a Federal law, validity or construction of a treaty, or the validity of a State law or Constitution challenged as violating the Federal Constitution¹⁶] unless otherwise provided by law,^[f] and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States;^[g] also in all cases arising under the patent laws,^[h] under the revenue laws,^[i] and under the criminal laws^{[j]-[jj]} and in admiralty cases.^[k] . . . In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.^[l]

Part of § 6, act Mar. 3, 1891, c. 517, 26 Stat. 828, U. S. Comp. Stat. 1901, p. 549, 550.

[a] Cross-references.

The omitted portions of the section deal with the certifying of questions

620. The question whether a judge was competent to sit on an appeal from an order dissolving his order appointing a receiver is raised in *American C. Co. v. Jacksonville, Ry.* 148 U. S. 372, 387, 37 L. ed. 492, 13 Sup. Ct. Rep. 758. 153, 43 L. ed. 930, 19 Sup. Ct. Rep. 620.
¹⁴*American C. Co. v. Jacksonville, T. & K. W. Ry.* 148 U. S. 372, 387, 37 L. ed. 492, 13 Sup. Ct. Rep. 758.
¹⁵U. S. Comp. Stat. 1901, p. 494.
¹⁶See ante, § 42.

¹³*Moran v. Dillingham*, 174 U. S.

in cases made final in the circuit court of appeals to the Supreme Court for instruction;¹⁷ the review of such cases by certiorari in the Supreme Court;¹⁸ and the time for taking appeal to the Supreme Court under the last clause.¹⁹

[b] Writ of error or appeal.

A writ of error brings up matters of law only; an appeal, unless expressly restricted, brings up both law and fact.¹ The distinction between actions at law and suits in equity is uniformly observed in the Federal courts;² and in the former cases and in criminal cases, the review is always by writ of error,³ even though the act of Congress speak loosely of appeal and not error.⁴ The proper method of reviewing a judgment in an action at law is by writ of error, with citation to adverse parties.⁵ An application for a writ of mandamus is reviewable only by a writ of error, not by appeal.⁶ The writ of habeas corpus does not perform the office of a writ of error or an appeal in respect to the proceedings complained of, if in such proceedings the court had jurisdiction of the subject-matter and the person.⁷ An order imposing a fine for contempt for violation of an injunction is to be regarded as a judgment in a criminal case and is reviewable upon a writ of error and not by appeal.⁸ An action brought against the United States by a supervisor of elections to recover items disallowed by the treasury department is an action at law and is reviewable only on a writ of error, and not by appeal.⁹ Judgments of the circuit courts in suits against the United States, under the act of March 3, 1887, are reviewable either by writ of error or appeal.¹⁰ A petition filed in the United States circuit court by a clerk to recover fees is an action at law, and the judgment can only be reviewed by writ of error.¹¹ A proceeding upon habeas corpus is properly removed from the circuit court of appeals by appeal, and not by writ of error.¹² But writ of error is the proper mode of reviewing a commitment for contempt of an injunction order.¹³

¹⁷Ante, § 40.

¹⁸Ante, § 41.

¹⁹Post, § 1904.

¹Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

²Hume v. United States, 118 Fed. 689, 55 C. C. A. 407. Post, § 799.

³Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Nelson v. Huidekoper, 66 Fed. 616, 13 C. C. A. 658; Muhlenberg Co. v. Dyer, 65 Fed. 634, 13 C. C. A. 64; Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379.

⁴De Lemos v. United States, 107 Fed. 121, 46 C. C. A. 196; Elliott v. Toepfner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133. See post, § 1886.

⁵Nelson v. Huidekoper, 66 Fed. 616, 13 C. C. A. 658.

⁶Muhlenberg Co. v. Dyer, 65 Fed. 634, 13 C. C. A. 64.

⁷Ex parte Lennon, 64 Fed. 320, 12 C. C. A. 134.

⁸Gould v. Sessions, 67 Fed. 163, 14 C. C. A. 366; Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665.

⁹United States v. Tinsley, 73 Fed. 369, 19 C. C. A. 515.

¹⁰United States v. Ady, 76 Fed. 359, 22 C. C. A. 223.

¹¹United States v. Fletcher, 60 Fed. 53, 8 C. C. A. 453.

¹²King v. McLean Asylum, 64 Fed. 331, 12 C. C. A. 145, 26 L.R.A. 784.

¹³Bessette v. Conkey, 133 Fed. 165, 66 C. C. A. 291.

[c] Scope of review—discretionary matters not reviewable.

The right of review in the appellate courts of the United States is limited to questions of law appearing on the face of the record and does not extend to matters of discretion.¹⁴ An appeal will not lie in a contempt proceeding instituted for the protection of the property of a receiver.¹⁵ There may be an appeal from an award of costs when the force of a statute or some positive rule of law is involved, though it concerns only costs.¹⁶ An award of costs within the discretion of the court below will not be reviewed on appeal, except in case of grave and manifest abuse.¹⁷ A refusal to allow an amendment of the complaint is within the discretion of the trial court and will not be reviewed.¹⁸ A motion for a continuance is not reviewable by the circuit court of appeals.¹⁹ A refusal to set aside a verdict as against the weight of evidence, is not reviewable.²⁰

An order granting or refusing a new trial^{*} is not reviewable.¹ While the denial of the motion for a new trial is not reviewable, yet the exclusion

¹⁴*Duncan v. Atchison T. & S. F. Ry. Co.* 72 Fed. 808, 19 C. C. A. 202; *Dietz v. Lymer*, 61 Fed. 792, 10 C. C. A. 71; *Seymour v. Malcolm McDonald Lumber Co.* 58 Fed. 957, 7 C. C. A. 593; *Pittsburg Wire Co. v. Roberts*, 71 Fed. 706, 18 C. C. A. 302; *The Florence*, 71 Fed. 527; *Southern Pac. Co. v. Earl*, 82 Fed. 690, 27 C. C. A. 185; *Farmer's Loan & T. Co. v. McClure*, 78 Fed. 209, 24 C. C. A. 64; *Goldsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; *Isaacs v. United States*, 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. Rep. 51; *Drexel v. True*, 74 Fed. 12, 20 C. C. A. 265.

¹⁵*King v. Wooten*, 54 Fed. 612, 4 C. C. A. 519.

¹⁶*The City of Augusta*, 80 Fed. 297, 25 C. C. A. 430.

¹⁷*Clarke v. Richmond & W. P. I. Ry. Co.* 62 Fed. 328, 10 C. C. A. 387; *Blanks v. Klein*, 78 Fed. 395, 24 C. C. A. 144; *Tyler Min. Co. v. Sweeney*, 79 Fed. 277, 24 C. C. A. 578.

¹⁸*Watts v. Weston*, 62 Fed. 136, 10 C. C. A. 302.

¹⁹*Richmond Railway & Elec. Co. v. Dick*, 52 Fed. 379, 3 C. C. A. 149; *Davis v. Patrick*, 57 Fed. 909, 6 C. C. A. 632.

²⁰*O'Donohue v. Bruce*, 92 Fed. 858, 35 C. C. A. 52.

¹*Reagan v. United States*, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; *Blitz v. United States*, 153 U. S. 308, 38 L. ed. 725, 14 Sup. Ct. Rep. 924; *Moore v. United States*, 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; *Holder v. United States*, 150 U. S. 91, 37 L. ed. 1010, 14 Sup. Ct. Rep. 10; *Bucklin v. United States*, 159 U. S. 682, 40 L. ed. 305, 16 Sup. Ct. Rep. 182; *Smith v. State of Mississippi*, 162 U. S. 592, 40 L. ed. 1082, 16 Sup. Ct. Rep. 900; *Wheeler v. United States*, 159 U. S. 523, 40 L. ed. 245, 16 Sup. Ct. Rep. 93; *Sigafus v. Porter*, 84 Fed. 430, 28 C. C. A. 443; *City of Lincoln v. Sun Vapor Street Light Co.* 59 Fed. 756, 8 C. C. A. 253; *Richmond Ry. & Elec. Co. v. Dick*, 52 Fed. 379, 3 C. C. A. 149; *Morning Journal Assn. v. Rutherford*, 51 Fed. 513, 16 L.R.A. 803, 2 C. C. A. 354; *Smith v. Sun Printing & Pub. Assn.* 55 Fed. 240, 5 C. C. A. 91; *Woodbury v. Shawneetown*, 74 Fed. 205, 20 C. C. A. 400; *The Natchez*, 78 Fed. 183, 24 C. C. A. 49; *Willis v. Board of Commrs.* 86 Fed. 872, 30 C. C. A. 445; *Nederland Life Ins. Co. v. Hall*, 86 Fed. 741, 30 C. C. A. 363; *Atlas Distilling Co. v. Rheinstrom*, 86 Fed. 244, 30 C. C. A. 10; *Luitweiler v. United States*, 85 Fed. 957, 29 C. C. A. 504; *Zimpelman v. Hipwell*, 54 Fed. 848, 4 C. C. A. 609; *Northern Pac. Ry. Co. v. Charless*, 51 Fed. 562, 2 C. C. A. 380; *Southwestern Virginia Imp. Co. v. Frari*, 58 Fed. 171, 7 C. C. A. 149; *Little Josephine M. Co. v. Fullerton*, 58 Fed. 521, 7 C. C. A. 340; *Edge Moore Bridge Works v. Fields*, 58 Fed. 173, 7 C. C. A. 152; *Alexander v. United States*, 57 Fed. 828, 6 C. C. A. 602; *Condram v. Chicago M. & St. P. Ry. Co.* 67 Fed. 522, 14 C. C. A. 506, 28

of affidavits on such motion may be reviewed as to the question of their admissibility.² When a trial court refuses to consider a ground urged for a new trial for the reason that it considers it has no power to do so, its refusal may be assigned as error.³

[d] Finality of decision as necessary to right of appeal.

The appellate jurisdiction of the circuit courts of appeals is restricted to the review of final judgments and decrees,⁵ excepting interlocutory orders relating to injunctions and receivers.⁶ A decree of a Federal court is final for the purposes of an appeal, when it ends the litigation on the merits, so that if affirmed, nothing would be left to the trial court but to execute it.⁷ The circuit court of appeals cannot give finality to a decree of the circuit court which was not final when entered of record in the circuit court.⁸ One portion of a decree may be final, and for that reason appealable, while the remainder may be interlocutory, and not appealable.⁹ A decree may be a final appealable decree, although if no appeal be taken a rehearing or bill of review would be available remedies in the court of original jurisdiction.¹⁰ A decree of the circuit court setting aside the subpoena and dismissing the bill of complaint as against one of the defendants because of lack of jurisdiction over the person of such defendant is not a final decree.¹¹ A decree dissolving a partnership, "enjoining until the final decree in this suit" both parties from disposing of the partnership property, and directing the taking of testimony, is not a final appealable decree.¹² Neither is an order of the circuit court denying the petition of nonresident creditors of an insolvent foreign corporation to be made formal parties.¹³ An order dismissing two or three sued on a joint obligation, because not served with process, is not a final order from which an appeal lies.¹⁴ A decree made after a final

L.R.A. 749; *Jefferson H. Co. v. Warren*, 128 Fed. 565, 63 C. C. A. 193. ⁵*Robinson v. Belt*, 56 Fed. 328, 5 C. C. A. 521.

²*Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50. ⁶See post, § 78. ⁷*Talley v. Curtain*, 58 Fed. 4, 7 C. C. A. 1; *Morgan v. Thompson*, 124 Fed. 204, 59 C. C. A. 672.

³*Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321; *Emanuel v. Gates*, 53 Fed. 772, 3 C. C. A. 663; *Fitzsimmons v. United States*, 54 Fed. 812, 4 C. C. A. 589; *Middlesex Banking Co. v. Smith*, 83 Fed. 133, 27 C. C. A. 485; *Rhodes v. United States*, 79 Fed. 740, 25 C. C. A. 186; *Phillip Schneider B. Co. v. American Ice Mach. Co.* 77 Fed. 138, 23 C. C. A. 89; *Supreme Lodge of K. of P. v. Hill*, 76 Fed. 468, 22 C. C. A. 280; *Morris v. Canda*, 80 Fed. 739, 26 C. C. A. 128; *Prichard v. Budd*, 76 Fed. 710, 22 C. C. A. 504; *Criner v. Mathews*, 67 Fed. 945, 15 C. C. A. 93; *Berry v. Seawell*, 65 Fed. 742, 13 C. C. A. 101. ⁸*Standard Elevator Co. v. Crane* El. Co. 76 Fed. 767, 22 C. C. A. 549.

⁹*Standard Elevator Co. v. Crane* El. Co. 76 Fed. 767, 22 C. C. A. 549. ¹⁰*Standard Elevator Co. v. Crane* El. Co. 76 Fed. 767, 22 C. C. A. 549.

¹¹*Hohorst v. Hamburg-American Packet Co.* 148 U. S. 262, 37 L. ed. 444, 13 Sup. Ct. Rep. 590. ¹²*Ries v. Henderson*, 78 Fed. 515, 24 C. C. A. 194.

¹³*Jones v. Sands*, 79 Fed. 913, 25 C. C. A. 233. ¹⁴*Beck & Pauli Lith. Co. v. Wacker B. B. & M. Co.* 76 Fed. 10, 22 C. C. A. 11.

hearing on the merits, declaring infringement of a trademark, awarding a perpetual injunction, and referring the cause to a master for an accounting, is not a final decree.¹⁵ An order allowing the amendment of a bill of exceptions after the end of the term, and after the date fixed for settling the same, is not a final decision.¹⁶ Neither is an order final which grants certain relief upon the party's complying with conditions specified in the order;¹⁷ nor an order reviving a suit in the name of complainant's administrator;¹⁸ nor an order upon an intervening petition upon a claim presented against an insolvent estate, which order refers such claim to a master.¹⁹ A decree awarding a perpetual injunction in a patent suit, but with an order of reference to a master to ascertain the damages suffered by infringement, is not a final decree.²⁰ A decree entered on a full hearing on the merits sustaining a patent, declaring an infringement awarding a perpetual injunction and referring the matter to a master to ascertain profits is not a final decree.¹ An order appointing commissioners to assess damages for the taking and condemnation of land is not a final judgment.² An order denying leave to intervene in a cause is in no sense a final judgment, and is not appealable.³ The dismissal of a petition for removal on the ground of local prejudice is not a final judgment.⁴ A decree removing the liquidators of a corporation because they had interests adverse thereto, is not a final decree.⁵ An order quashing an attachment and leaving the action still pending in the trial court is not a final decision;⁶ neither is an order discharging a previous order to the marshal to seize and hold property in a suit to enforce an equitable chattel mortgage.⁷ An order overruling a demurrer to an interplea whereby a third person claims certain goods seized in attachment, is not a final judgment.⁸ An order setting aside a final decree at the succeeding term has been held not a final decision.⁹ A decree which declares certain claims of a patent valid and infringed, but holds others invalid, and that yet others are not infringed is not a final decree in respect to the claims found invalid or not infringed, so as to give plaintiff a right to appeal before the case is finally disposed of after the accounting.¹⁰ An order made for the purpose of executing a decree after an appeal from such decree has been perfected, but reserving final

¹⁵Raymond v. Royal Baking Powder, 76 Fed. 465, 22 C. C. A. 276.

¹⁶Honey v. Chicago, B. & O. R. Co. 82 Fed. 773, 27 C. C. A. 262.

¹⁷Stratton v. Dewey, 79 Fed. 32, 24 C. C. A. 435.

¹⁸Mackaye v. Mallory, 79 Fed. 1, 24 C. C. A. 420.

¹⁹Security Trust Co. v. Sullivan, 77 Fed. 778, 23 C. C. A. 458.

²⁰Brush Electric Co. v. Western El. Co. 76 Fed. 762, 22 C. C. A. 543.

¹Lockwood v. Wickes, 75 Fed. 118, 21 C. C. A. 257.

²Luxton v. North River Bridge Co. 147 U. S. 337, 37 L. ed. 194, 13 Sup. Ct. Rep. 356.

³Lewis v. Baltimore, & L. R. Co. 62 Fed. 218, 10 C. C. A. 446.

⁴Patten v. Cilley, 62 Fed. 497.

⁵Dufour v. Lang, 54 Fed. 913, 4 C. C. A. 663.

⁶Hamner v. Scott, 60 Fed. 343, 8 C. C. A. 655.

⁷Riddle v. Hudgins, 58 Fed. 490, 7 C. C. A. 335.

⁸Robinson v. Belt, 56 Fed. 329, 5 C. C. A. 521.

⁹Fisher v. Simon, 67 Fed. 387, 14 C. C. A. 443.

¹⁰Marden v. Campbell Printing Press & Mfg. Co. 67 Fed. 810, 15 C. C. A. 26.

action until a commissioner should report his proceedings to the court is not reviewable.¹¹ Neither is a decree determining the right of a complainant to an account, and settling the principles on which an account should be taken.¹² A judgment is not final while a motion for a new trial is pending.¹³

A decree to be final for the purposes of appeal must leave the case in such a condition that if there be an affirmance the lower court would have nothing to do but execute the decree already entered.¹⁴ A decree which substantially and completely determines the rights of the parties is appealable, though the main suit has not reached a final decree.¹⁵ An order of the circuit court discharging from imprisonment a defendant held under execution against his person upon a judgment in a civil action, is final and appealable.¹⁶ A decree in admiralty awarding libelants a definite sum, adjudging that a maritime lien exists therefor, and directing the sale of the vessel and payment of the proceeds into the registry to await the further order of the court, is a final appealable decree.¹⁷ A judgment of nonsuit is subject to review.¹⁸ A judgment which denies the petition of a receiver of a corporation to have a judgment opened is a final judgment.¹⁹ So is an order overruling a motion by the owner of a patent to be dismissed from a suit brought by the licensee, on the ground that the suit had been brought without the owner's authority.²⁰ A decree of confirmation of a sale of property by a receiver was final and appealable where it finally disposed of the possession and ownership of the property.¹ So a decree will be considered as final where it shows that the court adjudicated all the merits of the case, leaving nothing to be further disposed of, except to carry it into effect, though by inadvertence no time was prescribed within which certain conveyances therein directed were to be executed.² Likewise a decree for specific performance, concluding all the rights of the parties, notwithstanding a conveyance which it directs to be made, is to be afterward presented to the judges for their approval of its form and terms.³ A decree allowing \$5,000 to complainant's solicitors for services and directing payment of same out of funds in a receiver's hands, in a suit by a stockholder against a corporation, is pro tanto a final decree.⁴

¹¹Gunn v. Black, 60 Fed. 159, 8 C. C. A. 542.

¹²Pittsburgh C. & St. L. Ry. Co. v. Baltimore & O. Ry. Co. 61 Fed. 705, 19 C. C. A. 20.

¹³Kingman & Co. v. Western Mfg. Co. 170 U. S. 675, 42 L. ed. 1193, 18 Sup. Ct. Rep. 786.

¹⁴National Bank v. Smith, 156 U. S. 330, 39 L. ed. 441, 15 Sup. Ct. Rep. 358.

¹⁵Central Trust Co. v. Madden, 70 Fed. 451, 17 C. C. A. 236; Klever v. Seawell, 65 Fed. 373, 12 C. C. A. 653.

¹⁶Stroheim v. Deimel, 77 Fed. 802, 23 C. C. A. 467.

¹⁷The Eugene, 87 Fed. 1001, 31 C. C. A. 345.

¹⁸Koons v. Bryson, 69 Fed. 297, 16 C. C. A. 227.

¹⁹Rust v. United Waterworks Co. 70 Fed. 129, 17 C. C. A. 16.

²⁰Brush Electric Co. v. Electric Imp. Co. 51 Fed. 557, 2 C. C. A. 373.

¹City of New Orleans v. Peake, 52 Fed. 74, 2 C. C. A. 626.

²Desvergers v. Parsons, 60 Fed. 143, 8 C. C. A. 526.

³Long v. Maxwell, 59 Fed. 948, 8 C. C. A. 410.

⁴Jacksonville, etc. Ry. Co. v. American Const. Co. 57 Fed. 66, 6 C. C. A. 249.

Orders finally dismissing interpleaders from the suit, also dismissing an auxiliary petition brought by plaintiff to enjoin them from enforcing a judgment, and vacating an injunction previously granted thereunder, embody final decisions as to such interpleaders.⁵ A decree ordering the dismissal of a libel, if not amended within ten days, is final for the purpose of an appeal within that time by libellant.⁶ A decree may be final in part, and therefore appealable, although the remainder is not appealable.⁷ An order signed by the judge, and entered by the clerk finally dismissing defendants, and directing costs to be taxed, is final.⁸ The circuit court of appeals has jurisdiction of an appeal from a final decision of a district judge at chambers in a habeas corpus case, as well as from a final decision of a district court.⁹ A final decree is suspended by a motion for rehearing, and does not take effect and become operative for the purposes of an appeal until such motion is overruled.¹⁰ A decree adjudging defenses bad in law and finding defendant liable for such sum as might thereafter be found due, is not final.¹¹

[e] All cases not appealable to Supreme Court direct, reviewable in circuit court of appeals.

The necessary effect of this provision was to distribute the entire appellate jurisdiction.¹² The appellate jurisdiction of the circuit court of appeals is not restricted by any provision requiring a given value in dispute¹³ and is very liberal.¹⁴ The court has no original jurisdiction.¹⁵ As is elsewhere shown a party is sometimes obliged to choose between an appeal to the Supreme Court and to the circuit court of appeals.¹⁶ If only a jurisdictional question is involved the appeal must be to the Supreme Court,¹⁷ though the existence of such a question along with others will not preclude a choice of the circuit court of appeals as the forum of review or preclude a decision by it, of the entire case.¹⁸

[f] "Unless otherwise provided by law."

If construed as applying to prior laws this clause would virtually defeat

⁵Standley v. Roberts, 59 Fed. 836, 8 C. C. A. 305.

⁶United States v. Three Friends, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495.

⁷The Alert, 61 Fed. 113, 9 C. C. A. 390.

⁸Prescott, etc. Ry. Co. v. Atchison T. Co. 84 Fed. 213, 28 C. C. A. 481.

⁹Webb v. York, 74 Fed. 753, 21 C. C. A. 65.

¹⁰Andrews v. Thum, 72 Fed. 290, 18 C. C. A. 566.

¹¹Guarantee Co. v. Mechanics, etc. T. Co. 173 U. S. 586, 43 L. ed. 818, 19 Sup. Ct. Rep. 551.

¹²Lau Ow Bew v. United States, 144 U. S. 56, 36 L. ed. 240, 12 Sup. Ct. Rep. 517; Badaraces v. Corf, 53 Fed. 169, 3 C. C. A. 491.

¹³The Paquete Habana, 175 U. S. 683, 44 L. ed. 320, 20 Sup. Ct. Rep. 290. But see North A. T. Co. v. Smith, 93 Fed. 8, 35 C. C. A. 183.

¹⁴Warner v. Texas P. Ry. 54 Fed. 920, 4 C. C. A. 670.

¹⁵Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584.

¹⁶Ante, § 42, [d]-[dd] § 39, [e]

¹⁷Halpin v. Amerman, 138 Fed. 548, 70 C. C. A. 462. See also Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. 79. But if jurisdictional question below was decided in appellant's favor it cannot be objected that the circuit court of appeals had no jurisdiction on appeal. Viquesney v. Allen, 131 Fed. 21, 65 C. C. A. 259.

¹⁸See ante, § 42, [d]-[dd]-[e]

the entire purposes of the new statute.¹ Hence it has been said that it refers to contemporaneous and subsequent laws;² and was inserted out of abundant caution in order that any qualification of the jurisdiction in later laws should not be construed as taking away the jurisdiction conferred by the above section except when expressly so provided.³ But in the ninth circuit it has been held that the old provision requiring a value of over \$50 in dispute to confer a right of appeal to the circuit court in admiralty is still in force and applies to appeals to the circuit court of appeals.⁴

[g] Judgment final where jurisdiction dependent on diverse citizenship.

A case removed for local prejudice is one made final in the circuit court of appeals under this section.⁵ The same is true of a suit between citizens of different States over land grants from different States.⁷ It will be observed however, that a controversy between a citizen and a foreign State is not among the enumerated cases made final in the circuit court of appeals because of the citizenship or character of parties, and hence may be carried by further appeal to the Supreme Court.⁸ Where Federal jurisdiction arises because a proceeding is ancillary to another in which diverse citizenship is the basis of jurisdiction, appeal in the ancillary case is governed by this clause and final in the circuit court of appeals.⁹ Other cases dealing with the question of finality of the circuit court of appeals decision are discussed elsewhere.¹⁰

[gg]—where other ground of jurisdiction apparent in plaintiff's statement.

It is to be noted that the statute makes judgment final only where jurisdiction depends "entirely" on diverse citizenship. Hence it follows that the judgment is not final under this section unless jurisdiction is entirely dependent on diverse citizenship. This is determined from plaintiff's statement of his cause in his bill or declaration. If that shows other adequate ground of jurisdiction under accepted rules,¹² such as a question arising

¹Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 343, 2 Sup. Ct. Rep. 517; Louisville P. W. Co. v. Collector of Customs, 49 Fed. 564, 1 C. C. A. 371.

²Mason v. Pewabic M. Co. 153 U. S. 361, 38 L. ed. 745, 14 Sup. Ct. Rep. 847; In re Lennon, 150 U. S. 398, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; American C. Co. v. Jacksonville, etc. Ry. 148 U. S. 383, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

³Lau Ow Bew, 144 U. S. 47, 36 L. ed. 343, 12 Sup. Ct. Rep. 517.

⁴North A. T. Co. v. Smith, 93 Fed. 8, 35 C. C. A. 183.

⁵Cochran v. Montgomery Co. 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58.

⁷Stevenson v. Fain, 195 U. S. 165, 49 L. ed. 142, 25 Sup. Ct. Rep. 6.

⁸Colombia v. Cauca Co. 190 U. S. 524, 47 L. ed. 1159, 23 Sup. Ct. Rep. 704.

⁹Ante, § 3.

¹⁰Ante, § 39.[b]

¹²Mere assertion of title under mining patent is not: Bonin v. Gulf Co. 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608; nor an inferential allegation of denial of due process: Empire, etc. M. Co. v. Hanley, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691; nor suit for publishing manuscript: Press P. Co. v. Monroe, 164 U. S. 112, 41 L. ed. 367, 17 Sup. Ct. Rep. 40.

under the Federal laws,¹³ the case is not within the class here made final and may go to the Supreme Court on a further appeal.¹⁴

In this connection, however, it is necessary to distinguish the cases where the other ground of jurisdiction presents a case properly appealable direct to the Supreme Court from the circuit or district court.¹⁵ Thus, where the original pleading showed a case involving the constitutionality of a State law under the Federal Constitution or other question of the type requiring an appeal of the whole case directly from the trial court to the Supreme Court,¹⁶ the circuit court of appeals cannot entertain an appeal,¹⁷ even although the original pleading also averred diverse citizenship.¹⁸

[ggg] — where a jurisdictional question arises.

If a question of the trial courts jurisdiction is involved, § 5 of the act of 1891 provides for certifying it directly to the Supreme Court for decision,¹ although the party has a right to elect² an appeal to the circuit court of appeals on the whole case if otherwise within § 6, supra.³ But where the trial court dismisses for want of jurisdiction, the jurisdictional question will generally be the only question in the case, and in that event and in any other case, where only the jurisdictional question exists,⁴ it is held that

¹³I e., a question of construction but not of constitutionality in which appeal must be direct to the Supreme Court (ante, § 42, § 39(c1); Florida, etc. R. R. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

¹⁴Colorado, etc. M. Co. v. Turek, 150 U. S. 142, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Union P. Ry. v. Harris, 158 U. S. 327, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; Florida, etc. Ry. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Borgmeyer v. Idler, 159 U. S. 413, 40 L. ed. 199, 16 Sup. Ct. Rep. 34.

¹⁵Ante, § 42.

¹⁶Ante, § 42.

¹⁷Indianapolis v. Trust Co. 83 Fed. 529, 27 C. C. A. 580; Hubinger Co. v. Quincy, etc. Co. 98 Fed. 897, 39 C. C. A. 336; Union & P. Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; Holt v. Indiana Mfg. Co. 80 Fed. 1, 25 C. C. A. 301; Wright v. MacFarlane, 122 Fed. 773, 58 C. C. A. 570, and cases cited; St. Clair Co. v. Interstate S. & C. T. Co. 110 Fed. 785, 49 C. C. A. 169; Barr v. New Burnswick, 72 Fed. 689, 19 C. C. A. 71; Owensboro v. Owensboro W. Works, 115 Fed. 318, 53 C. C. A. 146; Seattle v. Thompson, 114 Fed. 96, 52 C. C. A. 44. Some of the courts have been led into error on

this point by statements in Carter v. Roberts, 177 U. S. 496, 500, 44 L. ed. 863, 20 Sup. Ct. Rep. 113, apparently declaring that the court of appeals has a discretion to entertain such cases: United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299; Pike P. P. Co. v. Colorado Springs, 105 Fed. 7, 44 C. C. A. 333. But the Carter case is explained and qualified in American S. R. Co. v. New Orleans, 181 U. S. 282, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

¹⁸Penn Mut. L. I. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

¹Ante, § 42.

²Ante, § 42.(d)

³If there are other questions the appeal may be to the circuit court of appeals: Texas & P. R. R. v. Bloom, 60 Fed. 979, 9 C. C. A. 300; United States Freehold, etc. Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470; Beck & P. L. Co. v. Wacker, 76 Fed. 10, 22 C. C. A. 11; Board of Councilmen v. Deposit Bank, 124 Fed. 21, 59 C. C. A. 538; even though the other questions are not properly preserved by exception: Reliable, etc. Co. v. Stahl, 105 Fed. 663, 44 C. C. A. 657.

⁴The Alliance, 70 Fed. 273, 17 C. C. A. 124; The Annie Faxon, 87 Fed. 963, 31 C. C. A. 325; Manufacturing Co. v. Barber, 60 Fed. 465, 9 C. C.

the party cannot go to the circuit court of appeals, but must take the question directly to the Supreme Court.⁵ Nor would the circuit court of appeals be the proper tribunal to mandamus the circuit court to take jurisdiction.⁶ It has been held in the second circuit that the circuit court of appeals will not consider the jurisdictional question when presented with other questions on the merits.⁷

[gggg]—where Federal question arises during progress of cause.

Where a Constitutional question arises during the trial,¹⁰ or by supplemental pleading,¹¹ and is not set up in the original pleading, which shows only diverse citizenship, such a case is deemed one in which originally the jurisdiction depended entirely upon citizenship. If the party takes such a case to the circuit court of appeals its judgment is final and not appealable; nor can he afterwards take a direct appeal on such Federal question arising during the trial to the Supreme Court, although § 5 of the act¹² would have so permitted in the first instance.¹³ It is a case for election of remedies.¹⁴ The circuit court of appeals cannot decline to entertain an appeal where jurisdiction originally depended entirely upon diverse citizenship, because a constitutional question arose and became controlling in the case, such for instance as the validity of a State law under the Federal Constitution.¹⁵ It is not sufficient that a constitutional question might have arisen if not in fact raised.¹⁶

A. 79; *United States v. Sutton*, 47 Fed. 129, 2 C. C. A. 115.

⁵*Cabot v. McMaster*, 65 Fed. 533, 13 C. C. A. 39; *Excelsior W. P. Co. v. Pacific B. Co.* 109 Fed. 497, 48 C. C. A. 349; *Dudley v. Board*, 103 Fed. 209, 43 C. C. A. 184; *Hays v. Richardson*, 121 Fed. 536, 57 C. C. A. 598; *Evans, etc. Co. v. McCaskill*, 101 Fed. 658, 41 C. C. A. 577; *In re Aspinwall's Estate*, 90 Fed. 675, 33 C. C. A. 217; *United States v. Sutton*, 47 Fed. 129, 2 C. C. A. 115; *Halpin v. Amerman*, 138 Fed. 548, 70 C. C. A. 462; *St. Louis C. C. Co. v. American L. Co.* 125 Fed. 196, 60 C. C. A. 80.

⁶*United States v. Swan*, 65 Fed. 647, 13 C. C. A. 77; *United States v. Severens*, 71 Fed. 768, 18 C. C. A. 314.

⁷*United States v. Lee Yen Tai*, 113 Fed. 465, 51 C. C. A. 299; *Sun P. & P. Co. v. Edwards*, 121 Fed. 826, 58 C. C. A. 162; *Fisheries Co. v. Lennen*, 130 Fed. 534, 65 C. C. A. 79. But see contra ante, § 42[d] and cases cited. And see *American S. R. Co. v. New Orleans*, 181 U. S. 282, 45 L. ed. 859, 21 Sup. Ct. Rep. 646, which explains *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861,

20 Sup. Ct. Rep. 713, relied on by the judges of the second circuit. See also contra: *Rust v. United W. Co.* 70 Fed. 129, 17 C. C. A. 16; *Baltimore & O. R. R. v. Meyers*, 62 Fed. 367, 10 C. C. A. 485; *The Presto*, 93 Fed. 522, 35 C. C. A. 394; *Coler v. Grainger Co.* 74 Fed. 16, 20 C. C. A. 267.

¹⁰Ex parte *Jones*, 164 U. S. 693, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *American S. R. Co. v. New Orleans*, 181 U. S. 286, 45 L. ed. 861, 21 Sup. Ct. Rep. 646; *Watkins v. King*, 118 Fed. 524, 55 C. C. A. 390.

¹¹*Third St. Ry. v. Lewis*, 173 U. S. 460, 43 L. ed. 766, 19 Sup. Ct. Rep. 451.

¹²See ante, § 42.

¹³*Cary Mfg. Co. v. Acme, etc. Co.* 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211. See also cases cited ante, § 38.[c]

¹⁴Ante, § 42,[d]-[dd]

¹⁵*American S. R. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Columbia T. T. v. Loeb*, 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Keyser v. Lowell*, 117 Fed. 400, 24 C. C. A. 574.

¹⁶*World's C. Exp. v. United States*, 56 Fed. 654, 6 C. C. A. 58.

[h] Cases arising under the patent laws.

The question when a case is deemed to arise under the patent laws has already been considered as it is one of the classes of cases in which Federal jurisdiction is made exclusive.¹⁸ A suit by the United States to cancel a patent for an invention is not a case arising under the patent laws, made final in the circuit court of appeals.¹⁹ Neither is a suit to enjoin the collection of a State tax on the value of patent rights.²⁰

[i] Cases arising under the revenue laws.

The act of 1890 providing for appeals to the Supreme Court from decisions of the board of general appraisers is superseded pro tanto by this clause, which has the effect of making such cases appealable to the circuit court of appeals¹ and not to the Supreme Court.² The judgment of the circuit court of appeals are now final in cases arising under the revenue laws.³

[j] Cases arising under criminal laws.

Since 1897, the only criminal cases appealable direct from the trial to the Supreme Court, are capital cases,⁵ unless of course, a treaty or constitutional question is involved conferring a right of direct appeal under § 5 of that act of 1891.⁶ A writ of scire facias upon a forfeited recognizance to secure the appearance of a person to answer to a charge of embezzlement in a case arising under criminal laws.⁷ Proceedings in a criminal case are not reviewable until after final judgment.⁸

[jj] — habeas corpus and contempt proceedings.

By the act of 1891 the circuit court of appeals has succeeded to the appellate jurisdiction in habeas corpus formerly exercised by the circuit court under R. S. § 763.¹⁰ It has no original habeas corpus jurisdiction.¹¹ But if a habeas corpus case presents a treaty or constitutional question of the type appealable direct from the trial to the Supreme Court,¹² appeal should be to that court rather than the circuit court of appeals.¹³ And if properly appealable to the circuit court of appeals it is not again appealable to the Supreme Court.¹⁴

¹⁸Ante, § 15.[k]

¹⁹United States v. American Bell Tel. Co. 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69.

²⁰Holt v. Indiana Mfg. Co. 80 Fed. 25, 25 C. C. A. 301.

¹Post, § 79.

²Anglo-Californian Bank v. United States, 175 U. S. 39, 44 L. ed. 65, 20 Sup. Ct. Rep. 20.

³Hubbard v. Soby, 146 U. S. 56, 36 L. ed. 886, 13 Sup. Ct. Rep. 13.

⁵Ante, § 42.[f] Good Shot v. United States, 104 Fed. 257, 43 C. C. A. 525.

⁶Ante, § 42. Motes v. United States, 178 U. S. 466, 44 L. ed. 1153, Fed. Proc.—19.

20 Sup. Ct. Rep. 993; Davis v. Burke, 97 Fed. 501, 38 C. C. A. 299.

⁷Hunt v. United States, 166 U. S. 41 L. ed. 1063, 17 Sup. Ct. Rep. 609. 424, 41 L. ed. 1063, 17 Sup. Ct. Rep. 609.

⁸Whitworth v. United States, 114 Fed. 302, 52 C. C. A. 214.

¹⁰United States v. Fowkes, 53 Fed. 13, 3 C. C. A. 394.

¹¹Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584.

¹²Ante, § 42.

¹³Davis v. Burke, 97 Fed. 501, 38 C. C. A. 299.

¹⁴Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 344, 12 Sup. Ct. Rep. 517.

A contempt proceeding is sui generis, though closely akin to a criminal proceeding.¹⁵ The Supreme Court has in many cases denied its own jurisdiction to review a contempt proceeding in an inferior court upon appeal or error.¹⁶ But it has recently sustained the jurisdiction of the circuit court of appeals to review contempt proceedings in the circuit court, under its power to review criminal cases.¹⁷ And where the contempt is by one not a party to the suit below, writ of error will lie from the interlocutory order in contempt regardless of final judgment in the case in which the adjudication of contempt occurred.¹⁸ Conflicting views have been expressed as to whether a contempt by a party to the suit is reviewable prior to final judgment in the cause.¹⁹

[k] Admiralty cases.

A suit to limit the liability of shipowners is deemed an admiralty case, final in the circuit court of appeals.¹

[l] Further appeal in other cases if exceeding one thousand dollars.

This clause of § 6 of the act of 1891 is considered in the chapter dealing with the Supreme Court's jurisdiction.³ The effect of a provision measuring a right of appeal by a value in dispute is also considered elsewhere.⁴ By requiring a value in dispute exceeding one thousand dollars, cases involving less and cases not susceptible of pecuniary estimate, are necessarily made final in the circuit court of appeals.

§ 78. Appeal from interlocutory receivership or injunction orders or decrees.

Where, upon a hearing in equity^[a] in a district or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree,^[b] in any cause^[c] an appeal may be taken^[d] from

¹⁵O'Neal v. United States, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776. ¹⁶Grimiss, 112 Fed. 377, 50 C. C. A. 291.

¹⁷See In re Chetwood, 165 U. S. 462, 41 L. ed. 788, 17 Sup. Ct. Rep. 392; O'Neal v. United States, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776; Besette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665. ¹⁸Besette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665. ¹⁹See Christensen E. Co. v. Westinghouse A. B. Co. 129 Fed. 96, 63 C. C. A. 598; Bullock E. & M. Co. v. Westinghouse E. & M. Co. 129 Fed. 105, 63 C. C. A. 607.

¹Oregon R. R. Co. v. Balfour, 179 U. S. 56, 45 L. ed. 84, 21 Sup. Ct. Rep. 28. ³Ante, § 39. ⁴Ante, § 45, [c] § 48. [c]

Butler v. Fayerweather, 91 Fed. 458, 33 C. C. A. 625; Flower v. Mac-

such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the circuit court of appeals.

Part of § 7 of act Mar. 3, 1891, 26 Stat. 828, as amended Apr. 14, 1906, c. 1627, 34 Stat. 116.

[a] History of section and cross-references.

The section also provides that such appeals must be within thirty days,⁷ and regulates the matter of bond and supersedeas⁸ and gives such cases precedence.⁹ As originally enacted this section allowed appeal merely from interlocutory orders granting or continuing injunctions, and confined the rights to cases finally appealable to the circuit court of appeals. An amendment in 1895¹⁰ enlarged the provision so as to permit appeal also from an order refusing, dissolving or refusing to dissolve an injunction. In 1900¹¹ the enlargement of the right of appeal introduced by the act of 1895 was withdrawn, but interlocutory receivership orders were for the first time made appealable. In 1906 the clause restricting the right to causes "in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals," was stricken out.

[b] Construction and application.

Since the amendment of 1900, an order refusing an injunction is not appealable.¹² An order refusing to dissolve an injunction has been held not an order continuing an injunction within the meaning of the present law, and hence not appealable;¹⁴ although an order refusing to dissolve and ordering the injunction continued to final hearing has been declared appealable;¹⁵ as also an order continuing an injunction vacated temporarily during the hearing.¹⁶ An order awarding permanent injunction in infringement suit and reference to master to find damages is appealable as interlocutory.¹⁷ The successful party can defeat a right to such interlocutory appeal by waiving his injunction until final decree. Prior to the

⁷Post, § 1906.

⁸Post, §§ 2020, 2021.

⁹Post, § 2056.

¹⁰Act Feb. 18, 1895, c. 96, 28 Stat. 666.

¹¹Act June 6, 1900, c. 803, 31 Stat. 660. This act amended § 7 of the act of 1891, without referring to the act of 1895, but it was held effectual to supersede the amendment of 1895: *Rowan v. Ide*, 107 Fed. 161, 46 C. C. A. 214; *Columbia W. Co. v. Boyce*, 104 Fed. 172, 44 C. C. A. 588; *Heinze v. Butte & B. Co.* 107 Fed. 165, 46 C. C. A. 219.

¹²*March v. Romare*, 116 Fed. 354, 53 C. C. A. 574; *Columbia W. Co. v. Boyce*, 104 Fed. 172, 44 C. C. A. 588; *American S. F. Co. v. Vaught*, 108 Fed. 571, 47 C. C. A. 496; *Berliner*

G. Co. v. Seaman, 113 Fed. 750, 51 C. C. A. 440.

¹⁴*Rowan v. Ide*, 107 Fed. 161, 46 C. C. A. 214; *Heinze v. Butte & B. etc. Co.* 107 Fed. 165, 46 C. C. A. 219; *Dreutzer v. Frankfort L. Co.* 65 Fed. 642, 13 C. C. A. 73.

¹⁵*Berliner G. Co. v. Seaman*, 108 Fed. 714, 47 C. C. A. 630.

¹⁶*Armat M. P. Co. v. Edison M. Co.* 125 Fed. 939, 60 C. C. A. 380.

¹⁷*Starr B. Works v. General E. Co.* 129 Fed. 102, 63 C. C. A. 604; *Lockwood v. Wickes*, 75 Fed. 118, 21 C. C. A. 257; *Richmond v. Atwood*, 52 Fed. 10, 2 C. C. A. 596, 17 L.R.A. 615. The successful party can defeat a right to such interlocutory appeal by waiving his injunction until final decree.

present amendment making receivership orders appealable it was held that the mandatory orders frequently issued upon appointment of a receiver, commanding persons to surrender property to him or refrain from disturbing his possession, or suspending the operation of previous orders made in the cause, were not technically injunctions and hence not appealable;¹⁸ though of course technical injunctions are often issued at such a time.¹⁹ But under the present provisions an order appointing a receiver "upon a hearing in equity" is appealable; though there is a difference of opinion as to whether an *ex parte* hearing at the filing of a bill²⁰ will suffice or an adversary hearing on a motion to discharge is necessary.¹ The phrase "upon a hearing in equity" when applied to injunctions would seem intended to forbid appeal from the temporary restraining order often issued upon the filing of a bill.² Appeal has, however, been allowed from a preliminary injunction made on a *prima facie* showing;³ and it has been said that the words "interlocutory order or decree" are used in their broadest sense and confer a right to appeal from an injunction order at any stage of the case.⁴ An order dissolving a temporary restraining order is not appealable.⁵ An order denying a rehearing is not an interlocutory injunction order.⁶ An order punishing one not party to a suit for violating the injunction issued therein, is not within this section.⁷

[c] Case need not now be one appealable to the circuit court of appeals.

Prior to 1906 appeal only lay if the case was one appealable to the circuit court of appeals after final decision.⁸ Under the earlier wording, the courts held that if jurisdiction in the circuit court rested upon the fact that the constitutionality of an ordinance or the application of the Constitution was involved, an interlocutory injunction order was not appealable.⁹ They further held that the existence of a jurisdictional question would not prevent appeal of interlocutory injunction orders;¹⁰ nor the fact that a

¹⁸ *Highland Av. & B. R. Co. v. Works*, 61 Fed. 782, 10 C. C. A. 60. *Columbia E. Co.* 168 U. S. 628, 42 L. ed. 606, 18 Sup. Ct. Rep. 240; *Jack v. State*, 102 Fed. 210, 42 C. C. A. 267. Contra see *Pennsylvania Co. v. Jacksonville, etc. Ry.* 55 Fed. 131, 5 C. C. A. 53.

¹⁹ *Smith v. Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; *In re Tampa S. R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; *Lake Nat. Bank v. Savings Bank*, 78 Fed. 517, 24 C. C. A. 195; *Texas, etc. Co. v. Storrow*, 92 Fed. 5, 34 C. C. A. 182.

²⁰ *Joseph D. G. Co. v. Hecht*, 120 Fed. 760, 57 C. C. A. 64.

¹ *Pacific N. P. Co. v. Allen*, 109 Fed. 515, 48 C. C. A. 521.

² See *Joseph D. G. Co. v. Hecht*, 120 Fed. 760, 57 C. C. A. 64.

³ *Andrews v. National P. & F. Bank*, 78 Fed. 517, 24 C. C. A. 195.

Works, 61 Fed. 782, 10 C. C. A. 60. Presumably this was after an adversary hearing.

⁴ *Richmond v. Atwood*, 52 Fed. 22, 17 L.R.A. 615, 2 C. C. A. 596.

⁵ *Denver & R. G. R. R. v. Walker*, 68 Fed. 23, 15 C. C. A. 188.

⁶ *Boston & A. R. R. v. Pullman's P. Co.* 51 Fed. 305, 2 C. C. A. 172.

⁷ *Bessette v. Conkey*, 133 Fed. 165, 66 C. C. A. 291.

⁸ See *supra*, note. [a]

⁹ *Illinois C. R. R. v. Adams*, 93 Fed. 852, 35 C. C. A. 635; *Dawson v. Columbia Av. etc. Co.* 102 Fed. 200, 42 C. C. A. 258; *Macon v. Georgia P. Co.* 60 Fed. 781, 9 C. C. A. 262.

¹⁰ *In re Tampa S. R. R.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; *Lake Nat. Bank v. Savings*

constitutional question was raised later in the cause, where originally jurisdiction rested on diverse citizenship.¹¹

[d] Scope of review and disposition of cause.

The merits will generally not be investigated, and the order of the court below will be affirmed unless an abuse of legal discretion is shown;¹² or violation of the rules of equity controlling the exercise of a court's discretion.¹⁴ The fact that an injunction is granted in one and refused in another case very similar, does not necessarily indicate abuse of discretion.¹⁵ If, however, the court below did not give relief sufficiently broad, the appellate court will do so.¹⁶ The court may determine the case on its merits and dismiss where a want of equity is apparent,¹⁷ or a final determination is possible.¹⁸ The whole of the interlocutory decree is reviewable and not merely the injunction part.¹⁹ A harmless order dissolving an injunction will not be reviewed in order to decide a question of jurisdiction.²⁰ On appeal from interlocutory injunction granted in a patent infringement suit, complainant cannot by cross appeal obtain review of so much of the order as dismissed the bill as to parts of patent found invalid.¹ The order fixing the appeal bond is not reviewable.²

§ 79. Appeals from circuit court decisions reviewing revenue decisions of the board of general appraisers.

[The circuit court having heard and determined an appeal from the decision of the board of general appraisers as to the classification of merchandise under the revenue laws and the rate of duty thereon]⁵ the decision of such court shall be final . . . unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States [since 1891, by the circuit court of ap-

¹¹Staffords v. King, 90 Fed. 136, 32 C. C. A. 536. See ante, § 77.¹⁸

¹³Wright v. MacFarlane, 122 Fed. 775, 58 C. C. A. 570; Bissell C. S. Co. v. Goshen S. Co. 72 Fed. 545, 19 C. C. A. 25; Murray v. Bender, 109 Fed. 585, 48 C. C. A. 555; Railroad Comrs v. Rosenbaum Co. 130 Fed. 110, 64 C. C. A. 444.

¹⁴Lehman v. Graham, 135 Fed. 39, 67 C. C. A. 513.

¹⁵Societe Anon. v. Allan, 90 Fed. 815, 33 C. C. A. 282.

¹⁶Charles E. Hires Co. v. Consumers' Co. 100 Fed. 809, 41 C. C. A. 71.

¹⁷Berliner G. Co. v. Seaman, 110 Fed. 30, 49 C. C. A. 99; In re Tampa S. R. R. 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177.

¹⁸Knoxville v. Africa, 77 Fed. 501, 23 C. C. A. 252.

¹⁹Smith v. Vulcan I. Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; United States R. Co. v. American O. L. Co. 82 Fed. 248, 27 C. C. A. 118. But see Lake Nat. Bank v. Savings Bank, 78 Fed. 517, 24 C. C. A. 195.

²⁰Lake St. El. R. R. v. Farmers' L. & T. Co. 77 Fed. 769, 23 C. C. A. 448.

¹Ex parte National, etc. Co. 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404.

²Crown, etc. Co. v. Standard S. Co. 136 Fed. 841, 69 C. C. A. 200.

⁵See post, § 140.

peals] in which case said circuit court, or the judge making the decision may, within thirty days thereafter, allow an appeal to said Supreme Court [since 1891, to the circuit court of appeals]; but an appeal shall be allowed on the part of the United States whenever the Attorney General shall apply for it within thirty days after the rendition of such decision. . . . Said Supreme Court [since 1891, the circuit court of appeals] shall have jurisdiction and power to review such decision and shall give priority to such cases, and may affirm, modify, or reverse such decision of such circuit court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

The foregoing is from an act of 1890, passed to facilitate the collection of revenue. The circuit court of appeals act in the following year, made revenue cases appealable to the new tribunal and made its decisions final.⁶ The effect of that law was therefore to substitute a right of appeal to the circuit court of appeals for the appeal to the Supreme Court originally provided.⁷

§ 80. Appeals from appellate court of Indian Territory.

The admission of Indian Territory and Oklahoma as a state of the union has superseded the act of 1905 whereby appeal lay from the court of appeals of the Indian Territory to the circuit court of appeals for the eighth circuit.⁹

Author's section.

Prior to the act of 1905 the matter was governed by an act of 1895,¹⁰ providing that "writs of error and appeals from the final decision of said appellate court [in Indian Territory] shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States." The circuit court of appeals act originally provided for appeals from the United States court in the Indian Territory to the Supreme Court and to the circuit court of appeals in the same manner as from Federal circuit or district courts.¹¹ But in 1895 an appellate court was created in Indian Territory, having jurisdiction over all

⁶ Ante, § 77.[U]

⁷ Anglo-Californian Bank v. United States, 175, U. S. 37, 44 L. ed. 64, 20 Sup. Ct. Rep. 19; Louisville P. W. Co. v. Collector, 49 Fed. 561, 1 C. C. A. 371; United States v. Howell, 51 Fed. 798, 2 C. C. A. 510.

⁹ Act Mar. 3, 1905, c. 1479, § 12, 33 Stat. 1801, U. S. Comp. Stat. 1905, p. 150.

¹⁰ Act Mar. 1, 1895, c. 145, § 11, 23 Stat. 698.

¹¹ Act Mar. 3, 1891, c. 517, § 13, U. S. Comp. Stat. 1901, p. 553.

appeals from the trial court; and the same act provided for appeal from the new appellate court to the circuit court of appeals as specified above. This necessarily superseded the original provision in the act of 1891¹² as to the circuit court of appeals.

§ 81. Appeals from Territorial supreme courts.

The circuit court of appeal, in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

§ 15 of act Mar. 3, 1891, c. 517, 26 Stat. 830, U. S. Comp. Stat. 1901, p. 554.

This general provision as to appeals from the Territories applies now only to Arizona and New Mexico; and the same is true of the general legislation governing appeals from the Territories to the Supreme Court.¹⁴ Separate provisions exist in the case of Alaska,¹⁵ and Hawaii.¹⁶ The legislation governing appeals from Porto Rico does not seem to provide appeal to the circuit court of appeals in any cases.¹⁷ The same is true of the Philippines.¹⁸ By Supreme Court order Utah, Oklahoma and New Mexico have been assigned to the eighth circuit.¹⁹ Alaska and Arizona to the ninth circuit.²⁰ By a later order Hawaii has been assigned to the ninth circuit.¹ The class of cases made final in the circuit court of appeals has already been considered.² A conviction of an infamous crime was formerly appealable to the Supreme Court and not to the circuit court of appeals and at that time such a case could not have been entertained on appeal from the supreme court of a Territory.³ Cases in which jurisdiction depended entirely on diverse citizenship (made final in the circuit court of appeals) could not arise in a Territorial court whose jurisdiction is plenary and

¹²*Gowen v. Bush*, 72 Fed. 299, 18 C. C. A. 572; *Scott v. Hammer*, 72 Fed. 289, 18 C. C. A. 565; *Harless v. United States*, 88 Fed. 97, 31 C. C. A. 397.

¹⁴*Ante*, § 48.

¹⁵*Post*, §§ 82-84.

¹⁶*Post*, § 85.

¹⁷*Ante*, § 55. See *Royal Ins. Cases Co. v. Martin*, 192 U. S. 160, 48 L. ed. 389, 24 Sup. Ct. Rep. 247.

¹⁸*Ante*, § 56.

¹⁹*In re Boles*, 48 Fed. 75, 1 C. C. A. 48; *Aztec M. Co. v. Ripley*, 53 Fed. 7, 3 C. C. A. 388. See 139 U. S. Appendix.

²⁰*Coquitlam v. United States*, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117. But appeal from Alaska is now otherwise provided for, *post*, § 82.

¹*Ex parte Wilders S. S. Co.* 183 U. S. 545, 46 L. ed. 321, 22 Sup. Ct. Rep. 225. But see *post*, § 85.

²*Ante*, § 77.[§1-U]

³*Folsom v. United States*, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222.

never dependent on the character of the parties.⁴ The few cases in which appeal has been attempted have for the most part not come within the terms of the statute conferring jurisdiction.⁵ There is ground for arguing that appeal lies from a Territorial supreme court not only in admiralty, revenue and criminal cases, other than capital, but also in the class of cases appealable from the circuit or district court, which are final in the circuit court of appeals because not involving more than one thousand dollars.⁶ Cases arising under the Federal laws, involving their construction but not their constitutionality, in which the value in dispute was less than one thousand dollars, or else of a nature not susceptible of pecuniary estimate, would be the chief and perhaps the only class of cases in which this right of review from a Territorial supreme court could be claimed. The contention has been denied in the circuit court of appeals, but the case was not of the type appealable and made final on appeal from the circuit or district court, because, while involving less than \$1,000, it did not involve Federal laws at all and hence could never have arisen in a Federal court.⁷ The circuit court of appeals has jurisdiction only over the Territorial supreme and not the district courts.⁸

§ 82. Appeal from District Court of Alaska.

In all other cases [than cases of prize, cases involving the construction or application of the Federal Constitution, or the constitutionality of any Federal law, or drawing in question the validity or construction of a treaty, or in which the constitution or law of a State is claimed to violate the Federal Constitution]⁹ where the amount involved or the value of the subject-matter exceeds five hundred dollars the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders,¹⁰ of the district court [of Alaska].

Part of § 504, Alaska Code, 31 Stat. 414, act June 6, 1900, c. 786.

The act of 1874 no longer controls appeal from Alaska.¹¹ Formerly the circuit court of appeals exercised appellate jurisdiction over the Alaska

⁴Nor do citizens of a Territory possess that citizenship upon which Federal jurisdiction can be based. *Ante*, § 2. [s]

⁵See *Union C. C. Co. v. Champlin*, 116 Fed. 858, 54 C. C. A. 208, and cases cited.

⁶*Ante*, § 77.[1] See *Aztec M. Co. v. Ripley*, 151 U. S. 79, 38 L. ed. 80, 14 Sup. Ct. Rep. 236.

⁷*Badaracco v. Cerf*, 53 Fed. 169, 3 C. C. A. 491.

⁸*In re Boles*, 48 Fed. 75, 1 C. C. A. 48.

⁹Such cases are appealable direct to the Supreme Court. See *ante*, § 52.

¹⁰So in the printed statutes.

¹¹*Shields v. Mongollon Ex. Co.* 137 Fed. 539, 70 C. C. A. 123.

district court under § 15 of the act of 1891.¹² This section requires that suit to recover interest in a mining claim be reviewed by writ of error.¹³

§ 83. — from interlocutory injunction orders of Alaska district court.

An appeal may be taken to the circuit court of appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the district court within sixty days after the entry of such interlocutory order. The proceedings in other respects in the district court [of Alaska] in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court.

§ 507 Alaska code, act June 6, 1900, c. 786, 31 Stat. 415.

This provision is somewhat similar to § 7 of the act of 1891,¹⁴ although it does not require that the injunction order have been made "upon a hearing in equity."¹⁵

§ 84. Decision on appeal from Alaska final.

The judgments of the circuit court of appeals shall be final in all cases coming to it from the district court [of Alaska].

Part of § 505, Alaska code, 31 Stat. 415, act June 6, 1900, c. 786.

But any question upon which the circuit court of appeals desires instruction may be certified to the Supreme Court.¹⁷

§ 85. Appeals from Hawaii district court.

Writs of error and appeals from said district court [in Hawaii] shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error . . . and other matters and proceedings as between the courts of the United States and the courts of the several States shall

¹²Ante, § 81.

¹³Shields v. Mongollon Ex. Co. 137 Fed. 539, 70 C. C. A. 123.

¹⁴Ante, § 78.

¹⁵Lane v. Jordon, 116 Fed. 623, 54

C. C. A. 79

¹⁷See ante, § 53

govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.

Part of § 86, act Apr. 30, 1900, c. 339.

The section governing appeals to the Supreme Court is given elsewhere.¹⁹ The appellate jurisdiction of the circuit court of appeals over the circuit and district courts has already been discussed.²⁰ A case in which the Hawaiian district court's jurisdiction depended upon a constitutional question is not appealable to the circuit court of appeals;¹ but is of the type appealable direct to the Supreme Court.²

§ 86. Appellate jurisdiction in bankruptcy.

The appellate jurisdiction of the circuit court of appeals in bankruptcy is considered elsewhere.³

Author's section.

§ 87. — in trademark cases.

The circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trademarks registered in accordance with the provision of this act, arising under the present act without regard to the amount in controversy.

Part of § 17, act. Feb. 20, 1905, c. 592. 33 Stat. 728, U. S. Comp. Stat. 1905, p. 675.

The first portion of the above section declares the jurisdiction of the circuit court.⁵ Other portions of the act are given in the chapter dealing with procedure in trademark cases.⁶

§ 88. Appeals from United States court in China.

Appeals shall lie from all final judgments or decrees of said court to the United States circuit court of appeals of the ninth judicial circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said circuit court of appeals to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said court of appeals in cases coming from district and circuit courts of the United States. Said appeals or writs of error shall be regulated by the procedure governing appeals within the

¹⁹Ante, § 54.

²⁰Ante, § 77.

¹Wright v. MacFarlane, 122 Fed. 770, 58 C. C. A. 570.

²Ante, § 42.

³Post, § —.

⁵Post, § 162.

⁶Post, § 1177, et seq.

United States from the district courts to the circuit courts of appeal, and from the circuit courts of appeal to the Supreme Court of the United States, respectively, so far as the same shall be applicable; and said courts are hereby empowered to hear and determine appeals and writs of error so taken.

§ 3 of act June 30, 1906, c. 3934, 34 Stat. 815.

CHAPTER 4.

THE CIRCUIT COURT.—ORGANIZATION AND GENERAL POWERS.

- § 100. "Circuit justice" and "circuit judge" defined and distinguished.
- § 101. Allotment of justices to the circuits.
- § 102. Circuit judges.
- § 103. Establishment of circuit courts in the various States.
- § 104. By whom circuit courts are to be held.
- § 105. Justices of Supreme Court to attend once in two years.
- § 106. Judges of circuit courts may sit apart.
- § 107. When Iowa district judges holding circuit court, to sit together.
- § 108. Circuit courts at same time in different districts.
- § 109. Who may hold criminal terms in southern district of New York.
- § 110. Whose opinion prevails where judges divided.
- § 111. Whose opinion prevails where district judge holds circuit court with other judges.
- § 112. Suit transferred to another circuit court in case of disability.
- § 113. When such causes certified back.
- § 114. Justices may hold courts of other circuits on request.
- § 115. —in cases where no justice is allotted to a circuit.
- § 116. When district court matters to be certified into and disposed of in circuit court.
- § 117. District court matters subsequent to certifying order also to be transmitted.
- § 118. Powers of district judge vested, during disability, in circuit judge.
- § 119. Duty of disabled district judge to certify and of circuit judge to take cognizance.
- § 120. Circuit court's jurisdiction of transferred district court matters.

§ 100. "Circuit justice" and "circuit judge" defined and distinguished.

The words "circuit justice" and "justice of a circuit," when used in this Title, [i. e. relating to the judiciary] shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice.

R. S. § 605, U. S. Comp. Stat. 1901, p. 486.

§ 101. Allotment of justices to the circuits.

The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court.

R. S. § 606, U. S. Comp. Stat. 1901, p. 487.

§ 102. Circuit judges.

At present there are four circuit judges in the second, seventh and eighth circuits, and three circuit judges in each of the other seven circuits, excepting the fourth wherein there are now only two. They have the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit.

Author's section.

Revised Statutes, § 607, called for one circuit judge in each circuit. A special act of 1887 provided an additional circuit judge in the second circuit;¹ and the circuit court of appeals act of 1891,² provided for the appointment of an additional circuit judge in each circuit. Later statutes have at various times provided for a third circuit judge in the third, fifth, sixth, seventh, eighth and ninth circuits.³ Acts of 1902 and 1903 provided a fourth circuit judge for the second and eighth circuits;⁴ and acts of 1905 provided an additional circuit judge in the first and seventh circuits.⁵ Provisions as to salary, residence, and expenses of judges are given elsewhere.⁶

§ 103. Establishment of circuit courts in the various States.

The statutes now provide for and there exists a circuit court of the United States in and for each Federal judicial district throughout the several States, whether a State comprise two or more such

¹Act Mar. 3, 1887, 24 Stat. 492.

²Act Mar. 3, 1891, c. , 26 Stat. 826.

³Third circuit by act Feb. 23, 1899, c. 186, 30 Stat. 846. Fifth and sixth circuits by act Jan. 25, 1899, c. 56, 30 Stat. 803. Seventh circuit by act Feb. 8, 1895, c. 59, 28 Stat. 643. Eighth circuit by act July 23, 1894, c. 147, 28 Stat. 115. Ninth circuit by act Feb. 18, 1895, c. 94, 28 Stat. 665.

⁴Second circuit, act Apr. 17, 1902, c. 530, 32 Stat. 106; Eighth circuit, act Jan. 31, 1903, c. 345, 32 Stat. 791.

⁵Act Jan. 21, 1905, c. 51, 33 Stat. 611; Act Mar. 3, 1905, c. 1427, § 1, 33 Stat. 992, U. S. Comp. Stat. 1905, p. 140.

⁶Post, §§ 46, et seq.

districts, or one only. In a few instances separate circuit and district courts are created for the several divisions into which certain districts have been divided.

Author's section.

Formerly there was not always a circuit as well as a district court in each district. At the time of the adoption of the Revised States a circuit court was provided for each district except in Alabama, Arkansas and Mississippi,⁸ in which States there was only one circuit court, although two or more districts. Later statutes have created the additional courts, and repealed R. S. § 655, conferring circuit court powers on certain district courts.⁹ The various statutes which have created two or more divisions in a large number of the Federal judicial districts¹⁰ have usually not created separate circuit and district courts in such divisions, but have merely provided for sessions and terms of those courts as created for the district, in each such division. However in the case of Missouri the statute dividing the two districts, one into two and the other into four divisions, provides "that there shall be, and there are hereby, established a district and circuit court of the United States in each of the several divisions" of the two districts.¹¹ This is an exception to the general policy of Congress.

§ 104. By whom circuit courts are to be held.

Circuit courts shall be held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the said judges sitting together.

R. S. § 609, U. S. Comp. Stat. 1901, p. 494.

This provision was first enacted in 1869.¹² The authority of a district judge holding a circuit court alone under this section, is just as extensive as that of any other judge sitting in the same court.¹⁴ Such judge can issue a writ of injunction just as fully and freely in all respects as when the court is held by the circuit justice or judges or by two justices.¹⁵ Different judges holding the same court should not overrule one another except for most cogent reasons.¹⁶ In some cases there are special provisions for three judges to sit at circuit.^{16½}

⁸R. S. § 608, U. S. Comp. Stat. 1901, p. 489.

⁹Alabama by act June 22, 1874, c. 401, 18 Stat. 195, U. S. Comp. Stat. 1901, p. 490. Arkansas and Mississippi by act Feb. 6, 1889, c. 113, 25 Stat. 655, U. S. Comp. Stat. 1901, p. 492.

¹⁰See post, §§ 257, et seq.

¹¹See act Feb. 28, 1887, c. 271, § 3, 24 Stat. 425, U. S. Comp. Stat. 1901, p. 386. So also the legislation

respecting South Carolina seems to create a district court for each division. See post, § 284.

¹²Act April 10, 1869, c. 22, 16 Stat. 44.

¹⁴McDowell v. Kurtz, 77 Fed. 206. 23 C. C. A. 119.

¹⁵Goodyear, etc. Co. v. Folsom, 3 Fed. 509.

¹⁶Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 Fed. 288.

^{16½}See post, § 1347.

§ 105. Justices of Supreme Court to attend once in two years.

It shall be the duty of the Chief Justice, and of each justice of the Supreme Court, to attend at least one term of the circuit court in each district of the circuit to which he is allotted during every period of two years.

R. S. § 610, U. S. Comp. Stat. 1901, p. 494.

While the above section does not require that the justices shall go to their circuits more than once in two years, its effect is to compel them to do this, there being so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year.¹⁷

§ 106. Judges of circuit courts may sit apart.

Cases may be heard and tried by each of the judges holding a circuit court sitting apart by direction of the presiding justice or judge, who shall designate the business to be done by each.

R. S. § 611, U. S. Comp. Stat. 1901, p. 494.

§ 107. When Iowa district judges holding circuit court, to sit together.

The circuit judge of the eighth judicial circuit may, by order, direct the judges of the said northern and southern districts of Iowa¹ to sit together in holding the circuit court in either of said districts; and when so sitting the judge oldest in commission shall preside, and in case of disagreement between them his opinion shall prevail for the time being: Provided, however, That a certificate of division may be signed by them with like effect as in cases provided by law for certificates of division between a circuit and district judge.

§ 8 act July 20, 1882, c. 312, 22 Stat. 173 U. S. Comp. Stat. 1901, p. 351.

The proviso as to certificate of division is no longer operative, since R. S. §§ 651, 652, to which it refers were superseded by the circuit court of appeals act of 1891.²

§ 108. Circuit courts at same time in different districts.

Circuit courts may be held at the same time in the different districts of the same circuit.

R. S. 612, U. S. Comp. Stat. 1901, p. 494.

¹⁷In re Neagle, 135 U. S. 55, 34 L. ed. 68, 10 Sup. Ct. Rep. 658.

¹See post, § 267.

²U. S. Comp. Stat. 1901, p. 527.

This section was carried into the Revised Statutes from an act of 1869.³ It is of course now usual for courts to be so held.

§ 109. Who may hold criminal terms in southern district of New York.

The terms of the circuit court for the southern district of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the circuit judge of the second judicial court and the district judges for the southern and eastern districts of New York, or any one of said three judges. . . .

Part of R. S. § 613, U. S. Comp. Stat. 1901, p. 494.

The remainder of the above section provides for allowing expenses of a visiting judge of the eastern district.⁴

§ 110. Whose opinion prevails where judges divided.

Whenever, in any civil suit or proceeding in a circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.

R. S. § 650, U. S. Comp. Stat. 1901, p. 527.

The section was first enacted in 1872.⁷ The further provision of R. S. § 652, for certifying such cases to the Supreme Court is superseded by the circuit court of appeals act of 1891.⁸

§ 111. Whose opinion prevails where district judge holds circuit court with other judges.

A district judge sitting in a circuit court shall not give a vote in any case of appeal or error from his own decision. . . . When he holds a circuit court with either of the other judges, the judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge.

Part of R. S. § 614.

The first part of the above and the part omitted deal with the appellate power of the circuit court, and are not in force, since the appellate

³Act Apr. 10, 1869, c. 22, 16 Stat. 44. ⁷Act June 1, 1872, c. 255, 17 Stat. 196.

⁴Post, § 472.

⁸See ante, § 42,[a] § 39.

powers of that court were taken away by the act of 1891.¹⁰ But there is room for arguing that the latter portion of the section is still in force.

§ 112. Suit transferred to another circuit court in case of disability.

When it appears in any civil suit in any circuit court that all of the judges thereof who are competent by law to try said case are in any way interested therein, or have been of counsel for either party, or are so related or connected with either party as to render it, in the opinion of the court, improper for them to sit in such trial, it shall be the duty of the court, on the application of either party, to cause the fact to be entered on the records, and to make an order that an authenticated copy thereof, with all the proceedings in the case, shall be forthwith certified to the most convenient circuit court in the next adjoining State or in the next adjoining circuit; and said court shall, upon the filing of such record and order with its clerk, take cognizance of and proceed to hear and determine the case, in the same manner as if it had been rightfully and originally commenced therein; and the proper process for the due execution of the judgment or decree rendered in the cause shall run into and may be executed in the district where such judgment or decree was rendered, and also into the district from which the cause was removed.

R. S. § 615, U. S. Comp. Stat. 1901, p. 495.

By the provisions of R. S. §§ 591-595,¹¹ another district judge may be designated to perform the duties of a disabled district judge in both the district and circuit courts. Disqualification is not established by an unverified petition filed in a cause alleging that the judge's wife had bought an interest in the land in controversy.¹² The fact that a judge is one of the parties in a collision suit does not disqualify him from hearing and determining a suit to fix the liabilities of sureties on an appeal bond in the former suit.¹³ Nor does the fact that a judge is a creditor of a bankrupt, disqualify him from reviewing an order in the bankruptcy proceedings, where he has sold his claim and received compensation therefor.¹⁴ Upon a proper case arising under the section, a motion to remove should be made by one of the parties, and the order of removal may be made by the disqualified judge.¹⁵

The "most convenient court" is that court which is competent to act,

¹⁰See § 70.

¹¹Post, § 172 et seq.

¹²McGuire v. Blount, 199 U. S. 142, 50 L. ed. 125, 26 Sup. Ct. Rep. 1.

¹³The Richmond, 9 Fed. 863.

Fed. Proc.—20.

¹⁴In re Sime, 2 Sawy. 320, Fed. Cas. No. 12,860.

¹⁵The Richmond, 9 Fed. 863. See also Spencer v. Lapsley, 20 How. 266, 15 L. ed. 904.

and nearest to the subject of the controversy, the witnesses, the parties, and the court whence the removal is to take place;¹⁶ and upon the transfer it is the duty of that court to take cognizance of the suit and try it as if originally brought there.¹⁷ It has all the powers necessary to carry the litigation into a judgment or decree, and hence may issue a subpoena to the marshal of the district in another State from which the case was transferred.¹⁸

§ 113. When such causes certified back.

The circuit justice, or the circuit judge of any circuit, may order any civil cause, which is certified into any court of the circuit under the provisions of the preceding section, to be certified back to the court whence it came; and then the latter shall proceed therein as if the cause had not been certified from it: *Provided*, That if, for any reason, it shall be improper for the judges of such court to try the cause so certified back, it shall be tried by some other judge holding such court, pursuant to the provisions of the next section.

R. S. § 616, U. S. Comp. Stat. 1901, p. 495.

§ 114. Justices may hold courts of other circuits on request.

Whenever a circuit justice deems it advisable on account of his disability or absence, or of his having been of counsel, or being interested in any case pending in the circuit court for any district in his circuit or of the accumulation of business therein, or for any other cause, that said court shall be held by the justice of any other circuit, he may, in writing, request the justice of any other circuit to hold the same, during a time to be named in the request; and such request shall be entered upon the journal of the circuit court so to be holden. Thereupon it shall be lawful for the justice so requested to hold such court, and to exercise within and for said district, during the time named in said request, all the powers of the justice of such circuit.

R. S. § 617, U. S. Comp. Stat. 1901, p. 495.

§ 115. — in cases where no justice is allotted to a circuit.

Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice of the Supreme Court may make a

¹⁶Richardson v. Boston, 1 Curt. 250, Fed. Cas. No. 11,780.

¹⁷See Lee County v. Rogers, 7 Wall. 181, 19 L. ed. 160.

¹⁸May v. Le Claire, 18 Fed. 49.

request as provided in the preceding section, which shall have effect in like manner until a justice is allotted to such circuit.

R. S. § 618, U. S. Comp. Stat. 1901, p. 496.

This and the previous section were carried into the Revised Statutes from an act of 1863.¹

§ 116. When district court matters to be certified into and disposed of in circuit court.

When satisfactory evidence is shown to the circuit judge of any circuit, or, in his absence, to the circuit justice allotted to the circuit, that the judge of any district therein is disabled to hold a district court, and to perform the duties of his office, and an application accordingly is made in writing to such circuit judge or justice, by the district attorney or marshal of the district, the said judge or justice, as the case may be, may issue his order in the nature of a certiorari, directed to the clerk of such district court, requiring him forthwith to certify into the next circuit court to be held in said district all suits and processes, civil and criminal, depending in said district court, and undetermined, with all the proceedings thereon, and all the files and papers relating thereto. Said order shall be immediately published in one or more newspapers printed in said district, at least thirty days before the session of such circuit court, and shall be sufficient notification to all concerned; and thereupon the circuit court shall proceed to hear and determine the suits and processes so certified. And all bonds and recognizances taken for, or returnable to, such district court, shall be held to be taken for, and returnable to, said circuit court, and shall have the same effect therein as they could have had in the district court to which they were taken.

R. S. § 587, U. S. Comp. Stat. 1901, p. 479.

By the provisions of R. S. §§ 591-595² another district judge may be designated to perform the duties of a disabled district judge in both the district and circuit courts.

§ 117. District court matters subsequent to certifying order also to be transmitted.

When an order has been made as provided in the preceding section, the clerk of the district court shall continue, during the

¹Act Mar. 3, 1863, c. 93, 12 Stat. 768. ²Post, § 172 et seq.

disability of the district judge, to certify, as aforesaid, all suits, pleas, and processes, civil and criminal, thereafter begun in said court, and to transmit them to the circuit court next to be held in that district; and the said court shall proceed to hear and determine them as provided in said section: Provided, That when the disability of the district judge ceases or is removed, the circuit court shall order all such suits and proceedings then pending and undetermined therein, in which the district courts have an exclusive original cognizance, to be remanded, and the clerk of such court shall transmit the same, with all matters relating thereto, to the district court next to be held in that district; and the same proceedings shall then be had in the district court as would have been had if such suits had originated or been continued therein.

R. S. § 588, U. S. Comp. Stat. 1901, p. 479.

This and the following section were carried into the Revised Statutes from an act of 1809.⁴

§ 118. Powers of district judge vested, during disability, in circuit judge.

In the case provided in the two preceding sections the circuit judge, and in his absence the circuit justice, shall have and exercise, during such disability, all the powers of every kind vested by law in such district judge. But this provision does not require them to hold any special court, or court of admiralty, at any other time than that fixed by law for holding the circuit court in said district.

R. S. § 589, U. S. Comp. Stat. 1901, p. 480.

§ 119. Duty of disabled district judge to certify and of circuit judge to take cognizance.

Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next circuit court for the district; and if there be no circuit court therein, to the

⁴Act Mar. 2, 1809, c. 27, 2 Stat. 534-535.

next circuit court in the State; and if there be no circuit court in the State, to the next convenient circuit court in an adjoining State; and the circuit court shall, upon the filing of such record with its clerk, take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein.

R. S. § 601, U. S. Comp. Stat. 1901 ,p. 484.

A district judge who was a resident citizen and taxpayer of a county, was held not to be disqualified by pecuniary interest, from sitting in a case involving the validity of bonds issued by the county.⁶

§ 120. Circuit court's jurisdiction of transferred district court matters.

When any cause, civil or criminal, of whatever nature, is removed into a circuit court, as provided by law, from a district court wherein the same is cognizable, on account of the disability of the judge of such district court, or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or connected with either party to such cause as to render it improper, in his opinion, for him to sit on the trial thereof, such circuit court shall have the same cognizance of such cause, and in like manner, as the said district court might have, or as said circuit court might have if the same had been originally and lawfully commenced therein; and shall proceed to hear and determine the same accordingly.

R. S. § 637, as amended act Feb. 27, 1877, c. 69, 19 Stat. 241, U. S. Comp. Stat. 1901, p. 519.

⁶Wade v. Travis Co. 72 Fed. 985.

CHAPTER 5.

CIRCUIT COURT.—JURISDICTION.

- § 124. Circuit court's jurisdiction under R. S. § 629—suits by United States or officers, and arising under import, revenue and postal laws.
- § 125. —suits for penalties, condemnation of insurrectionary property, slave trade and on debentures.
- § 126. —patent and copyright suits, national banks and suits against Federal officers for acts done under Federal laws.
- § 127. —suits for offices, removal of officers, etc., under civil rights laws.
- § 128. —suits for punishing vessel owners and officers causing death.
- § 129. Jurisdiction over cases arising under Federal Constitution, treaties or laws.
- § 130. Jurisdiction where United States are plaintiffs or petitioners.
- § 131. In cases of diverse citizenship, or land grants from different states.
- § 132. Jurisdiction of crimes and offenses.
- § 133. Removal of causes arising under Federal Constitution, treaties or laws.
- § 134. Removal of causes where United States are parties, diverse citizenship or land grants from different States.
- § 135. Removal of separable controversies.
- § 136. Removal on ground of prejudice or local influence.
- § 137. Removal of causes against persons denied any civil rights, etc.
- § 138. Removal of causes against revenue and registration officers.
- § 139. Concurrent jurisdiction with Court of Claims.
- § 140. Jurisdiction over revenue decisions of general appraisers.
- § 141. Jurisdiction of partition suits where United States are parties.
- § 142. Over proceedings under anti-trust act of 1890.
- § 143. Jurisdiction to enforce injunction in copyright cases.
- § 144. Jurisdiction to prevent combinations restraining import trade.
- § 145. To remove structures obstructing navigation.
- § 146. To mandamus marshals, clerks, etc., to make return of fees.
- § 147. Jurisdiction over suits for penalties under alien immigrant laws.
- § 148. Over suit on defaulting paper contractor's bond.
- § 149. Jurisdiction of suits to determine right to Indian allotments.
- § 150. Circuit and district court's jurisdiction over government condemnation suits.
- § 151.—over damage suits under interstate commerce act.
- § 152.—of mandamus to compel equal facilities to shippers.

- § 153.—under alien immigrant laws.
- § 154.—of suits for unlawful occupancy of public lands.
- § 155.—over crimes in Indian reservations in South Dakota.
- § 156.—over alien enemies.
- § 157.—over offenses committed upon the great lakes.
- § 158.—to enforce awards of foreign consuls.
- § 159. Jurisdiction to mandamus Union Pacific R. R.
- § 160. Removal of suits by aliens against Federal officers.
- § 161.—over creditors' bills affecting national banks.
- § 162.—of suits respecting trade marks.

§ 124. Circuit court's jurisdiction under R. S. § 629—suits by United States or officers, and arising under import, revenue, and postal laws.

The circuit courts shall have original jurisdiction; . . . Second. Of all suits in equity where the matter in dispute, exceeds the sum or value of five hundred dollars, and the United States are petitioners.^[a] Third. Of all suits at common law where the United States, or any officer thereof suing under the authority of any act of Congress, are plaintiffs.^[b] Fourth. Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty or maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue and of all causes arising under the postal laws.^[c]

Pars. 2, 3 and 4 of R. S. § 629, U. S. Comp. Stat. 1901, p. 503.

[a] In general—equity suits by United States.

In construing the provisions of R. S. § 629, of which the above section is a part, and the subsequent act of 1875 as amended and corrected in 1887-1888, the Supreme Court has held that the latter provision was not intended to interfere with prior statutes conferring jurisdiction on the circuit and district courts in special cases and over particular subjects, nor to divide the jurisdiction vested exclusively in the district courts.¹ The same construction was placed on the original act of 1875.² The equity jurisdiction of suits by the United States as set forth in the second paragraph above, is apparently superseded by the subsequent act of 1875 as amended in 1887-1888, which gives the circuit court jurisdiction of all suits in equity in which the United States are petitioners regardless of the amount in

¹In *re Hohorst*, 150 U. S. 653, 37 S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. L. ed. 1211, 14 Sup. Ct. Rep. 221. 304; *Idem*, 11 Fed. 476; *Price v. Ab-*

²*United States v. Mooney*, 116 U. S. 607, 17 Fed. 508.

controversy.³ Under the above provision it was held that the circuit court had jurisdiction of a creditor's bill brought by the United States.⁴

[b] Common law suits by United States or officers thereof.

The district courts are also given jurisdiction of common law suits by the United States "or by any officer thereof authorized by law to sue."⁵ The right of United States to bring a common law suit in the circuit court is given also by the act of 1875 as amended.⁶ Under this provision the circuit courts have jurisdiction over suits by the postmaster general upon official bonds of postmasters.⁷ A receiver of a national bank is a United States officer within the meaning of the provision⁸ as is also an agent of a national bank who has displaced a receiver.⁹ But the provision does not apply to a suit against a receiver.¹⁰

[c] Suits under import, internal revenue and postal laws.

By the fourth paragraph of R. S. § 629, above set forth, the circuit courts have jurisdiction of all suits at law or equity arising under any act providing for a revenue from imports or tonnage, irrespective of the amount involved. The provision evidently includes all actions against customs officers acting under color of their office.¹² Hence it would include an action against a collector to recover back duties assessed upon non-importable property.¹³ The provision gives jurisdiction also over suits arising under statutes providing for internal revenue.¹⁴ A suit against the heirs and executors of an internal revenue collector to recover taxes illegally collected is within the provision.¹⁵ But an allegation in a complaint that plaintiffs claim title through a certain revenue law is not sufficient to give the circuit court jurisdiction where the plaintiffs' title in that respect is not disputed.¹⁶ The jurisdiction of suits for penalties and forfeitures arising under acts providing for revenue from imports and tonnage is denied the circuit courts by this provision.¹⁷ The district courts have jurisdiction in such cases.¹⁸ But circuit courts have jurisdiction of penalties and forfeitures arising under the internal revenue laws.¹⁹

³Post, § 130.

⁴United States v. Stiner, 8 Blatchf. 544, Fed. Cas. No. 16,404.

⁵Post, § 196.

⁶Post, § 130.

⁷Postmaster General v. Early, 12 Wheat. 136, 6 L. ed. 577.

⁸Scofield v. Palmer, 134 Fed. 753; Brown v. Smith, 88 Fed. 565; see also Gibson v. Peters, 150 U. S. 344, 37 L. ed. 1106, 14 Sup. Ct. Rep. 134; Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; Price v. Abbott, 17 Fed. 508; Rankin v. Herod, 130 Fed. 390. See ante, § 24.

⁹McConville v. Gilmour, 36 Fed. 277, 1 L.R.A. 498.

¹⁰Hallam v. Tillinghast, 75 Fed. 849.

¹²Downes v. Bidwell, 182 U. S. 248, 45 L. ed. 1091, 21 Sup. Ct. Rep. 770.

¹³Idem.

¹⁴Spreckles, etc. Co. v. McClain, 192 U. S. 407, 48 L. ed. 499, 24 Sup. Ct. Rep. 376.

¹⁵Sinking Fund Comm'rs v. Buckner, 48 Fed. 533.

¹⁶Ex parte Smith, 94 U. S. 455, 25 L. ed. 211.

¹⁷Coffey v. United States, 116 U. S. 433, 29 L. ed. 683, 6 Sup. Ct. Rep. 432.

¹⁸See post, § 195.

¹⁹Coffey v. United States, 116 U. S. 427, 29 L. ed. 683, 6 Sup. Ct. Rep. 432.

§ 125. — suits for penalties, condemnation of insurrectionary property, slave trade and on debentures.

The circuit courts shall have original jurisdiction. . . . Fifth. Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels. Sixth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, Title "Insurrection." Seventh. Of all suits arising under any law relating to the slave trade. Eighth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Pars. 5, 6, 7 and 8 of R. S. § 629, U. S. Comp. Stat. 1901, p. 506.

The fifth paragraph of R. S. § 629, was originally enacted in 1855.¹ The venue of suits for penalties and forfeitures is set forth in a following chapter.² The sixth paragraph was carried into the Revised Statutes from an act of 1861.³ In construing that act the Supreme Court held that the circuit court had jurisdiction of proceedings for the condemnation of real estate and property on land as well as maritime prizes.⁴ Paragraph eight set forth above, was originally enacted in 1799.⁵

§ 126. — patent and copyright suits, national banks and suits against Federal officers for acts done under Federal laws.

The circuit courts shall have original jurisdiction: . . . Ninth. Of all suits at law or in equity arising under the patent^[a] or copyright laws^[b] of the United States. Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.^[c] Eleventh. Of all suits brought by any banking association established in the district for which the court is held, under the provisions of Title "The National Banks," to enjoin the Comptroller of the Currency or any receiver acting under his direction, as provided by said title.^[d] Twelfth. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the

¹Act Mar. 3, 1855, c. 213, 10 Stat. 720.

²Post, § 421.

³Act Aug. 6, 1861, c. 60, 12 Stat. 687.

⁴Union Ins. Co. v. United States, 6 Wall. 763, 18 L. ed. 882.

⁵Act Mar. 2, 1799, c. 22, 1 Stat.

United States for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Pars. 9, 10, 11 and 12 of R. S. § 629, U. S. Comp. Stat. 1901, pp. 504, 505.

[a] Suits under patent laws.

The jurisdiction vested in the circuit courts over patent and copyright suits is exclusive of the State courts.⁸ To constitute a suit arising under the patent laws the plaintiff must set up some right, title or interest under those laws, or at least make it appear that some right or interest will be defeated by one construction or sustained by the opposite construction of such laws.⁹ It is held that a suit by a licensee of a patent against a patentee and a third party claiming under subsequent license, for infringement of the patent, in which the bill sets up title under the license, is a suit under the patent laws, although the defense alleges that plaintiff has forfeited his rights by failure to comply with the terms.¹⁰ A suit for injunction and recovery of damages, for infringement of patent arises under the patent laws, although incidentally involving a question as to the ownership of the patent.¹¹

It is well settled, however, that a suit brought to enforce or set aside a contract, though such contract be connected with a patent is not a suit under the patent laws.¹² Thus a bill to enforce the specific execution of a contract respecting the use of the patent is not a case under the patent laws,¹⁴ nor is a bill to recover royalties;¹⁵ nor an action by owner of patent upon an agreement to make and sell certain articles.¹⁶ Where the bill states a contract between the parties which the complainant seeks to have set aside in order to pursue the defendant as an infringer, the suit does not arise under the patent laws.¹⁷ Nor does it so arise on a complaint setting forth the illegal assessment of taxes on patents,¹⁸ or in case of

⁸Ante, § 15.

⁹Pratt v. Paris, etc. Co. 168 U. S. 259, 42 L. ed. 460, 18 Sup. Ct. Rep. 62.

¹⁰Excelsior, etc. Co. v. Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681.

¹¹Atherton, etc. Co. v. Atwood Co. 102 Fed. 949, 43 C. C. A. 72; Harrington v. Atlantic & P. T. Co. 143 Fed. 329.

¹²Excelsior, etc. Co. v. Pacific Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; Pratt v. Paris, etc. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425; Dale, etc. Co. v. Hyatt, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; Walter R. Wood

Mowing, etc. Mach. Co. v. Skinner, 139 U. S. 293, 37 L. ed. 193, 11 Sup. Ct. Rep. 528.

¹⁴Pliable Shoe Co. v. Bryant, 81 Fed. 521; Kurtz v. Strauss, 100 Fed. 800; Brown v. Shannon, 20 How. 55, 15 L. ed. 826. See also Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

¹⁵Albright v. Teas, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550.

¹⁶Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46, 25 L. ed. 683, 8 Sup. Ct. Rep. 756.

¹⁷Atherton, etc. Co. v. Atwood, etc. Co. 102 Fed. 949, 43 C. C. A. 72.

¹⁸Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

suit to enforce judgment against patent rights.¹⁹ Suits arising under the patent and copyright laws are more fully discussed in a previous section.²⁰

[b] Suits under copyright laws.

A suit does not arise under the Federal copyright laws upon a bill alleging the composing of a copyrightable song by the plaintiff and the unlawful obtaining of a copyright by the defendant, there being no allegation of infringement of copyright nor any question as to its scope or legality.¹ But a suit to recover a penalty for infringement of copyright under R. S. § 4965, is one arising under the copyright laws, since it involves both the validity and infringement of the copyright.²

[c] Suits by and against national banks.

Paragraph nine as set forth above was originally enacted in 1864.⁴ Jurisdiction of such suits was also given to the district courts.⁵ By a later act of 1888,⁶ however, national banks are deemed citizens of the State of their location and the circuit and district courts have no other jurisdiction over suits by and against them, than such as they would have in cases between individual citizens of the State. This latter act, however, expressly provides that its provisions shall not affect Federal jurisdiction in cases commenced by the United States or its officers, or in cases for winding up the affairs of such banks. Suits under the first of these exceptions are governed by paragraph three of R. S. § 629;⁷ but suits under the second exception are still apparently governed by the above provision. Whether the Federal jurisdiction in the latter case is exclusive or concurrent with the State courts quære.⁸

[d] Suits to enjoin Comptroller of the Currency.

As originally enacted in 1864¹⁰ the eleventh paragraph set forth above, read "Of all suits brought by or against." The phrase "or against" was stricken out by the later act of 1875.¹¹ The venue of proceedings by national banks to enjoin a comptroller is set forth in a following chapter.¹²

§ 127. — suits for offices and removal of officers, etc., under civil rights laws.

The circuit courts shall have original jurisdiction: . . . Thirteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative or Delegate in Congress, or member of a State legislature, authorized

¹⁹Ryan v. Lee, 10 Fed. 917.

²⁰Ante, § 15.

¹Hoyt v. Bates, 81 Fed. 645.

²Falk v. Curtis Pub. Co. 100 Fed.

77.

⁴Act June 3, 1864, c. 106, § 57, 13 Stat. 116.

⁵Post, § 207.

⁶Ante, § 24.

⁷Ante, § 124.[b] Stephens v. Bernays, 41 Fed. 401.

⁸Lake National Bank v. Wolfeborough, 78 Fed. 519, 24 C. C. A. 195.

¹⁰Act, June 3, 1864, c. 106, 13 Stat. 116.

¹¹Act, Feb. 18, 1875, c. 80, 18 Stat. 318.

¹²Post, § 415.

by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the States. Fourteenth. Of all proceedings by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a State legislature, contrary to the provisions of the third section of the Fourteenth Article of Amendment of the Constitution of the United States. Fifteenth. Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several States. Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. Seventeenth. Of all suits authorized by law to be brought by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Title "Civil Rights." Eighteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Pars. 13, 14, 15, 16, 17 and 18 of R. S. § 629, as amended Feb. 22, 1875, c. 95, § 4, 18 Stat. 333, U. S. Comp. Stat. 1901, pp. 506, 507.

The thirteenth paragraph above set forth was carried into the Revised Statutes from an act of 1870.¹⁴ The jurisdiction conferred by it is limited to those cases where the sole question touching the right to the office arises

¹⁴Act May, 31, 1870, c. 114, 16 Stat. 146.

out of the denial of the right to vote on account of race color or previous condition of servitude.¹⁵ Hence it does not include a case in which the plaintiff has been ejected from an office to which he has been legally elected.¹⁶ Jurisdiction over quo warranto suits against office holders contrary to the Fourteenth Amendment given to the circuit court by paragraph fourteen, above is given also to the district courts.¹⁷ District courts have jurisdiction similar to that conferred by the sixteenth paragraph set forth above.¹⁸ That paragraph was not expressly re-enacted by the act of 1875 as amended, but cases hereunder are evidently suits of a civil nature arising under the Constitution and laws of the United States, within the meaning of the first section of that act.²⁰ The paragraph refers to civil rights only.¹ It does not apply to a case where a common carrier refuses to transport goods, although the defense is that a State statute makes the transportation of such goods a penal offense.² But where under a State law a corporation of another State is not allowed to plead a judgment as a set off in a suit brought against it, such corporation is derived of a constitutional right and the circuit court under this paragraph may afford it appropriate relief.³

§ 128. — suits for punishing vessel owners and officers causing death.

The circuit courts shall have original jurisdiction: . . . Nineteenth. Of all suits and proceedings arising under section fifty-three hundred and forty-four, Title "Crimes," for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed.

Par. 19 of R. S. § 629, U. S. Comp. Stat. 1901, p. 507.

R. S. § 5344,⁴ specifies the circuit court as the tribunal having jurisdiction to enforce its provisions. The twentieth as well as the first paragraph of R. S. § 629, was expressly superseded by the act of 1875.⁵

§ 129. Jurisdiction over cases arising under Federal Constitution, treaties, or laws.

The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature,^{[a]-[b]} at common law or in equity,^[c] where

¹⁵Johnson v. Jumel, 3 Woods, 69, Fed. Cas. No. 7,392.

¹⁶Idem.

¹⁷Post, § 206.

¹⁸Post, § 204.

²⁰Post, § 129; California Oil Co. v. Miller, 96 Fed. 22.

¹Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

²Bowman v. Chicago, etc. R. Co. 115 U. S. 611, 29 L. ed. 502, 6 Sup. Ct. Rep. 192.

³Anglo-American, etc. Co. v. Davis, etc. Co. 105 Fed. 537.

⁴As amended 1905, see U. S. Comp. Stat. 1905, p. 721.

⁵Act Mar. 3, 1875, c. 137, § 10, U. S. Comp. Stat. 1901, p. 514.

the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars,^{[d]-[e]} and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority.^{[h]-[n]}

Part of § 1 act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, and corrected Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 508.

[a] Circuit court jurisdiction in general.

The amendment of 1887, 1888, so far as affecting the foregoing consisted in substituting "two thousand dollars" for "five hundred dollars," and "interest and costs" for "costs." As has been frequently declared by the Supreme Court, the general object of the act of 1875 as amended and corrected was to contract and not to enlarge the jurisdiction of the circuit courts.⁸ Its purpose was to define the jurisdiction of such courts as between themselves and the courts of the States, and it does not repeal the special provisions of former laws conferring on the circuit or district courts jurisdiction in special cases,⁹ nor was it intended to divide the jurisdiction which prior acts vested exclusively in the district courts.¹⁰ The circuit court has no other jurisdiction than that conferred upon it by the Constitution and the laws of the United States, and hence the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears.¹¹ So where the jurisdiction depends on diverse citizenship and the record does not show a case within the jurisdiction of the circuit court, the Supreme Court will take notice of that fact although no question of jurisdiction has been raised by the parties.¹² Where, however, the circuit court is authorized to take cognizance of a cause it is not deprived of jurisdiction by the fact that the plaintiff has joined other actions over which it has no jurisdiction.¹³

⁸Mexican, etc. R. Co. v. Davidson, 157 U. S. 208, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; In re Pennsylvania Co. 137 U. S. 454, 34 L. ed. 739, 11 Sup. Ct. Rep. 141; Smith v. Lyon, 133 U. S. 320, 33 L. ed. 637, 10 Sup. Ct. Rep. 303; Fisk v. Henarie, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207; Tennessee v. Union, etc. Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Ohappell v. Waterworth, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; St. Louis, etc. Ry. Co. v. Davis, 132 Fed. 632, and cases cited.

⁹In re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; United States v. Mooney, 116 U. S. 107, 29 L. ed. 552, 6 Sup. Ct. Rep. 304; Price v. Abbott, 17 Fed. 508; United States v. Mooney, 11 Fed. 476.

¹⁰United States v. Mooney, 116 U. S. 108, 29 L. ed. 583, 6 Sup. Ct. Rep. 304; Price v. Abbott, 17 Fed. 506.

¹¹Grace v. American, etc. Ins. Co. 109 U. S. 283, 27 L. ed. 935, 3 Sup. Ct. Rep. 207; Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; Brown v. Keene, 8 Pet. 112, 8 L. ed. 885; Railway Co. v. Ramsey, 22 Wall. 322, 22 L. ed. 823; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; Kentucky v. Powers 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387. See ante, § 9.

¹²Grace v. American, etc. Ins. Co. 109 U. S. 285, 27 L. ed. 935, 3 Sup. Ct. Rep. 207; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387. Ante, § 9.

¹³Independent School Dist. v. Rew,

[b] "Suit of a civil nature."

The term "suit of a civil nature" is used to distinguish from admiralty and criminal cases. It does not restrict the jurisdiction to old and settled forms but includes all suits in which legal rights are to be ascertained and determined.¹⁵ Whether a suit is of a civil nature is determined not by the form but by the nature of the right asserted and at issue.¹⁶ So where the action is penal in its nature the fact that a State statute declares it to be a civil action does not make it a suit of a civil nature.¹⁷ A libel in personam in admiralty is not a civil suit within the meaning of the term.¹⁸ Nor is a proceeding for a purely criminal contempt of court¹⁹ nor is a suit to recover a penalty for the importation of foreign laborers.²⁰ But a claim for future alimony under State judgment is a suit of a civil nature of which the Federal court may have jurisdiction.¹ The general question as to what is a suit or controversy within the constitutional grant of Federal judicial power has already been considered.² Federal courts have frequently declared that where State courts have jurisdiction over controversies between domestic citizens, the Federal courts have a similar jurisdiction if one of the parties is a citizen of any other State.³

[c] "At common law or in equity."

The common law suits referred to by the section include not only those suits which the old common law recognized but all suits in which legal rights are to be ascertained and determined, in distinction to those where equitable rights alone are recognized, and to admiralty proceedings.⁵ Hence a suit arising wholly under a state statute may be a suit at common law.⁶ Hence the state legislature cannot, by making special provisions for the trial of different controversies nor by declaring such controversies special proceedings and not civil suits in law or equity, deprive the Federal courts of jurisdiction.⁷ Federal courts look to the substance and determine whether in its essential nature the controversy is a suit in law or in

111 Fed. 5, 49 C. C. A. 198, 55 L.R.A. 364.

¹⁵United States v. Block, 3 Biss. 208, Fed. Cas. No. 14,610.

¹⁶Ames v. Kansas, 111 U. S. 449, 28 L. ed. 487, 4 Sup. Ct. Rep. 437; Texas v. Day, etc. Co. 41 Fed. 230; Iowa v. Chicago, 37 Fed. 497, 3 L.R.A. 554.

¹⁷Indiana v. Oil Co. 85 Fed. 870.

¹⁸Atkins v. Fibre, etc. Co. 18 Wall. 272, 21 L. ed. 841.

¹⁹Williams Mower, etc. Co. v. Raynor, 7 Biss. 245, Fed. Cas. No. 17,748; Hurk v. Milwaukee, etc. Co. 26 Fed. 507.

²⁰United States v. Whitcomb, etc. Co. 45 Fed. 89; United States v. Mexican, etc. Co. 40 Fed. 769.

¹Israel v. Israel, 130 Fed. 240.

²Ante, § 2. [d]

³See ante, §§ 2, [s]; 5.

⁵Brisenden v. Chamberlain, 53 Fed. 309; Keith v. Rockingham, 2 Fed. 834, 18 Blatchf. 246; Kohl v. United States, 91 U. S. 367, 23 L. ed. 449.

⁶Brisden v. Chamberlain, 53 Fed. 309; Dennick v. Railroad Co. 103 U. S. 11, 26 L. ed. 439; Keith v. Rockingham, 2 Fed. 834, 18 Blatchf. 246.

⁷In re Jarnecke Ditch, 69 Fed. 163. Colorado etc. Railway Co. v. Jones, 29 Fed. 193; Wahl v. Franz, 100 Fed. 683, 40 C. C. A. 638, 49 L.R.A. 62; Ellis v. Davis, 109 U. S. 498, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327.

equity.⁸ So where the controversy is within the jurisdiction of the circuit court, such jurisdiction cannot be defeated on the ground that the State statute gives a remedy in a form not available in the circuit court.⁹ Equity suits are to be understood as those suits in which relief is sought according to the principles and practice of English equity jurisprudence¹⁰ and equity jurisdiction, when conferred, is uniform throughout the Federal courts and cannot be limited or extended by State legislation.¹¹ Condemnation proceedings by the United States are suits at law within the meaning of the section,¹² as are also similar proceedings under a State law.¹³

[cc] — probate proceedings.

A proceeding to probate a will is not a suit at common law or in equity, within the meaning of the above rule, such a proceeding being in rem and not necessarily involving any dispute between the parties.¹⁴ Nor, independently of statute, has a court of equity general jurisdiction to set aside a will or its probate.¹⁵ By State statute, however, jurisdiction may be vested in the State courts of equity to set a will or its probate for fraud or other reasons, and when so vested there seems no reason why the Federal courts setting in those States have not concurrent jurisdiction in a proper case.¹⁶ As has been seen,¹⁷ the Federal courts also have jurisdiction to adjudicate claims against an estate and the rights of a legatee or claimant under a will, although no power to take the property of a decedent out of the custody of the State court of probate.

[d] Amount in dispute to exceed two thousand dollars.

In a suit arising under the Constitution or laws of the United States

⁸In re Jarnecke Ditch, 69 Fed. 163.

⁹Wilson v. Smith, 66 Fed. 81.

¹⁰Lrvine v. Marshall, 20 How. 565, 15 L. ed. 998; Robinson v. Campbell, 3 Wheat. 212, 4 L. ed. 373.

¹¹McConihay v. Wright, 121 U. S. 201, 30 L. ed. 932, 7 Sup. Ct. Rep. 940; Scott v. Neely, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; Cates v. Allen, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; Mississippi Mills v. Cohn, 150 U. S. 205, 37 L. ed. 1054, 14 Sup. Ct. Rep. 76; Thomas v. Marble, etc. Co. 58 Fed. 489, 7 C. C. A. 330. See ante, § 5, post, § 935.

¹²Kohl v. United States, 91 U. S. 376, 23 L. ed. 449; United States v. Oregon, etc. Co. 16 Fed. 524, 9 Sawy. 61.

¹³Kirby v. Chicago, etc. R. Co. 106 Fed. 551; Terre Haute v. Evansville, etc. R. Co. 106 Fed. 545; Union Terminal R. Co. v. Chicago, etc. R. Co. 119 Fed. 209.

¹⁴Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Kirby v. Railroad Co. 106 Fed. 551. See Copeland v. Bruning, 72 Fed. 6.

¹⁵Case of Broderick's Will, 21 Wall. 509, 22 L. ed. 509; see Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524.

¹⁶Williams v. Crabbe, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425; Gaines v. Fuentes, 92 U. S. 20, 23 L. ed. 524; Ellis v. Davis, 109 U. S. 496, 27 L. ed. 1006, 3 Sup. Ct. Rep. 329; Byers v. McAuley, 149 U. S. 610, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Richardson v. Green, 61 Fed. 429, 435, 9 C. C. A. 565; dissenting opinion Wahl v. Franz, 100 Fed. 705, 40 C. C. A. 638; Brodhead v. Shoemaker, 44 Fed. 518, 11 L.R.A. 567. See contra, In re Cilley, 58 Fed. 977; Reed v. Reed, 31 Fed. 49. See also ante, § 2.[5]

¹⁷Ante, § 17.

or under treaties made or which shall be made, the circuit court has no jurisdiction unless the amount in controversy, exclusive of interest and costs amounts to two thousand dollars.¹ This rule is not affected by the fact that the operation of the act of Mar. 3, 1891 was to do away with any pecuniary limitations on appeals directly from the circuit court to the Supreme Court.² The value of matter in dispute which conditions the jurisdiction of the Federal Court is the amount or value of that which the complainant claims to recover or that which the defendant will lose if the complainant obtains recovery.³ In ascertaining this amount the inquiry must be limited to the particular action, and hence any estimate in money by reason of the probative force of the judgment itself, in some subsequent proceeding cannot be considered.⁴ The court will look to the whole record.⁵ If it appears from the showing of the parties that the amount in dispute is less than two thousand dollars, jurisdiction cannot be given by allegations in the pleadings that the amount is sufficient.⁶ The sum demanded is, however, presumed to be the matter in dispute until the contrary is shown.⁷ In a stockholders' suit on behalf of the corporation the value in dispute is not measured by the value of complainants stock interest.⁸

[e] — ascertainment of amount in suits *ex contractu* and otherwise.

In suits *ex contractu* the amount claimed will not establish the jurisdiction, when the application of settled rules of relief and measure of damages to the particular allegations of the complaint show that the recovery must be less.^{8½} In suits not *ex contractu* the plaintiff's demand is the amount in controversy unless such demand is colorable.⁹ Hence in a suit for an account and to set aside a settlement,¹⁰ or for an amount

¹United States v. Sayward, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; Fishback v. Western Union Tel. Co. 161 U. S. 100, 40 L. ed. 632, 16 Sup. Ct. Rep. 506; Shewalter v. Lexington, 143 Fed. 161.

²The Paquete Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290; Holt v. Indiana, etc. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272. Ante, § 42.

³Cowell v. City, etc. Co. 121 Fed. 53, 57 C. C. A. 393.

⁴Washington, etc. R. R. v. District of Columbia, 146 U. S. 231, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; United States v. Wanamaker, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 281; Hollander v. Fechheimer, 162 U. S. 328, 40 L. ed. 986, 16 Sup. Ct. Rep. 796; Hartford Fire Ins. Co. v. Bonner, etc. Co. 56 Fed. 378, 5 C. C. A. 524; Mayer, et al. v. Postal, etc. Co. 62 Fed. 502.

⁵Edwards v. Bates, 55 Fed. 439; and see Shippirio v. Goldberg, 192 U. S. 240, 48 L. ed. 424, 24 Sup. Ct. Rep. 259; see also Vance v. Vandercock Co. 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645.

⁶Cabot v. McMaster, 61 Fed. 130. See Way v. Clay, 140 Fed. 352, where land in ejectment suit not worth \$2000 and no special damages were alleged.

⁷Hilton v. Dickinson, 108 U. S. 166, 27 L. ed. 688, 2 Sup. Ct. Rep. 424. See also Edwards v. Bates Co. 55 Fed. 439.

⁸Hill v. Glasgow, etc. R. R. 41 Fed. 614.

⁹Barry v. Edmunds, 116 U. S. 561, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; Peeler v. Lathrop, 48 Fed. 780, 1 C. C. A. 93.

¹⁰Peeler v. Lathrop, 48 Fed. 780, 1 C. C. A. 93.

claimed on condemnation proceedings,¹¹ or for the amount demanded in a nuisance case,¹² the amount itself if claimed in good faith fixes the jurisdiction. Where there is no cause to suspect the action is colorable and the amount claimed is within the jurisdiction, the case should not be dismissed unless from the nature of the action it appears that the plaintiff cannot recover an amount within the jurisdiction.¹³ The fact that there is a defense apparent on the face of the petition does not diminish the amount nor determine the amount actually in dispute.¹⁴ In a suit concerning the loss of an office the amount of the salary is considered as determining the jurisdictional amount.¹⁵ In a suit to quiet title,¹⁶ or to set aside a fraudulent conveyance,¹⁷ the test of jurisdiction is the value of the property affected. Where a will is contested the matter in dispute is the value of the property passed by the will and not the separate interests of the parties.¹⁸

[ee] — where matter in dispute not susceptible of pecuniary estimate.

In some cases, however, the matter in dispute is not appraisable for jurisdictional purposes. Thus it has been held that the circuit court has no jurisdiction over a habeas corpus proceeding by a father to obtain possession of his infant child since the matter in dispute could not be estimated in money.¹ So also in a suit for divorce the matter in dispute does not exceed two thousand dollars even where the income of the husband exceeded ten thousand dollars and alimony was asked, since it is discretionary with the court whether or not alimony shall be granted at all.² Where the suit is against election officers for their rejection of plaintiff's vote the matter in dispute while capable of being estimated,³ is a matter peculiarly appropriate for the determination of a jury.⁴ The effect of requiring a value in dispute on appeal has already been considered.⁵

[f] — aggregating claims to secure jurisdictional amount.

It is settled that where two or more plaintiffs having single interests unite for the convenience of litigation in a single suit, it can only be sustained as to those whose claims exceed the jurisdictional amount.⁷ So also where two or more defendants are sued by the same plaintiff in one

¹¹Postal, etc. Co. v. Southern Ry. 88 Fed. 806.

¹²Herbert v. Rainey, 54 Fed. 251.

¹³Levinski v. Banking Co. 92 Fed. 461, 34 C. C. A. 452.

¹⁴Schunk v. Moline, etc. Co. 147 U. S. 505, 37 L. ed. 258, 13 Sup. Ct. Rep. 417. See also Turner v. Southern, etc. Ass'n. 101 Fed. 315, 41 C. C. A. 379.

¹⁵Smith v. Whitney, 116 U. S. 172, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.

¹⁶Woodside v. Cicernni, 93 Fed. 4, 35 C. C. A. 177; Greenfield v. United States Mortgage Co. 133 Fed. 784.

¹⁷Simon v. House, 46 Fed. 318.

¹⁸Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603.

¹Ex parte Everts, 1 Bond, 197, Fed. Cas. No. 4,581; Clifford v. Williams, 131 Fed. 100.

²Bowman v. Bowman, 30 Fed. 850.

³Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; Giles v. Harris, 189 U. S. 485, 47 L. ed. 911, 23 Sup. Ct. Rep. 639.

⁴Wiley v. Sinkler, 179 U. S. 65, 45 L. ed. 84, 21 Sup. Ct. Rep. 17.

⁵See for instance, ante, § 45. [c]

⁷Walter v. Northeastern R. R. 147 U. S. 373, 37 L. ed. 208, 13 Sup. Ct. Rep. 350; Seaver v. Bigelows, 5 Wall.

suit the test of jurisdiction is the joint or several character of the liability to the plaintiff.⁸ Thus, the circuit court cannot enjoin taxes in different counties no one of which amounts to two thousand dollars.⁹ Nor can such court enjoin the collection of taxes against stockholders of a bank,¹⁰ or against property owners of a city whose property is abutting on the same street,¹¹ where no single tax assessment exceeds two thousand dollars. Where, however, an injunction is sought to restrain a State auditor from completing an appraisal and levy of taxes the Federal courts have jurisdiction if the total amount of the taxes exceeds two thousand dollars.¹² In a suit to have a receiver appointed for an insolvent corporation the claims of the creditors joining in the suit need not separately equal the jurisdictional amount.¹³ It is also held that where a suit is brought by creditors of such corporation on behalf of themselves and all others similarly situated to recover property fraudulently acquired the circuit court has jurisdiction, although the claims of each do not exceed two thousand dollars.¹⁴ So also the value of the matter in dispute in a suit to set aside the judgment of a probate court, establishing claims against an estate, because fraudulently procured is the aggregate of the claims thus procured.¹⁵ The provision of the judiciary act of 1875¹⁶ that an assignee of a chose in action cannot sue in a Federal court unless his assignor could have maintained the action, has no reference to the jurisdictional amount. Hence an assignee of choses in action aggregating two thousand dollars may maintain a suit, so far as the jurisdictional amount is concerned, although his assignors could have sued because none of their claims were sufficient in amount.¹⁷

[g]—amount in controversy in injunction suits.

In a suit for an injunction the matter in dispute is not determined by the amount which the complainant might recover at law for the acts complained of, but by the value of the right to be protected or the extent of the injury to be prevented by the injunction.²¹ So on a suit to enjoin

208, 18 L. ed. 595. But often claimants below the jurisdictional amount can come in by ancillary application. See ante, § 3.

⁸Citizens Bank v. Cannon, 164 U. S. 322, 41 L. ed. 453, 17 Sup. Ct. Rep. 89; Walter v. Northeastern R. R. 147 U. S. 373, 37 L. ed. 208, 13 Sup. Ct. Rep. 350; Northern Pac. Ry. v. Walker, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650.

⁹Walter v. Northeastern R. R. 147 U. S. 373, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; Fishback v. Western Union, etc. Co. 161 U. S. 100, 40 L. ed. 631, 15 Sup. Ct. Rep. 508.

¹⁰Sioux Falls Bank v. Swausen, 48 Fed. 625.

¹¹Wheless v. St. Louis, 96 Fed. 869.

¹²Western Union, etc. Co. v. Norman, 77 Fed. 20.

¹³Jones v. Mutual, etc. Co. 123 Fed. 507.

¹⁴Stanwood v. Wishard, 134 Fed. 959.

¹⁵McDaniel v. Traylor, 196 U. S. 416, 49 L. ed. 533, 25 Sup. Ct. Rep. 369.

¹⁶Ante, § 23.

¹⁷Bowden v. Burnham, 59 Fed. 755. 8 C. C. A. 248; Davis v. Mills, 99 Fed. 39.

²¹Nashville, etc. Railway Co. v. McConnell, 82 Fed. 65; Humes v. Fort Smith, 93 Fed. 857; see also Arkansas v. Kansas, etc. Coal Co. 96 Fed. 353; Board of Trade v. Cella Comm. Co. 145 Fed. 28, —(C. C. A.) —.

a license tax on business the amount in controversy is the value of the business since it will be destroyed unless the injunction is granted.¹ Where the object of the injunction is to restrain the use of property by a party other than the owner, the right to use the property is the matter in dispute, and the jurisdiction depends on the value of that right.² Where in a suit to restrain the enforcement of a law, complainant shows penalties already incurred for its violation in excess of \$2,000, jurisdiction exists.³ So also where the injunction is to restrain the maintenance of an awning over part of a street, the amount in dispute is the value of the right to use the awning and not the amount of damage done by it to the plaintiff.⁴ On the same principle where the suit is brought by stockholder on behalf of other stockholders to enjoin a misapplication of the corporate funds, the amount in dispute is not the interest of the particular stockholder, but the value of the funds misapplied.⁵

[gg]—proof necessary where allegation controverted.

If the allegation in a bill that the value in dispute exceeds two thousand dollars, is put in issue, there must be proof offered to sustain it.⁶

[h] Suits arising under Constitution, laws or treaties of United States, —in general.

The provision conferring jurisdiction of suits of a civil nature at common law or in equity arising under the Federal Constitution, laws or treaties was absent from the judiciary act of 1789, and appeared first in the act of 1875.⁷ The general rule is that if it appears from the bill or statement of the plaintiff that in any aspect which the case may assume, the right to obtain relief may depend upon the construction of a provision of the Constitution or laws of the United States, and that the Federal claim is not merely colorable but rests on a reasonable foundation, the circuit court has jurisdiction.⁸ It is established also that the dispute between the parties must be a real and substantial one.⁹ Where it does not appear from any of the facts stated that there is a disputed construction of a Fed-

See *Louisville, etc. R. R. v. Bitterman*, 144 Fed. 34, —(C. C. A.) —. 14 Sup. Ct. Rep. 654.

¹*Humes v. Little Rock*, 138 Fed. 933.

²*Oleson v. Northern, etc. R. Co.* 44 Fed. 1.

³*McNeill v. Southern R. R.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

⁴*Whitman v. Hubbell*, 30 Fed. 81.

⁵*Hill v. Glasgow, etc. R. Co.* 41 Fed. 614.

⁶*Oregon R. & N. Co. v. Shell*, 143 Fed. 1008; *Klenk v. Byrne*, 143 Fed. 1008.

⁷*Nashville, etc. R. Co. v. Taylor*, 86 Fed. 174; *Tennessee v. Union, etc.*

Bank, 152 U. S. 459, 38 L. ed. 513, 14 Sup. Ct. Rep. 654.

⁸*St. Louis, etc. Ry. v. Davis*, 132 Fed. 632; *Illinois, etc. R. R. v. Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509.

⁹*Nashville, etc. Ry. v. Taylor*, 86 Fed. 178; *Southern Pac. R. R. v. California*, 118 U. S. 112, 30 L. ed. 103, 6 Sup. Ct. Rep. 993; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; *Penn. etc. Insurance Co. v. Austin*, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 227; *Western Union Tel. Co. v. Ann Arbor, etc. Ry.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *McCain v. Des Moines*.

eral law under which the parties claim, and the contest is about the facts only, a Federal question is not presented.¹⁰ Removal suits involving Federal questions are considered in a following section.¹¹

[i] Federal questions in particular cases.

A Federal court has jurisdiction over a suit by a telegraph company to enjoin threatened removal of line built and accepted pursuant to R. S. § 5263;¹² it has jurisdiction also over a suit to restrain construction of municipal water works on account of alleged violation of contract with the plaintiff and the water company,¹⁴ and over suits to enforce the liability of national bank stockholders.¹⁵ It has jurisdiction also of a suit to enjoin an assessment alleged to violate an exemption from assessability of United States bonds.¹⁶ An action for damages for denial of right to vote for a member of Congress is a suit under the Federal laws.¹⁷

But a Federal question is not presented in an action for damages for acts of the defendant as judge of a State court.¹⁸ Nor is such question presented in a suit against a circuit court clerk for damages for refusal to file papers where alleging him to be liable under R. S. §§ 1979, 1980;¹⁹ nor in a suit under R. S. § 2326, in support of an adverse claim in mining ground.²⁰ The fact that a suit is alleged to be over a United States patent does not raise a Federal question where the averments show that the question really at issue is the plaintiff's right to land formed by accretion.²¹

[j] Suits under the Constitution.

The mere allegation that constitutional questions are involved is not sufficient to give the circuit court jurisdiction when it appears that such allegation is without color or merit.¹ Thus a claim that an action of a State is in violation of the Fifth Amendment cannot be maintained as that Amendment is a limitation on the powers of Congress only.² Nor has the

174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 435; *Joy v. St. Louis*, 122 Fed. 528; *Minnesota v. Duluth, etc. Ry.* 87 Fed. 497; *Crystal Springs Land Co. v. Los Angeles*, 76 Fed. 151.

¹⁰*Austin v. Gagan*, 39 Fed. 626, 5 L.R.A. 476; *Theurkauf v. Ireland*, 27 Fed. 769; *Murray v. Bluebird Min. Co.* 45 Fed. 385; *California Oil, etc. Co. v. Miller*, 96 Fed. 17.

¹¹*Post*, § 133.

¹²*Ohio, etc. Co. v. Board of Com'rs.* 137 Fed. 947.

¹⁴*Knoxville W. Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224.

¹⁵*Wyman v. Wallace*, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. Rep. 495. See *post*, § 964.

¹⁶*Peoples Sav. Bank v. Layman*, 134 Fed. 635.

¹⁷*Knight v. Shelton*, 134 Fed. 423.

¹⁸*Kinney v. Mitchell*, 138 Fed. 270.

¹⁹*United States v. Bell*, 135 Fed. 339.

²⁰*Willitt v. Baker*, 133 Fed. 937.

²¹*Joy v. St. Louis*, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478.

¹*Newburyport, etc. Co. v. Newburyport*, 193 U. S. 576, 48 L. ed. 795, 24 Sup. Ct. Rep. 553.

²*St. Louis, etc. Ry. v. Davis*, 132 Fed. 632.

court jurisdiction merely because in the process of litigation it may become necessary to give a construction to the Constitution. The suit must, in part at least arise out of a controversy between the parties in regard to the Constitution.³ Whenever in any suit the right and title of either party to property is founded upon State legislation which undertakes to transfer to one person, the property of another without due process of law, a Federal question is presented.⁴ Where, however, the deprivation of property without due process of law is without legislative authority, the case does not present a Federal question.⁵ The circuit court has jurisdiction of a bill to restrain collection of taxes alleged to be repugnant to the Constitution, being a deprivation of property under the 14th Amendment.⁶ A Federal question is not presented where the constitutionality of a State law is admitted, but it is asserted that its construction by the State officers is such as to render the act unconstitutional.⁷ It is unnecessary that the particular provision of the Constitution relied upon be set out specially so long as the case made out necessarily comes within some of the provisions of that instrument.⁸

[k] Suits by and against States, involving Federal questions.

There is no constitutional provision prohibiting a State from suing in any tribunal which can entertain its case.¹⁰ The above provision gives the circuit court jurisdiction concurrent with the State courts, over all cases involving a Federal question, hence a State may under its provisions sue either in the State or in a circuit court when such question is involved and the amount is sufficient to give jurisdiction.¹¹ The immunity of a State from suit guaranteed by the Constitution,¹² is a personal privilege which the State may waive.¹³ But without its consent a State cannot be sued in the Federal circuit court, on the ground that a case is one arising under the Federal Constitution or have laws either by a citizen of another State or of a foreign State,¹⁴ or by one of its own citizens.¹⁵

³Gold Washing and Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656.

⁴Crystal Springs, etc. Co. v. Los Angeles 76 Fed. 148.

⁵Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; Huntington v. New York, 193 U. S. 441, 48 L. ed. 743, 24 Sup. Ct. Rep. 505.

⁶Michigan R. R. Tax Cases, 138 Fed. 223.

⁷Arbuckle v. Blackburn, 191 U. S. 413, 48 L. ed. 242, 24 Sup. Ct. Rep. 148.

⁸Bridge Proprietors v. Land, etc. Co. 1 Wall. 116, 17 L. ed. 571; see Crystal Springs, etc. Co. v. Los Angeles, 76 Fed. 153.

¹⁰Plaquemines, etc. Co. v. Henderson. 170 U. S. 511, 42 L. ed. 1126, 18 Sup. Ct. Rep. 685.

¹¹Plaquemines, etc. Co. v. Hender-

son, 170 U. S. 511, 42 L. ed. 1126, 18 Sup. Ct. Rep. 685; Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; New Orleans, etc. R. Co. v. Mississippi, 102 U. S. 140, 26 L. ed. 98. See also Illinois v. Illinois, etc. R. Co. 16 Fed. 886.

¹²Ante, § 7.

¹³Clark v. Bernard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

¹⁴Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; In re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Cunningham v. Macon, etc. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609.

¹⁵Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; North Carolina v. Temple, 134

The scope of the jurisdiction in suits against a State has already been considered.¹⁶

[l] Suits under Federal land grants.

The mere fact that the plaintiff and the defendant make adverse claims to land which has been granted under a Federal law does not present a Federal question,¹ since such a case may involve merely a question of fact.² A Federal question is raised, however, where a right is claimed under a particular Federal statute, the validity, construction or applicability of which is made the subject of dispute.³ So a controversy turning upon the validity of a patent from the United States under which the plaintiff claims title and which is denied by the defendant presents a Federal question,⁴ as does also a suit resting upon the proper interpretation of a land grant act of Congress.⁵ A Federal question is likewise presented where a complainant claims equitable title to Federal lands as a pre-emptor, and the question in dispute is whether he has a right to such title under the Federal land laws.⁶

[m] Suits on Federal judgments.

The fact that a suit was brought to recover the amount of a Federal judgment does not make it a suit arising under the Constitution and laws of the United States.⁸ Such a suit is nothing more than the case of an ordinary right of property sought to be enforced and cannot of itself give the Federal courts jurisdiction.⁹ Many suits respecting the enforcement or interpretation or enjoining of Federal judgments are maintainable as an exercise of the ancillary jurisdiction and regardless of citizenship or amount in dispute.¹⁰

[n] Federal question must appear from plaintiff's own statement.

It was held under the act of 1875¹² and is also the rule under the amendment of 1887-1888, that where the original jurisdiction of the circuit

U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; *Brown University v. Rhode Island College*, 56 Fed. 55.

¹⁶Ante, § 7.

¹*De Lamar, etc. Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

²*Shoshone Min. Co. v. Rutler*, 177 U. S. 505, 44 L. ed. 865, 20 Sup. Ct. Rep. 726; *Blackburn v. Portland, etc. Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Joy v. St. Louis*, 122 Fed. 527.

³*De Lamar, etc. Co. v. Nesbitt*, 177 U. S. 527, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

⁴*Doolan v. Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Pierce v. Moliken*, 78 Fed. 196.

⁵*Northern Pac. R. Co. v. Soderberg*,

188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365.

⁶*Jones v. Florida, etc. R. Co.* 41 Fed. 71.

⁸*Metcalf v. Watertown*, 128 U. S. 588, 32 L. ed. 544, 9 Sup. Ct. Rep. 173; *Pope v. Louisville, etc. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

⁹*Providence Savings Society v. Ford*, 114 U. S. 642, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; see *Berger v. Douglass*, 5 Fed. 23, 2 *McCrary*, 483.

¹⁰Ante, § 3.

¹²*Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado, etc. Mining Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

court is invoked on the ground that the determination of the suit depends upon some Federal question, that fact must appear from the declaration or bill of the party suing.¹³ The same rule is followed also in cases of removal from a State to a circuit court on the ground that a Federal question is presented.¹⁴ Where such a showing does not appear in the course of correct and logical pleading, in the plaintiff's declaration, jurisdiction cannot be created by the statement of some defense involving a Federal question, either in the form of allegations in plaintiff's complaint anticipating such defense or by the allegation of defendant's answer asserting it.¹⁵ But bad pleading on the part of the plaintiff in failing to allege a Federal question where one exists cannot defeat the defendant's right of removal.¹⁶

§ 130. Jurisdiction where United States are plaintiffs or petitioners.

The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity . . . in which controversy the United States are plaintiffs or petitioners.

Part of § 1 act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, c. 373, and corrected Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 508.

If a statute providing for a suit by the United States does not specify venue it is controlled by the above section.¹ In a controversy in which the United States are plaintiffs or petitioners the circuit court has original

¹³Ante, § 2, note.[f]; Metcalf v. Watertown, 128 U. S. 589, 32 L. ed. 544, 9 Sup. Ct. Rep. 173; Colorado, etc. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Borgmeyer v. Idler, 159 U. S. 413, 40 L. ed. 201, 16 Sup. Ct. Rep. 36; Third St., etc. Ry. v. Lewis, 173 U. S. 460, 43 L. ed. 767, 19 Sup. Ct. Rep. 451; Nashville, etc. Ry. v. Taylor, 86 Fed. 174; Minnesota v. Duluth, etc. R. Co. 87 Fed. 497; Press Pub. Co. v. Monroe, 164 U. S. 110, 41 L. ed. 369, 17 Sup. Ct. Rep. 40; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 158, 16 Sup. Ct. Rep. 1051; Oregon, etc. Ry. v. Skottowe, 162 U. S. 490, 40 L. ed. 1049, 16 Sup. Ct. Rep. 869.

¹⁴Boston, etc. Min. Co. v. Montana, etc. Co. 188 U. S. 639, 47 L. ed. 631, 23 Sup. Ct. Rep. 434; Arkansas v. Kansas, etc. R. R. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; Tennessee v. Union, etc. Bank, 152 U.

654; Walker v. Collins, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; Gableman v. Peoria, etc. Ry. 179 U. S. 337, 45 L. ed. 222, 21 Sup. Ct. Rep. 171; State v. Virginia, etc. Chemical Co. 117 Fed. 727; Mayo v. Dockery, 108 Fed. 897; Broadway Ins. Co. v. Chicago, etc. Ry. 101 Fed. 507.

¹⁵Metcalf v. Watertown, 128 U. S. 589, 32 L. ed. 544, 9 Sup. Ct. Rep. 173; Tennessee v. Union Bank, 152 U. S. 454, 38 L. ed. 512, 14 Sup. Ct. Rep. 654; Shields v. Boardman, 98 Fed. 455; California, etc. Co. v. Miller, 96 Fed. 19; Spencer v. Duplan, Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; Arkansas v. Kansas, etc. Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; Third St. R. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451.

¹⁶Post, § 133 [e].

¹United States v. Northern Pac. R. R. 134 Fed. 715, 67 C. C. A. 269.

jurisdiction without regard to the amount involved.² Where, however, the United States is a mere formal party and without interest in the suit it is not a plaintiff within the meaning of the section, and the amount in dispute in such case must exceed two thousand dollars in order to give the circuit court jurisdiction.³ An action by the United States on a contractor's bond for government work has been held within this section, although brought for the benefit of materialmen.⁴ The United States is also given the right to bring suit in a district court in a common law case, and this right is extended to an officer thereof duly authorized.⁵ So both the circuit and district court have jurisdiction of a suit by the government on the official bond of a public officer.⁶ A general discussion of the scope and extent of Federal jurisdiction in cases in which the United States is a party will be found in a previous section.⁷

§ 131. In cases of diverse citizenship, or land grants from different States.

The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars . . . in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid,^{[a]-[g]} or a controversy between citizens of the same State claiming lands under grants of different States,^[h] or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid.^[i]

Part of § 1, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, c. 373, and corrected Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 508.

[a]—History of provision.

Under section 11 of the judiciary act of 1789¹⁰ the circuit courts were given original jurisdiction concurrent with the State courts, of civil suits

²United States v. Sayward, 160 U. S. 498, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; Follett v. Tillinghast, 82 Fed. 241; United States v. Reid, 90 Fed. 522; United States v. Flournoy, etc. Co. 71 Fed. 576; United States v. Kentucky River Mills, 45 Fed. 273; United States v. Shaw, 39 Fed. 433, 3 L.R.A. 232.

³United States v. Sheridan, 119 Fed. 238.

⁴United States v. Churchyard, 132 Fed. 82; but see, United States v. Henderlong, 102 Fed. 2; United States v. Sheridan, 119 Fed. 236; United States v. Barrett, 135 Fed. 189.

⁵Post, § 196.

⁶United States v. Belknap, 73 Fed.

⁷Ante, § 2 [1].

¹⁰1 Stat. 78.

where "an alien is a party or the suit is between a citizen of the State where the suit is brought and a citizen of another State" if the value of the matter in dispute exclusive of costs exceeded five hundred dollars. The act of Mar. 3, 1875, while leaving the jurisdictional amount the same, gave the circuit court jurisdiction of controversies "between citizens of different States" using the very words of the Constitution¹¹ and avoiding the embarrassments which arose under the act just mentioned, limiting the authority of the circuit courts to suits "between a citizen of the State where the suit is brought and a citizen of another State." The act of 1887 and 1888 changed the provisions of the act of 1875 merely by raising the jurisdictional amount from five hundred dollars to two thousand dollars and made it "exclusive of interest and costs" instead of "exclusive of costs."

This section gives citizens of different States the right to sue in the Federal courts, and the fact that the State legislation has in a particular case conferred exclusive jurisdiction on the State courts cannot oust such jurisdiction.¹²

[b] Amount in controversy.

Concerning those provisions of the act of Mar. 3, 1887, embodied in the above Code section, it is uniformly held that the circuit court has jurisdiction without regard to the amount involved, of a controversy between citizens of the same State claiming lands under grants of different States,¹³ but that it has jurisdiction of controversies between citizens of different States, or between citizens of a State and foreign States, citizens or subjects, only when the amount exclusive of interest and costs exceeds two thousand dollars.¹⁴ The general subject of the amount in controversy necessary to give the circuit court jurisdiction, whether the suit is one arising under the Federal laws, or under the provision as to diverse citizenship, is discussed in a previous section.¹⁵

[c] What constitutes State citizenship.

In order to constitute State citizenship such as will entitle a party to sue in the circuit court there must be actual residence in the particular State and the intention that such residence shall be permanent.¹⁷ This rule is unaffected by the 14th Amendment, declaring that "all persons born or naturalized in the United States and subject to the jurisdiction thereof . . . are citizens of the State where they reside."¹⁸ No particular

¹¹*Ober v. Gallagher*, 93 U. S. 204, 23 L. ed. 830. Ante, § 2.

¹²*Schurmeier v. Connecticut*, etc. Ins. Co. 137 Fed. 42, 69 C. C. A. 22. See ante, § 5.

¹³*United States v. Sayward*, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371.

¹⁴*United States v. Sayward*, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; *Follett v. Tillingham*, 82

Fed. 241; *United States v. Kentucky River Mills*, 45 Fed. 273; *United States v. Shaw*, 39 Fed. 433, 3 L.R.A. 232; *United States v. Sheridan*, 119 Fed. 236; *United States v. Henderlong*, 102 Fed. 2.

¹⁵Ante, § 129.[d]-[gg]

¹⁷*Marks v. Marks*, 75 Fed. 325; *Mitchell v. United States*, 21 Wall. 352, 22 L. ed. 588.

¹⁸*Marks v. Marks*, 75 Fed. 325.

length of time for residence is required, all that is necessary being a removal to the particular State with the intention of remaining there.¹⁹ The motive of removal is immaterial.²⁰ Actual residence is necessary, however, and a person having once lost his residence in a State by having moved therefrom and making his domicile in another State does not by making preparations for return to his first residence and having fixed intention to remove there, become a resident of such State until actual return.¹ Citizens of the Territories or of the District of Columbia are not citizens of a State, and hence cannot sue or be sued and on the ground of diverse citizenship in the circuit court,² even though a person competent to sue be joined with such a person as coplaintiff or codefendant.³ Neither is a State itself a citizen within the meaning of the judiciary acts and hence in a suit between a State and a citizen of another State a circuit court has no jurisdiction on the grounds of diverse citizenship.⁴

Where diverse citizenship existed at the commencement of the suit, a subsequent change of domicile will not effect the court's jurisdiction.⁵ But where there is an entire want of jurisdiction it cannot be obtained by waiver on the part of the litigants.⁶ A wife's domicile is that of her husband for jurisdictional purposes.⁷ The necessity for explicit allegation of the requisite citizenship is discussed elsewhere.⁸

[d] Real and representative parties.

As already stated the courts will look to the real party in determining jurisdictional questions arising on the grounds of diverse citizenship, and hence a nominal complainant through whom the real complainant seeks

¹⁹Cooper v. Galbraith, Fed. Cas. No. 3,193, 3 Wash. C. C. 546; Morris v. Gilmer, 129 U. S. 328, 32 L. ed. 695, 9 Sup. Ct. Rep. 289; Marks v. Marks, 75 Fed. 326.

²⁰Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; Briggs v. French, 2 Sumn. 256, Fed. Cas. No. 1,871. See also Morris v. Gilmer, 129 U. S. 328, 32 L. ed. 695, 9 Sup. Ct. Rep. 289.

¹Pacific Mutual, etc. Co. v. Tompkins, 101 Fed. 539, 41 C. C. A. 488.

²Ante, § 2, subdiv. q; Hooe v. Jamieson, 166 U. S. 398, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596; Johnson v. Bunkerhill, etc. Co. 46 Fed. 417; Cameron v. Hodges, 127 U. S. 325, 32 L. ed. 134, 8 Sup. Ct. Rep. 1154; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825.

³Hooe v. Jamieson, 166 U. S. 398, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596; New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44.

⁴Ante, § 2, subdiv. q; Postal, etc. Cable Co. v. Alabama, 155 U. S. 482.

39 L. ed. 231, 15 Sup. Ct. Rep. 192; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; Commonwealth v. Chicago, etc. R. Co. 123 Fed. 457; Arkansas v. Kansas, etc. Co. 96 Fed. 353; Hickman v. Missouri, etc. R. Co. 97 Fed. 116.

⁵Koenigsberger v. Mining Co. 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. Rep. 751; Louisville R. Co. v. Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; Haracovic v. Standard Oil Co. 105 Fed. 785.

⁶Empire Coal Co. v. Empire Coal Co. 150 U. S. 159, 37 L. ed. 1037, 14 Sup. Ct. Rep. 66; Wolfe v. Hartford Ins. Co. 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602.

⁷Thompson v. Stalman, 139 Fed. 93.

⁸Ante, § 9.

relief will not be considered a party to the suit. But it is also well settled that the courts will look to the citizenship of the party in whom the cause of action is vested, and not to the status of his predecessor in interest, or those beneficially interested.¹⁰

[e] Several parties, plaintiff or defendant.

As stated in a previous section,¹² Federal jurisdiction fails where all parties on one side of a controversy have not a right by diverse citizenship to sue all parties on the other.¹³ But an arrangement of parties which is merely a contrivance to found jurisdiction on diverse citizenship in the circuit court, will not avail.¹⁴ Thus the circuit court has no jurisdiction, on the grounds of diverse citizenship, of a suit by a mortgagee of municipal water-works to enforce a contract of the company against the city where there was no antagonism in the claim of the mortgagee as respects the water company and no diversity of citizenship between the water company and the city.¹⁵ Where diversity of citizenship does not exist between certain defendants and the plaintiffs, the suit may be dismissed as to the former, and jurisdiction thus retained, where they are not indispensable parties to the suit and such dismissal will not prejudice them.¹⁶

[f] Citizenship of corporations.

The word "citizen" in the judiciary acts has always been held to include corporations.¹⁸ Under the early decisions the jurisdiction in suits between citizens of one State and corporations of another was maintained on the theory that the persons composing the corporations were suing or being sued,¹⁹ and hence if some members of the corporation were citizens of the same State as the opposing party, jurisdiction was denied.²⁰ It is now however well settled that for the purpose of suing on being sued in a Federal court, the stockholders of a corporation are conclusively presumed to be citizens of the State creating it.¹ But this presumption does not prevent the stockholders in suing for the corporation, from alleging actual citizenship different from that of the corporation and so sustaining Federal

¹⁰Ante, § 2.[s]

¹²Ante, § 2.[q]

¹³Hoe v. Jamieson, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596; Abel v. Book, 120 Fed. 47; Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679, 6 Sup. Ct. Rep. 426; Mirabile Corp. v. Purvis, 143 Fed. 920.

¹⁴Dawson v. Columbia Trust Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

¹⁵Dawson v. Columbia Trust Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

¹⁶See ante, § 2 [q]; Mason v. Dullaghan, 82 Fed. 689, 27 C. C. A. 296; Grove v. Grove, 93 Fed. 865. For distinctions as to necessary and

indispensable parties see post, §§ 902, 1019.

¹⁸Barrow, etc. Co. v. Kane, 170 U. S. 100, 42 L. ed. 965, 18 Sup. Ct. Rep. 526.

¹⁹Barrow, etc. Co. v. Kane, 170 U. S. 100, 42 L. ed. 965, 18 Sup. Ct. Rep. 526.

²⁰Commercial, etc. Bank v. Slocomb, 14 Pet. 60, 10 L. ed. 354.

¹Ante, § 2 [t]; Barrow, etc. Co. v. Kane, 170 U. S. 100, 42 L. ed. 965, 18 Sup. Ct. Rep. 526; National, etc. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; St. Louis, etc. R. Co. v. James, 161 U. S. 555, 559, 40 L. ed. 805, 16 Sup. Ct. Rep. 621; Mississippi, etc. Co. v. Pat-

jurisdiction.² A corporation does not become a citizen of another State by transacting business therein nor by having an office therein,³ nor by agreeing as a condition of being permitted to transact business in another State, that it may be sued therein.⁴ It is established also that a State corporation incorporating under the laws of another State does not thereby become a citizen of the second State for the purposes of Federal jurisdiction.⁵ Hence a citizen of the second State may bring suit against it or have a suit removed on the ground of diverse citizenship.⁶

[g] Averment of citizenship essential.

Where the jurisdiction depends on the citizenship of the parties it is essential that such citizenship or the facts which in legal intentment constitute it should be distinctly and positively averred in the pleadings or other parts of the record.⁸ It is not sufficient that the jurisdiction may be inferred argumentatively from the pleadings.⁹ The averment must show that the requisite citizenship existed at the commencement of the suit.¹⁰ Where jurisdiction is dependent upon the citizenship of the plaintiff's assignor such citizenship must affirmatively appear.¹¹ Likewise where an executor, administrator, trustee or receiver is suing in his representative capacity his personal citizenship must be alleged,¹² and the court has no jurisdiction where a defendant trustee and plaintiff are residents of the same State.¹³ So also where a party sues by a guardian or next friend,

terson, 98 U. S. 407, 25 L. ed. 208; *Marshall v. Baltimore, etc. R. Co.* 16 How. 329, 14 L. ed. 959; *Louisville, etc. R. Co. v. Letson*, 2 How. 558, 11 L. ed. 378.

²*Doctor v. Harrington*, 196 U. S. 587, 49 L. ed. 606, 25 Sup. Ct. Rep. 355.

³*Railroad Co. v. Koontz*, 104 U. S. 12, 26 L. ed. 643; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *In re Keasbey, etc. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *McCormick Co. v. Walthers*, 134 U. S. 43, 33 L. ed. 834, 10 Sup. Ct. Rep. 485; *Freemen v. American, etc. Co.* 116 Fed. 551; *United States v. Southern Pac. R. Co.* 49 Fed. 302.

⁴*Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Platt v. Massachusetts, etc. Co.* 103 U. S. 707, 26 L. ed. 601.

⁵*Ante*, § 2 [t].

⁶*Freeman v. American, etc. Co.* 116 Fed. 548.

⁸*Ante*, § 9. *Wolfe v. Hartford, etc. Ins. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Horne v. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081,

11 Sup. Ct. Rep. 449; *Chapman v. Barney*, 129 U. S. 681, 32 L. ed. 801, 9 Sup. Ct. Rep. 426, and see *Railway Co. v. Ramsey*, 22 Wall. 322, 22 L. ed. 823; *Briges v. Sperry*, 95 U. S. 401, 24 L. ed. 390; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873.

⁹*Brown v. Keene*, 8 Pet. 112, 8 L. ed. 885; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057; *Continental Ins. Co. v. Rhoads*, 119 U. S. 240, 30 L. ed. 381, 7 Sup. Ct. Rep. 193.

¹⁰*Benjamin v. City of New Orleans*, 71 Fed. 758; also 74 Fed. 417, 20 C. C. A. 591; *Chicago Lumber Co. v. Comstocks*, 71 Fed. 477, 18 C. C. A. 207; *Laskey v. Mining Co.* 56 Fed. 628; *Brigel v. Coal, etc. Co.* 73 Fed. 13.

¹¹*North American, etc. Co. v. Morrison*, 178 U. S. 268, 44 L. ed. 1064, 20 Sup. Ct. Rep. 869; *Brock v. Northwestern, etc. Co.* 130 U. S. 341, 32 L. ed. 905, 9 Sup. Ct. Rep. 552; see *Morgan v. Gay*, 19 Wall. 82, 22 L. ed. 100; *Hampton v. Truckee Canal Co.* 19 Fed. 2, 9 Sawy. 381.

¹²*Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179.

¹³*Gardner v. Brown*, 21 Wall. 41,

the citizenship of the party himself must be alleged.¹⁴ In the case of a partnership or joint stock company, there being no presumption that the members thereof are citizens of the particular State in which it does business,¹⁵ the citizenship of each of the members must be alleged.¹⁶ But diverse citizenship being alleged an allegation of residence is unnecessary.¹⁷ The decisions are uniform in holding that an averment of residence is not the equivalent of an averment of citizenship for the purpose of supporting Federal jurisdiction.¹⁸ The following allegations have also been declared insufficient, that a party is "a citizen of the United States,"¹⁹ that a party is "of" a certain place.²⁰ The allegation that a corporation is a citizen of a particular State is not a sufficient averment of its citizenship as a corporation.¹ The averment should be that it is a corporation created under the laws of a particular State.²

[h] Citizens claiming under land grants of different States.

By the terms of the section jurisdiction is conferred only where citizens of the same State claim under land grants of different States, hence where the parties so claiming are citizens of different States, jurisdiction depends entirely on diverse citizenship.⁴ The amount in dispute is immaterial.⁵

[i] Suits between citizens and aliens.

The circuit court has jurisdiction of a suit between a citizen of a State and a subject of a foreign State, without reference as to which one is plaintiff or defendant.⁷ But the suit must be between a State citizen and an alien and hence the fact that one of the parties is an alien is not sufficient.⁸ Likewise the fact that a party is a citizen of the United States only and not of a particular State, is insufficient to give jurisdiction.⁹ A

22 L. ed. 527; *Donohoe v. Mariposa*, etc. Co. 5 Sawy. 167, Fed. Cas. No. 3,989.

¹⁴*Voss v. Neineber*, 68 Fed. 947; *Wiggins v. Bethune*, 29 Fed. 51; see ante. § 2 [q].

¹⁵Ante, § 2.

¹⁶*Great Southern, etc. Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Imperial Refining Co. v. Wyman*, 38 Fed. 574, 3 L.R.A. 503.

¹⁷*Baltimore, etc. R. R. v. Doty*, 133 Fed. 866, 67 C. C. A. 38.

¹⁸*Horne v. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Wolfe v. Insurance Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Everhart v. Huntsville College*, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555; *Grace v. Insurance Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup.

Ct. Rep. 207; *Brown v. Keene*, 8 Pet. 112, 8 L. ed. 885; *Marks v. Marks* 75 Fed. 325.

¹⁹*Wilson v. City Bank*, 3 Sumn. 422, Fed. Cas. No. 17,797.

²⁰*Jackson v. Ashton*, 8 Pet. 148, 8 L. ed. 898.

¹*Lafayette Ins. Co. v. French*, 18 How. 405, 15 L. ed. 451; *Loneragan v. Illinois, etc. R. R.* 55 Fed. 552; *Frisbie v. Chesapeake, etc. Ry.* 57 Fed. 3; *American, etc. Co. v. Johnson*, 60 Fed. 509, 9 C. C. A. 110.

²*Lafayette Ins. Co. v. French*, 18 How. 405, 15 L. ed. 451.

⁴*Stevenson v. Fain*, 195 U. S. 165, 49 L. ed. 142, 25 Sup. Ct. Rep. 6.

⁵*Supra* [b].

⁷*Hinckley v. Byrne, Deady*, 224, Fed. Cas. No. 6,510.

⁸*Prentiss v. Brennan*, 2 Blatchf. 162, Fed. Cas. No. 11,385.

⁹*Picquet v. Swan*, 5 Mason, 35, Fed. Cas. No. 11,134.

citizen of Cuba is a foreign citizen within the meaning of the section,¹⁰ as is also a corporation created under the laws of a foreign country.¹¹ But an Indian residing in the United States is not a foreign citizen,¹² nor, unless naturalized, is he a citizen of the United States nor of the State of his residence within the meaning of the statutes conferring jurisdiction on the Federal courts.¹³

Jurisdictional facts must appear affirmatively. One party must be alleged to be a citizen of a particular State and the other a citizen of some particular foreign State,¹⁴ the presumption being that a case is without the jurisdiction of the Federal courts unless the contrary appears from the record.¹⁵ The Supreme Court has held that by a description of a plaintiff as a "citizen of London, England," the fact that he was a subject of the English crown, did not affirmatively appear;¹⁶ and following this decision the circuit court has held that a "resident of Ontario, Canada, and a citizen of the Dominion of Canada and the Empire of Great Britain," is not a sufficient averment.¹⁷ A recent decision of the Supreme Court, however, holds that an averment that all the complainants are "of Cognac in France, and citizens of the Republic of France" is sufficient, and that an averment of alienage is unnecessary.¹⁸ The circuit court has no jurisdiction of suits between aliens, where no Federal question is involved.¹⁹

§ 132. Jurisdiction of crimes and offenses.

The circuit courts of the United States . . . shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States,^{[a]-[b]} except as otherwise provided by law,^[c] and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them.^[d]

Part of § 1, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, and corrected Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat 1901, p. 508.

¹⁰*Betancourt v. Mutual, etc. Ass'n.* 101 Fed. 305.

¹¹*Terry v. Imperial Ins. Co.* 3 Dill. 408, Fed. Cas. No. 13,838; *Shattuck v. North British, etc. Ins. Co.* 58 Fed. 609, 7 C. C. A. 386; *Sherwood v. Newport News, etc. Co.* 55 Fed. 1.

¹²*Cherokee Nation v. Georgia*, 5 Pet. 19, 8 L. ed. 31; *Cherokee Nation v. Southern Kansas Ry. Co.* 135 U. S. 653, 8 L. ed. 594, 10 Sup. Ct. Rep. 965.

¹³*Paul v. Chilsoquie*, 70 Fed. 402.

¹⁴*Bors v. Preston*, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407.

¹⁵*Bors v. Preston*, 111 U. S. 255, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; see also *King Bridge Co. v. Otoe Co.*

120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Stuart v. Easton*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 268; *Mansfield, etc. Ry. v. Swan*, 111 U. S. 383, 28 L. ed. 464, 4 Sup. Ct. Rep. 512.

¹⁶*Stuart v. Easton*, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268.

¹⁷*Rondot v. Township*, 79 Fed. 676, 25 C. C. A. 145; see also *Voight v. Michigan, etc. R. R.* 130 Fed. 398.

¹⁸*Hennessy v. Richardson Drug Co.* 189 U. S. 34, 47 L. ed. 698, 23 Sup. Ct. Rep. 532.

¹⁹*Pooley v. Luce*, 72 Fed. 561; *Laird v. Mutual, etc. Asso. Co.* 44 Fed. 712; *Jackson v. Twentyman*, 2 Pet. 136, 7 L. ed. 374; *Prentiss v. Brennan*, 2 Blatchford, 164, Fed. Cas. No.

[a] In general.

Federal courts have no common law jurisdiction in criminal cases¹ and can take cognizance of offenses only as authorized by Congress.² Before an offense can become cognizable in the circuit court Congress must first define or recognize it as such and affix a punishment to it, and confer jurisdiction on some court to try the offender.³ By the above section Congress has conferred on the circuit court exclusive cognizance of all crimes and offenses cognizable under the authority of the United States except as otherwise provided by law.⁴ The question whether a Federal court has jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed and must always be proved.⁵ The want of jurisdiction of subject-matter may appear in such proceeding either because there is no law making the act charged a crime, or because the act is not properly charged or because the facts fail to show that the party charged committed the act.⁶ An indictment found in a district court may on an order of a judge of that court be transmitted to a circuit court, and that court will have jurisdiction although the transfer was not made until after the defendant had pleaded.⁷

[b] Jurisdiction in particular cases.

Federal courts have jurisdiction of the crime of murder committed in a place under the exclusive jurisdiction of the United States.⁸ Perjury before a State notary in testimony as to a congressional election is within the jurisdiction of the circuit court under the above provision and is not cognizable in a State court.¹⁰ The offering of a bribe to a Federal officer to do an act not connected with his Federal duties, is no violation of a Federal law, and the offender cannot be subjected to Federal punishment.¹¹ An act of Congress declaring that the embezzlement by a guardian of money received by him from the government for his ward, is constitutional, and power may be vested in the circuit court to punish the offense.¹² The jurisdiction given by this section cannot be defeated by the refusal of a defendant to plead to an information.¹³ Federal jurisdiction in suits against consuls and vice-consuls is discussed in a previous section.¹⁴

11,385; *Hinckley v. Byrne, Deady*, 227, Fed. Cas. No. 6,510.

¹See ante, § 13.

²*Bollman v. Swartwout*, 4 Cranch, 93, 2 L. ed. 554; *United States v. Wiltberger*, 5 Wheat. 98, 7 L. ed. 37; *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259.

³*United States v. Hall*, 98 U. S. 345, 25 L. ed. 180; see also *United States v. Wilson*, 3 Blatchf. 435, Fed. Cas. No. 16,731.

⁴*United States v. Hall*, 98 U. S. 345, 25 L. ed. 180.

⁵*United States v. Rogers*, 23 Fed. 662.

⁶*In re Wolf*, 27 Fed. 606.

⁷*United States v. Richardson*, 28 Fed. 65. See *United States v. Murphy*, 3 Wall. 649, 18 L. ed. 217. Ante, § 116 et seq.

⁸*United States v. McBratney*, 104 U. S. 621, 26 L. ed. 869. See ante, § 25.

¹⁰*In re Loney*, 134 U. S. 375, 33 L. ed. 949, 10 Sup. Ct. Rep. 584, Affirming 38 Fed. 101.

¹¹*United States v. Gibson*, 47 Fed. 834.

¹²*United States v. Hall*, 98 U. S. 343, 25 L. ed. 180.

¹³*United States v. Borger*, 7 Fed. 193, 19 Blatchf. 249.

¹⁴Ante, § 2 [i].

[c] "Except as otherwise provided by law."

The district courts are given jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their respective districts, or upon the high seas, the punishment of which is not capital.¹⁶ The jurisdiction of the circuit courts therefore is exclusive only in the cases of capital offenses and in other cases is concurrent with the district court of the district in which the crime or offense is committed.¹⁷ The circuit and district courts are given concurrent jurisdiction over certain offenses committed on the great lakes and the waters connecting them.¹⁸

[d] Concurrent with district court.

The act giving the circuit court concurrent jurisdiction with the district court over crimes and offenses, operates prospectively and hence an after-created offense may be cognizable in the circuit court, although jurisdiction may, in terms be conferred on the district court only.¹

§ 133. Removal of causes arising under Federal Constitution, treaties or laws.

Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, ^{[a]-[f]}² which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.^[e]

First clause § 2, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, c. 373, 24 Stat. 552, and corrected Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 509.

[a] Removal of suits involving Federal questions—in general.

The original jurisdiction of the circuit courts over suits arising under the Constitution and laws of the United States has already been considered.⁵ The jurisdiction of the circuit courts on removal of such suits from the State courts seems to present no different principles. A suit is not removable simply because an act of Congress is to be construed or applied.

¹⁶Post, § 193.

¹⁷United States v. Holliday, 3, 415, 18 L. ed. 182. See also United Wall, 414, 18 L. ed. 182; United States v. Block, 3 Biss. 213, Fed. States v. Plumer, 3 Cliff. 28, Fed. Cas. No. 14,610.
¹⁸Ante, § 129.
¹Ante, § 129. [h]-[n] see also ante, § 2. [g]

¹⁸Ante, § 27.

There must be a dispute as to the construction of the act.⁶ The right of removal exists where plaintiff's statement shows that his recovery would be defeated by a construction of some Federal provision, which may fairly be contended for. Thus, a suit by a State to recover lands under a State statute forfeiting a previous railroad grant is removable where the validity of the act of forfeiture is questionable under the Federal Constitution.⁷ It has been held that a complaint by a State alleging that the defendant is about to import into the State a number of armed and lawless men, raises a Federal question under the 14th Amendment, and entitles the defendant to a removal.⁸ But a proceeding by a State to forfeit a franchise cannot be removed to the Federal courts on the ground that it impairs the obligations of a contract, the constitutional prohibition being that "no State shall pass any law" impairing the obligation of contracts.⁹

Suits arising under disputes as to public land laws are removable, as where the plaintiff denies the authority of the land department to issue a certain patent.¹¹ Where, however, the dispute merely involves the location of boundary lines no Federal question is involved.¹² A suit arising under Federal mining laws is removable¹³ as is also a mandamus proceeding to compel a railroad engaged in interstate commerce to run its trains to a certain station, since a judgment therein may impose a burden on interstate commerce.¹⁴ A bill by an assignee in bankruptcy to set aside a fraudulent conveyance by the bankrupt, is removable as presenting a Federal question.¹⁵ Where the Federal question has already been decided by the Supreme Court it ceases to be ground for removal.¹⁶ A suit by daughter of deceased homesteader to establish her right against widow to whom patent issued under R. S. § 2291, is one arising under Federal laws and removable.¹⁷ A suit on a marshal's bond involving the proper construction of a section of the Revised Statutes is removable.¹⁸

[b] — suits by and against national bank receivers.

A suit against a receiver of a national bank, appointed by the Comptroller of Currency is one arising under the laws of the United States.¹ Hence the circuit court has jurisdiction of a suit against such a receiver, brought to establish the claim of the plaintiff as a depositor in the bank.² It has jurisdiction also to compel the receiver to pay to the complainant out of the

⁶Fitzgerald v. Missouri, etc. Ry. 45 Fed. 812.

⁷State v. Duluth, etc. R. R. 87 Fed. 497.

⁸Arkansas v. Kansas, etc. Co. 96 Fed. 353.

⁹Kentucky v. Louisville Bridge Co. 42 Fed. 241.

¹¹Mitchell v. Smale, 140 U. S. 406. 35 L. ed. 442, 11 Sup. Ct. Rep. 819.

¹²Los Angeles, etc. Co. v. Hoff, 48 Fed. 340.

¹³Frank, etc. Co. v. Larimer, etc. Co. 8 Fed. 724.

¹⁴People v. Rock Island, etc. Ry. 71 Fed. 753.

¹⁵Woodridge v. McKenna, 8 Fed. 650.

¹⁶Myrtle v. Nevada, etc. Ry. 137 Fed. 193; Arkansas v. Choctaw, etc. Ry. 134 Fed. 106.

¹⁷McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78.

¹⁸Lawrence v. Norton, 13 Fed. 1, 4 Woods 383.

¹Speckart v. German Nat. Bank, 85 Fed. 12; Sowles v. Witters, 43 Fed. 700; Gilbert v. McNulta, 96 Fed. 83.

²Bartley v. Hayden, 74 Fed. 914.

funds of the bank in the receiver's hands a certain sum on the grounds that it was held by the receiver as a trust fund and not part of the bank property.³ A receiver of a national bank being a Federal officer⁴ may, under R. S. § 629,⁵ sue in the Federal courts without regard to the parties or the amount of the suit.⁶

[c] — suits against Federal corporations.

Suits against corporations organized under acts of Congress have always been held to be suits arising under the laws of the United States, and therefore cognizable by the circuit courts regardless of citizenship.⁸ By act of 1887, however, national banks for jurisdictional purposes are to be deemed citizens of the States in which they are located and hence, although Federal associations, have no more right to sue in a circuit court, than a citizen of the particular State.⁹ The fact that a State corporation is jointly sued with a Federal corporation does not change the nature of the suit. It is one arising under the Federal laws and hence removable.¹⁰

[d] — suits against Federal court receivers.

The fact that a receiver is appointed by a Federal court does not make all actions against him cases arising under the Constitution and laws of the United States.¹² Accordingly where he was appointed as receiver of a State corporation in the exercise of the general jurisdiction of the court, and not under any provision of the Federal laws, a suit against him does not per se, present a Federal question.¹³ While some cases in the Supreme Court go further than this¹⁴ they really involved receivers of Federal corporations.¹⁵ This distinction has apparently not been drawn in some of the

³Hot Springs, etc. School District v. National Bank, 61 Fed. 417.

⁴Frelinghuysen v. Baldwin, 12 Fed. 395.

⁵Ante, § 124.

⁶Price v. Abbott, 17 Fed. 506; Armstrong v. Ettlesohn, 36 Fed. 209; Armstrong v. Trautman, 36 Fed. 276.

⁸See Osborn v. United States Bank, 9 Wheat. 819, 6 L. ed. 223; Pacific R. R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Oregon, etc. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1049, 16 Sup. Ct. Rep. 869; Union Pac. Ry. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; Texas, etc. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1032, 17 Sup. Ct. Rep. 703; Texas R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Lund v. Chicago, etc. R. Co. 78 Fed. 385; United States Freehold, etc. Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470; Supreme Lodge, etc. v. Wilson, 66 Fed. 785, 14 C. C. A. 264.

⁹Ante, § 24. Ex parte Jones, 164 U. S. 693, 41 L. ed. 602, 17 Sup. Ct. Rep. 222; Wichita Nat. Bank v. Smith, 72 Fed. 569, 19 C. C. A. 42.

¹⁰Lund v. Chicago, etc. Ry. 78 Fed. 387; Martin v. St. Louis, etc. Ry. 134 Fed. 135.

¹²Gableman v. Peoria, etc. Ry. 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; Penner v. Rogers, 128 Fed. 988, see also. Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316; Pope v. Railway Co. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

¹³Gableman v. Peoria, etc. Ry. 179 U. S. 340, 45 L. ed. 220, 21 Sup. Ct. Rep. 171.

¹⁴See Railroad Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Tennessee v. Union, etc. Bank, 152 U. S. 463, 38 L. ed. 515, 14 Sup. Ct. Rep. 654.

¹⁵Marrs v. Felton, 102 Fed. 776.

circuit courts, which have held that all suits against a Federal receiver are suits under the laws of the United States.¹⁶ Where a suit against a receiver raises a Federal question, the fact that other parties are joined as co-defendants does not affect the nature of the suit or the right of removal.¹⁷

[e] Federal question to appear from plaintiff's statement.

As already stated the general rule is that the Federal question must appear by the plaintiff's statement of his own claim, and unless it does so appear the court has no jurisdiction either original or on removal.¹ The failure of the plaintiff so to set forth a Federal question is not remedied by any statement in the petition for removal or in the subsequent pleadings.² The above rule has been followed however, only since the amendment of 1887. As the act of 1875 originally stood, any civil suit of the requisite amount arising under the Federal laws might be removed by either party. Removal cases, while this provision was in force, held that the Federal question might be presented by the answer or plea of the defendant,³ the test being whether at the time of removal, a Federal question appeared on the record.⁴ By the amending act of 1887, only such Federal question might be removed as the circuit court had original jurisdiction over "by the preceding section," and since it is uniformly held that the circuit court has original jurisdiction over a suit involving a Federal question only when such question appears in the plaintiff's statement, a removal suit must also show jurisdiction on the face of the plaintiff's statement.⁵ An exception has been made where plaintiff has been guilty of bad pleading and failed to set forth facts which if stated would give the Federal courts jurisdiction.⁶ Accordingly failure to state that a corporation is a Federal corporation will not destroy the right of removal and the fact can be shown in the petition for removal.⁷ So also Federal jurisdiction cannot be defeated by a false statement in plaintiff's declaration, that the citizenship of defendant corporation is State, and not Federal.⁸

[f] Amount in controversy.

The above provision allows the removal of causes arising under the Federal Constitution or laws, of which the circuit courts are given juris-

¹⁶Landers v. Felton, 73 Fed. 313; Ray v. Peirce, 81 Fed. 881; Pitkin v. Cowen, 91 Fed. 600. But see Gableman v. Peoria, etc. R. Co. 101 Fed. 1, 41 C. C. A. 160.

¹⁷Landers v. Felton, 73 Fed. 311.

¹Ante, § 129.[h]

²Arkansas v. Kansas, etc. Co. 183 U. S. 188, 46 L. ed. 140, 22 Sup. Ct. Rep. 47; Cella v. Brown, 144 Fed. 742.

³See San Mateo v. Railroad Co. 13 Fed. 145; Van Allen v. Atchison, etc. R. Co. 3 Fed. 545, 1 McCrary, 598.

⁴Railroad Co. v. Mississippi, 102 U. S. 140, 26 L. ed. 98; Ames v. Kan-

sas, 111 U. S. 462, 28 L. ed. 487, 4 Sup. Ct. Rep. 437; Metcalf v. Watertown, 128 U. S. 589, 32 L. ed. 544, 9 Sup. Ct. Rep. 173.

⁵Tennessee v. Union, etc. Bank, 152 U. S. 461, 38 L. ed. 514, 14 Sup. Ct. Rep. 654.

⁶Speer v. Colbert, 200 U. S. 130, 50 L. ed. 403, 26 Sup. Ct. Rep. 201.

⁷Scott v. Choctaw, etc. R. R. 112 Fed. 182; Winters v. Drake, 102 Fed. 545.

⁸Texas, etc. Ry. v. Cody, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703.

diction "by the preceding section." That section requires in excess of two thousand dollars to be involved.¹⁰ Hence a removal to the Federal court is not allowed in a case arising under the Federal Constitution or laws, unless the amount in dispute exceeds two thousand dollars.¹¹ Where, however, a suit is merely ancillary to one in the Federal court, it may be removed regardless of the amount in controversy.¹² A receiver appointed by a Federal court, when authorized to defend in a suit affecting his trust, may remove the case regardless of the amount on the ground that such suit is ancillary.¹³

[g] May be removed by defendant or defendants.

As originally enacted in 1875 the above provision gave either party the right to remove on the ground that a Federal question was raised. This right is now, however, limited in terms to the defendant or defendants,¹⁵ and the rule is well established that all such defendants must join in the petition, where the removal is sought because of a Federal question.¹⁶ The rule has been applied where a State corporation and a Federal corporation are jointly sued¹⁷ and in the case of a joint suit against a railroad and its receiver.¹⁸

§ 134. Removal of causes where United States are parties, diverse citizenship, or land grants from different States.

Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section [i. e., causes where United States are plaintiffs or petitioners or where diverse citizenship exists or where parties claim under land grants from different States],²¹ and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein,^{[a]-[b]} being non-residents of that State.^[c]

Part of § 2, act Mar. 3, 1875, as amended Mar. 3, 1887, c. 373, 24 Stat. 552, and corrected Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 509.

¹⁰Ante, § 129.[d]

¹¹Hallam v. Tillinghast, 75 Fed. 849; Johnson v. Wells, Fargo, etc. Co. 91 Fed. 1.

¹²See Carpenter v. Northern Pac. R. Co. 75 Fed. 850. See ante, § 3.

¹³See Hallam v. Tillinghast, 75 Fed. 849.

¹⁵Caples v. Texas, etc. Ry. 67 Fed. 11; Tennessee v. Bank, 152 U. S. 462, 38 L. ed. 513, 14 Sup. Ct. Rep. 654.

¹⁶Gableman v. Railway Co. 179 U.

S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; Railroad Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; Miller v. Le Mars, etc. Bank, 116 Fed. 553; German, etc. Soc. v. Dormitzer, 116 Fed. 473, 53 C. C. A. 639; Martin v. St. Louis, etc. Ry. 134 Fed. 135.

¹⁷Scott v. Choctaw, etc. R. Co. 112 Fed. 182.

¹⁸Yarnell v. Felton, 104 Fed. 163.

²¹Ante, §§ 130, 131.

[a] The section in general, and cross-references.

Proceedings for ascertaining whether land grants of different states involved are provided by another section of the law.¹ This provision superseded R. S. § 639, respecting removal.² It is held that the above provision as to "any suit of which the circuit court is given jurisdiction by the preceding section," applies only to the first part of that section³ and not to the clause⁴ relating to the district in which suit may be brought.⁵ Where a suit is brought by several plaintiffs, residents of different States, against a nonresident defendant, the circuit court would have no original jurisdiction, neither the plaintiff nor the defendant being residents of the district, but on removal would have jurisdiction since the clause does not apply.⁶ So also where there is a single plaintiff and defendant if diverse citizenship exists, removal may be had though neither party is a resident of the district.⁷ The clause is, however, not jurisdictional, and may be waived.⁸ Hence even if it did apply to removal suits, the fact that the defendant has petitioned for a removal would be a sufficient waiver.⁹ Where, however, the State court has no jurisdiction over the subject-matter of the action on the merits the circuit court on removal is likewise without jurisdiction, although the suit may be between citizens of different States and the amount in dispute sufficient to give jurisdiction.¹⁰ But if the case is one of which the State court had jurisdiction, the fact that the defense made after removal is based upon a statute which the Federal courts are alone empowered to administer, and not cognizable in the State courts, will not defeat the circuit court's jurisdiction.¹¹

It is established that a suit cannot be removed for diverse citizenship unless the requisite citizenship exists both at the time when the suit is begun and when the petition for removal is filed.¹² So where there was no diversity of citizenship at the commencement of the suit, the substitution of new defendants who are nonresidents cannot give jurisdiction.¹³ An amendment to a complaint which transforms a non-removable cause to one which is removable, gives the defendant a right to remove if he acts promptly.¹⁴ A Federal court cannot acquire jurisdiction by removal of proceedings instituted in what was supposed to be a State court, but which

¹Post, § 1144.²O'Connor v. Texas, 202 U. S. 501, 50 L. ed. 1120, 26 Sup. Ct. Rep. 726.³See ante, §§ 129, 130, 131.⁴Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; Empire, etc. Co. v. Propeller, etc. Co. 108 Fed. 902.⁵See post, § 402.⁶Empire Min. Co. v. Propeller, etc. Co. 108 Fed. 902.⁷Burch v. Southern Pac. R. Co. 139 Fed. 350, and cases cited.⁸Empire Min. Co. v. Propeller, etc. Co. 108 Fed. 902; Burch v. Southern Pac. R. Co. 139 Fed. 350.⁹Empire Min. Co. v. Propeller, etc. Co. 108 Fed. 902.¹⁰Auracher v. Omaha, etc. R. Co. 102 Fed. 1. See also, Swift v. R. R. Co. 58 Fed. 861.¹¹Lehigh Valley R. Co. v. Rainey, 99 Fed. 598.¹²Gibson v. Bruce, 108 U. S. 569, 27 L. ed. 826, 2 Sup. Ct. Rep. 873; Akers v. Akers, 117 U. S. 197, 29 L. ed. 888, 6 Sup. Ct. Rep. 669; Stevens v. Nichols, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518.¹³Burnham v. First Nat. Bank, 53 Fed. 165, 3 C. C. A. 486.¹⁴Myrtle v. Nevada, etc. Ry. 137 Fed. 193.

had no legal existence.¹⁷ On removal for diverse citizenship the arrangement of parties in the declaration is not conclusive, and the Federal court may ascertain the real dispute and arrange the parties according to their interests.¹⁸ Thus in a stockholder's suit to enforce a right of the corporation, the latter will be aligned with the defendants where the controlling officers thereof are shown to be opposed to the object sought.¹⁹ Parties not indispensable may be dismissed or disregarded if their presence would oust or interfere with the jurisdiction of the court, or the right of removal.²⁰

[b] What suits removable.

The above provision gives defendant the right of removal of "any other suit . . . of which the circuit courts are given jurisdiction by the preceding section." The suits referred to are suits in which the United States are plaintiffs or petitioners, suits concerning land grants of different States, and cases of diverse citizenship.¹ As originally enacted the second section of the act of 1875, gave either party the right to remove a case "in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming land under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects." Now, however, the circuit court's jurisdiction on removal is limited to such suits as might originally have been brought in that court.² This limitation is based upon those elements specified as essential to jurisdiction in that section of the act just mentioned and not upon matters of procedure.³ That is, if a suit is of a civil nature at law and the controversy is between citizens of different States and the amount in dispute exceeds two thousand dollars, it is removable by a nonresident defendant under the above provision, even though the plaintiff could not have instituted it in the circuit court owing to a limitation of a State statute limiting that particular action to a particular State court.⁴ The method of procedure by which a suit is brought or instituted in a State court is merely formal and modal and nowise affects the right of removal by the defend-

¹⁷Crowley v. Southern Ry. Co. 139 Fed. 851.

¹⁸Carson v. Hyatt, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; Evers v. Watson, 156 U. S. 527, 39 L. ed. 521, 15 Sup. Ct. Rep. 430; Merchants, etc. Co. v. Insurance, etc. Co. 151 U. S. 385, 38 L. ed. 204, 14 Sup. Ct. Rep. 367; First Nat. Bank v. Bridgeport Trust Co. 117 Fed. 969; Hutton v. Bancroft, etc. Co. 77 Fed. 481; Oakes v. Yonah Land Co. 89 Fed. 243; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Groel v. United Electric Co. 132 Fed. 254.

¹⁹Groel v. United, etc. Co. 132 Fed. 252.

²⁰Cella v. Brown, 136 Fed. 439; Same v. Same, 144 Fed. 742; Boatman's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Axline v. Toledo, etc. R. Co. 138 Fed. 169; Groel v. United Electric Co. 132 Fed. 254.

¹Ante, §§ 130, 131.

²See ante, §§ 129, 130, 131; Railroad Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; Wahl v. Franz, 100 Fed. 682, 40 C. C. A. 638, 49 L.R.A. 62; Tennessee v. Bank, 152 U. S. 462, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

³In re Stutsman Co. 88 Fed. 341.

⁴Union, etc. Ry. v. Chicago, etc. R. Co. 119 Fed. 215. See also In re Stutsman, 88 Fed. 341.

ant.⁵ A proceeding for taking land of a non-resident corporation, by eminent domain is a removable controversy, the amount in dispute being sufficient.⁶ A mandamus proceeding under the laws of Iowa, has been held not a removable controversy.⁷

[c] — who may remove for diverse citizenship.

By the above provision it is clear that in all cases where there is no separable controversy the right of removal can be exercised only by non-resident defendants.⁸ All defendants must be non-residents.⁹ Where a petition alleges a joint cause of action against a resident and a non-resident defendant the cause is not removable, on the petition of either.¹⁰ Where the petition is brought by the non-resident in such a case, it is not removable even though it is averred in the petition that the resident defendant has no interest in the controversy or that the cause of action is not joint;¹¹ or upon an allegation that such defendant was joined merely for the purpose of defeating jurisdiction.¹² The defendant petitioning for a removal may, however, allege and prove that the local defendant was joined for the fraudulent purpose of defeating jurisdiction.¹³ Where such allegations of fraudulent joinder are denied the burden of proof lies with the defendant.¹⁴

While, by the terms of the provision the defendant must be a non-resident, mere temporary residence in the State where the suit is brought will not defeat his right of removal.¹⁵ The citizenship and residence of a domestic corporation, within the meaning of this provision, are in the State of its incorporation, although it may be organized chiefly for the purpose of doing business in other States.¹⁶ A foreign corporation is a citizen and resident of the place of its incorporation and does not become a resident of a State by doing business and having an office therein.¹⁷ Where a resident defendant is made party by amendment of the complaint the right of removal does not exist, although prior to the amendment the other defendant might have removed.¹⁸

⁵*Terre Haute v. Evansville R. Co.* 106 Fed. 548. See also, *Kirby v. Chicago, etc. R. Co.* 106 Fed. 557.

⁶*Madisonville, etc. Co. v. St. Bernard, etc. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251.

⁷*Mystic M. Co. v. Chicago, etc. Ry.* 132 Fed. 289.

⁸*Parkinson v. Barr*, 105 Fed. 81.

⁹*McCabe v. Mayesville*, 112 Ky. 861, 66 S. W. 1054.

¹⁰*Appel, etc. Co. v. Baggott*, 132 Fed. 1005.

¹¹*Louisville, etc. R. R. v. Wangelin*, 132 U. S. 601, 33 L. ed. 476, 10 Sup. Ct. Rep. 203.

¹²*Keller v. Kansas City etc. R. Co.* 135 Fed. 202.

¹³*Louisville, etc. R. R. v. Wange-*

lin, 132 U. S. 601, 33 L. ed. 476, 10 Sup. Ct. Rep. 203; *Union, etc. Ry. v. Chicago, etc. Ry.* 119 Fed. 211; *Kelly v. Chicago, etc. R. Co.* 122 Fed. 286.

¹⁴*Kansas, etc. Ry. v. Herman*, 187 U. S. 69, 47 L. ed. 76, 23 Sup. Ct. Rep. 24.

¹⁵*Chiatovich v. Hanchett*, 78 Fed. 193.

¹⁶*Baughman v. Waterworks Co.* 46 Fed. 4. *Fales v. Railroad Co.* 32 Fed. 675; *Purcell v. British Land Co.* 42 Fed. 467; *Galveston, etc. Railroad Co. v. Gonzales*, 151 U. S. 501, 38 L. ed. 248, 14 Sup. Ct. Rep. 403.

¹⁷*Purcell v. British Land Co.* 42 Fed. 467, note to *Eddy v. Casas*, 118 Fed. 364.

¹⁸*Merchants, etc. Bank v. Thompson*, 4 Fed. 878.

[d] — all defendants must join in petition.

Where the case does not present a separable controversy all the defendants must join in the petition for removal.¹ If the parties have been rearranged, all those whose interests are really those of the defendants must join.² Removal is defeated where one of the defendants allows his right to elapse by failing to take advantage of it within the required time.³

[e] — diversity of citizenship how to appear.

Where removal is sought solely for diverse citizenship, it is not necessary that the diverse citizenship appear in the plaintiff's complaint.⁵ The rule is that it must appear upon the record, either upon the petition for removal or upon the other pleadings,⁶ and unless it so appears the State court may proceed with the case.⁷ A statement in a policy of insurance made a part of the record by the pleading, may be referred to for facts necessary to give the right to removal.⁸ The diverse citizenship of the parties must, however, appear affirmatively.⁹ Allegations in the petition for removal which have been deemed sufficient to show diversity of citizenship are considered in a following note.

[f] — amount in controversy—counterclaim.

Since suits involving diverse citizenship are originally cognizable in the Federal court only when the amount in controversy exclusive of interest and costs exceeds two thousand dollars,¹¹ removal of such suits under the above provision cannot be allowed except when that amount is involved.¹² The amount must be exclusive of interest and where the principal is less than the jurisdictional amount the plaintiff cannot, by adding principal and interest in the amount prayed for, obtain removal.¹³ Where the amount claimed in the plaintiff's complaint and which he is entitled to recover if the allegations are true, is sufficient to give jurisdiction, it cannot be defeated after removal by the plaintiff changing his position with respect to the amount claimed.¹⁴ Thus, jurisdiction cannot be defeated by a concession by the plaintiff that the amount he claimed was less than that which he stated in the pleadings.¹⁵ But where before removal plaintiff's pleading

¹Miller v. Clifford, 133 Fed. 886, 67 C. C. A. 52; Chicago Railway Co. v. Martin, 178 U. S. 248, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248; Railroad Co. v. Dixon, 179 U. S. 140, 45 L. ed. 121, 21 Sup. Ct. Rep. 67.

²Wilson v. Oswego Twp. 151 U. S. 63, 38 L. ed. 70, 14 Sup. Ct. Rep. 259.

³Abel v. Book, 120 Fed. 47.

⁵Ysleta v. Canda, 67 Fed. 6.

⁶Phoenix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427; Bondurant v. Watson, 103 U. S. 286, 26 L. ed. 450.

⁷Phoenix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427.

⁸Robertson v. Scottish, etc. Ins. Co. 68 Fed. 173.

⁹Dalton v. Ins. Co. 118 Fed. 936. See Parkinson v. Barr, 105 Fed. 84.

¹¹Ante, § 131.

¹²See Gilson v. Mutual, etc. Ass'n. 129 Fed. 1003.

¹³Gilson v. Mutual, etc. Ass'n. 129 Fed. 1003.

¹⁴Johnson v. Computing Scale Co. 139 Fed. 339.

¹⁵Hayward v. Nordberg, 85 Fed. 4, 29 C. C. A. 438.

has been amended reducing the claim below \$2,000, there can be no removal.¹⁶

Upon the question whether or not a counterclaim set up by a removing defendant may be considered in determining the jurisdictional amount, there is a conflict of authority, some cases holding that it may be considered,¹⁷ and others that it may not.¹⁸ The latter cases rest their decisions on the fact that the removing defendant becomes a plaintiff so far as the counterclaim is concerned, and as the right of removal does not exist in favor of the plaintiff there can be no removal.¹⁹ Under a Utah statute which made it obligatory on defendant to set up his counterclaim or be forever barred from maintaining an action on it, it was held that the amount of the counterclaim might be considered.²⁰ The point was raised in a recent case in the southern district of New York, and the cause was remanded on the ground that a doubt existed as to jurisdiction.¹ Where the party removing is the original plaintiff and not the defendant, it is held that he becomes the defendant as regards the counterclaim and if a nonresident, and the counterclaim is sufficient to give jurisdiction, removal is proper.² If separate suits involving less than \$2,000 each are brought, no right of removal arises when they are consolidated for trial.³

[g] — how amount in controversy to appear.

It should appear either in the removal petition or the other pleadings, that the amount in dispute was sufficient to give the court jurisdiction at the time the suit was commenced. Hence an allegation in the petition that the controversy exceeded the jurisdictional amount at the time of removal is insufficient.⁴ The fact that the amount was not alleged in plaintiff's pleadings is immaterial if it sufficiently appears from the petition.⁵ Where an action for personal injuries is commenced by service of summons without a complaint, and removed, on a petition alleging that the amount in controversy is sufficient to give jurisdiction, remand has been refused because the complaint alleges an insufficient amount.⁶ Such a ruling however deprives the plaintiff of his right to elect for what amount of damages he will sue.

[h] Averments in petition for removal—diverse citizenship.

Unless otherwise set forth in the record the petition must clearly allege the citizenship of each party to the suit, an allegation of diverse citizen-

¹⁶ *Maine v. Gilman*, 11 Fed. 214.

¹⁷ *Walcott v. Watson*, 46 Fed. 529;
Clargson v. Manson, 4 Fed. 257, 18
Blatchf. 443.

¹⁸ *Bennett v. Devine*, 45 Fed. 705;
McKown v. Kansas, etc. Co. 105 Fed.
657.

¹⁹ *Bennett v. Devine*, 45 Fed. 705;
McKown v. Kansas, etc. Co. 105 Fed.
657.

²⁰ *Lee v. Ins. Co.* 74 Fed. 424.

¹ *Crane Co. v. Guanica*, 132 Fed. 713.

² *Price v. Ellis & Co.* 129 Fed. 482;

Carson, etc. v. Holtzclaw, 39 Fed. 1
578. But see *contra Waco, etc. Co. v.*
Stove Co. 91 Fed. 289, 33 C. C. A.
511; and see *West v. Aurora City.*
6 Wall. 139, 18 L. ed. 819.

⁴ *Strasburger v. Beecher*, 44 Fed.
214.

⁵ *Banigan v. Worcester*, 30 Fed. 392.

⁶ *Coffin v. Philadelphia, etc. R. Co.*
118 Fed. 688.

ship in general terms being insufficient.⁹ The fact that there are a large number of parties plaintiff or defendant does not take the case out of the rule.¹⁰ An averment of residence only is not sufficient.¹¹ Where the parties are suing in their representative character their personal citizenship must be alleged,¹² it being the personal citizenship of the parties which determines the right to removal.¹³ But where the suit is by an assignee diversity of citizenship must be alleged not only between the assignee and the defendant, but also between the defendant and the assignor,¹⁴ since diverse citizenship must exist not only at the time of the removal, but also at the time when the suit was commenced.¹⁵ The fact of diverse citizenship may however appear either from the petition or from the other parts of the record.¹⁶ Where a partnership or joint stock company is a party, the petition should state the individual names and citizenship of the firm members.¹⁷ Where a corporation is a party the averment should be that the corporation is created under the laws of the particular State.¹⁸ Such an averment is sufficient since a corporation is a citizen of the State of its incorporation only.¹⁹ In the case of a foreign corporation an averment that it is a "company duly chartered and incorporated under the laws of Great Britain" is sufficient.²⁰ But an averment that a corporation is a citizen of a particular State is insufficient.¹

[i] — non-residence of defendant.

The restriction as to the right to removal based on the residence of defendants is clearly jurisdictional and the non-residence of the defendant must be alleged in the petition or in other parts of the record.² Where a suit was brought in Indiana, an allegation in the petition that the defendant "was at the time of the commencement of the suit and still is a citizen and resident of the State of Ohio," is a sufficient allegation of his non-residence.³ An averment also that a party is a citizen of a certain State is held to include the idea of residence in that State and to be sufficient.⁴

⁹Thompson v. Stalman, 131 Fed. 809; Jones v. Adams Express Co. 129 Fed. 618; Cameron v. Hodges, 127 U. S. 322, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154. See generally post, § 1136, et seq.

¹⁰Jones v. Adams Express Co. 129 Fed. 619.

¹¹Everhart v. Huntsville College, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555; Minard v. Goggan, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 874; Southwestern, etc. Co. v. Robinson, 48 Fed. 769, 1 C. C. A. 91.

¹²Amory v. Amory, 95 U. S. 187, 24 L. ed. 428; Brisenden v. Chamberlain, 53 Fed. 310.

¹³Wilson v. Smith, 66 Fed. 82.

¹⁴Murphy v. Payette, etc. Gold Co. 98 Fed. 321.

¹⁵Supra, [a]

¹⁶Shattuck v. North British, etc. Co. 58 Fed. 609, 7 C. C. A. 386.

¹⁷Adams v. May, 27 Fed. 907; Chapman v. Barney, 129 U. S. 682, 32 L. ed. 802, 9 Sup. Ct. Rep. 426.

¹⁸Frisbie v. Chesapeake, etc. R. Co. 57 Fed. 3; see Myers v. Murray, 43 Fed. 695, 11 L.R.A. 216.

¹⁹Shaw v. Mining Co. 145 U. S. 444, 36 L. ed. 769, 12 Sup. Ct. Rep. 935; Southern Pac. R. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

²⁰Robertson v. Scottish Union, etc. Co. 68 Fed. 173.

¹Lafayette Insurance Co. v. French, 18 How. 404, 15 L. ed. 451; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207.

²Fife v. Whittell, 102 Fed. 539.

³Zeibert v. Hunt, 108 Fed. 449.

⁴Myers v. Murray, 43 Fed. 695,

Where the petitioning defendant is a corporation, an allegation that it was created under the laws of a State other than that in which the suit is brought is a sufficient allegation of non-residence,⁵ since a corporation cannot have a residence other than that of the State of its incorporation except by a positive and affirmative act of creation and adoption by another State.⁶ So it is held that a defendant being a foreign corporation is presumed to be a resident of the country where it was created, and non-residence being presumed and nothing appearing to dispute the same, it need not be alleged in the petition.⁷ Where an alien is defendant there should be an allegation of non-residence.⁸

§ 135. Removal of separable controversies.

When in any suit mentioned in this section¹¹ there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them,^{[a]-[j]} then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.^{[k]-[l]}

Part of § 2, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended act Mar. 3, 1887, c. 373, 24 Stat. 552, and corrected act Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 509.

[a] History of provision.

The removal of separable controversies was first provided for by an act of July 27, 1866.¹² That act gave the right of removal to a defendant, citizen of a State other than that in which the suit was brought; and was carried into the Revised Statutes.¹³ By the act of 1875 the right of removal in cases of separable controversies was extended to "one or more of the plaintiffs or defendants," and did not restrict the right to the party or parties who were non-residents of the State in which suit was brought. The present law restricts the right of removal to the "defendant or defendants."¹⁴ While the provision does not expressly require that the removing defendant be a non-resident of the State it is said to be clearly implied

11 L.R.A. 216; but see *Barth v. Coler*, 60 Fed. 466, 9 C. C. A. 81.

⁵*Myers v. Murray*, 43 Fed. 695, 11 L.R.A. 216; *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 577; *Snattuck v. North British, etc. Co.* 58 Fed. 609, 7 C. C. A. 386.

⁶*Overman Wheel Co. v. Pope, etc.* Co. 46 Fed. 577.

⁷*Howard v. Gold Reers, etc.* 102 Fed. 657.

⁸*Walker v. O'Neill*, 38 Fed. 374.

¹¹Ante, §§ 133, 134.

¹²14 Stat. 306, c. 288.

¹³R. S. § 639, sub. sec. 2. Ante, § 124.

¹⁴*Thruber v. Miller*, 67 Fed. 376, 14 C. C. A. 432.

from the context,¹⁵ making the provision practically identical with the original provision of the act of 1866, just stated.¹⁶

[b] Separable controversies in general.

If there is but a single controversy in a cause it cannot be deemed separable within the meaning of the above provision.²¹ In cases of diverse citizenship the right of removal is governed by the preceding code section and there can be no removal unless the defendant is a non-resident.²² The above provision governs only that class of cases where there are two or more controversies involved in the same suit.¹ Misjoinder of parties cannot justify removal, nor misjoinder of several causes of action. The sole question is whether there are several distinct controversies included in a single suit, whether properly so included or not.² Where there is but one indivisible controversy between the plaintiffs and defendants, as in the case of a suit for a partition, one of several defendants cannot remove.³ If the judgment must be for all or against all the defendants there can be no separable controversy.⁴ The fact that it is necessary to prove more facts against one defendant than against another is no test to determine whether or not there is a separable controversy.⁵

Separable controversies are separate and distinct causes of action disclosed by the record in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other.⁶ The case must be one capable of being separated into parts so that in one of the parts a controversy will be presented in which citizens of one or more States will be on one side and citizens of other States on the other.⁷ Other parties to the suit as it was begun, not indispensable to the controversy, will not be considered if their presence will oust the jurisdiction of the court.⁸

¹⁵Thurber v. Miller, 67 Fed. 376, 14 C. C. A. 432.

Schofield v. Demorest, 40 Fed. 273; see also Vinal v. Continental Const. Co. 34 Fed. 228; but see Staubrough v. Cook, 38 Fed. 369, 3 L.R.A. 400. See Iowa, etc. Min. Co. v. Bliss, 144 Fed. 446.

¹⁶Thurber v. Miller, 67 Fed. 379, 14 C. C. A. 432.

²¹Western Union Tel. Co. v. Brown, 32 Fed. 342; Sharkey v. Port Blakely Mill. Co. 92 Fed. 428.

²²Western Union Tel. Co. v. Brown, 32 Fed. 342.

¹Idem.

²Deere, etc. Co. v. Chicago, etc. Ry. 85 Fed. 888.

³See Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835.

⁴State v. Columbus, etc. R. Co. 48 Fed. 628.

⁵Ames v. Chicago, etc. Ry. Co. 39 Fed. 881.

⁶Boatman's Bank v. Fritzleu, 135 Fed. 663, 68 L. ed. 288; Geer v. Alkali Works, 190 U. S. 432, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Fraser v. Jennison, 106 U. S. 194; 27 L. ed. 132, 1 Sup. Ct. Rep. 171; see Torrence v. Shedd, 144 U. S. 530, 36 L. ed. 528, 12 Sup. Ct. Rep. 727, and cases cited; German Savings, etc. Co. v. Dormetzer, 116 Fed. 473, 53 C. C. A. 639; Merchant's Cotton Press Co. v. Insurance Co. 151 U. S. 385, 38 L. ed. 195, 14 Sup. Ct. Rep. 367.

⁷Fraser v. Jennison, 106 U. S. 194, 27 L. ed. 132, 1 Sup. Ct. Rep. 171; Geer v. Mathieson, etc. Works, 190 U. S. 432, 47 L. ed. 1125, 23 Sup. Ct. Rep. 807.

⁸Cella v. Brown, 136 Fed. 441.

[c] — where cause of action is joint and several.

Where the cause of action is joint and several and the plaintiff elects to sue two or more defendants jointly, a non-resident defendant being so sued with other defendants, co-residents with plaintiff, cannot remove on the ground of separable controversy.¹⁴ Plaintiff has his right to elect whether his suit in such case shall be joint or several.¹⁵ This is a well settled rule, and it is also established that whether the joint action is in tort¹⁶ as for a joint fraud or joint trespass,¹⁷ or joint negligence,¹⁸ or whether it is on a contract,¹⁹ the defendants cannot by a denial of joint liability or by the presentation of separate defenses resolve the joint suit into separable controversies. Separate answer or defense may defeat a joint recovery, but it cannot deprive the plaintiff of his right to prosecute his suit in his own way.²⁰ In a tort action by suing less than all the tort feorsors, the plaintiff has not elected to make the action several so as to entitle one or more of the defendants to remove.¹

[cc] — suit against corporation and its employee.

Under this principle where the complaint charges concurrent negligence jointly against a corporation such as a railroad, and its employees, the controversy is not separable;² and if a railroad and its section foreman are jointly sued for the negligent burning of plaintiff's premises, no separable controversy is presented.³ The joinder of an employee as co-defendant in damage suits against railroad and other corporations for the purpose of defeating removal proceedings, has been a common expedient in recent years; and the efforts of defendant corporations to avoid that result has

¹⁴Ames v. Chicago, etc. R. Co. 39 Fed. 883; Mitchell v. Smale, 140 U. S. 409, 35 L. ed. 443, 11 Sup. Ct. Rep. 820; Sweeney v. Grand Island, etc. R. Co. 61 Fed. 5; Kane v. Indianapolis, 82 Fed. 772; Moore v. Los Angeles, etc. Co. 89 Fed. 78.

¹⁵Boatman Bank v. Fritzleu, 135 Fed. 662, 68 C. C. A. 288; Powers v. Chesapeake, etc. R. Co. 169 U. S. 96, 42 L. ed. 675, 18 Sup. Ct. Rep. 264; Brown v. Cox, 75 Fed. 690; Moore v. Los Angeles, etc. Co. 89 Fed. 78; Southern Ry. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

¹⁶Pirie v. Tvedt, 115 U. S. 43, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; Powers v. Chesapeake, etc. R. Co. 169 U. S. 96, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Creagh v. Equitable, etc. Assn. 88 Fed. 3; Louisville, etc. Ry. v. Wangelin, 132 U. S. 602, 33 L. ed. 476, 10 Sup. Ct. Rep. 204.

¹⁷Barth v. Coler, 60 Fed. 469, 9 C. C. A. 83; Little v. Giles, 118 U. S. 601, 30 L. ed. 269, 7 Sup. Ct. Rep. 32.

¹⁸Chesapeake, etc. Ry. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Fogarty v. Southern Pac. Co. 123 Fed. 974.

¹⁹Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482, 7 Sup. Ct. Rep. 301; Putnam v. Ingraham, 114 U. S. 57, 29 L. ed. 65, 5 Sup. Ct. Rep. 746; Louisville, etc. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735.

²⁰Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; Pirie v. Tvedt, 115 U. S. 41, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034.

¹Fox v. Mackay, 60 Fed. 4.

²Chesapeake, etc. Ry. v. Dixon, 179 U. S. 139, 45 L. ed. 125, 21 Sup. Ct. Rep. 67; Dougherty v. Atchison, etc. Ry. Co. 126 Fed. 239; Weaver v. Northern, etc. Ry. 125 Fed. 155; Riser v. Southern Ry. 116 Fed. 215. But see McIntyre v. Southern Ry. 131 Fed. 985.

³Deere, etc. Co. v. Chicago, etc. Ry. 85 Fed. 876.

led to some refinement in the law upon this point. It has been held that in the absence of allegation of concurrent negligence in both master and servant the defendant corporation may remove.⁴ So also where action was based on a State statute never construed to create a joint liability, and the allegations were as to negligent acts of the railroad with which the servant had no concern, and which were necessary to make out an action under the State law, a separable controversy was held to be disclosed.⁵ Likewise where a railroad leased its road to a corporation in another State and the latter corporation was guilty of negligence, joint liability has been denied and removal allowed.⁶ Cases in which both railroad and employee have actually been guilty of negligence have been distinguished from cases where the liability of the former rests merely on the principle of respondeat superior. In the latter class it is said that there are separable controversies and a right of removal.⁷ It seems questionable whether this distinction is sustained by the decisions of the Supreme Court.⁸

While the Federal court may be without jurisdiction on removal the action being joint, yet if the suit is dismissed as to all save one non-resident defendant, the Federal court may then take jurisdiction.⁹ Default by one of several defendants jointly sued does not place the parties in any different position in reference to removal¹⁰ and it will be refused notwithstanding such default.¹⁰

[ccc] — sham joinder of co-citizen defendant.

Some cases have given consideration to the claim of a non-resident defendant that the joinder of the domestic defendant was a sham and for the sole purpose of defeating its right of removal.^{10½} The general question of devices to secure or defeat Federal jurisdiction has already been considered.¹¹ When the sham is obvious removal has been allowed notwithstanding such joinder,¹² but if there is any ground upon which the joinder of the domestic defendant may be justified, allegations of sham cannot be allowed to prevail.¹³

⁴Sessions v. Southern Pac. Co. 134 U. S. 139, 48 L. ed. 910, 24 Sup. Ct. Rep. 609.
⁵Helms v. Northern Pac. R. Co. 120 Fed. 389.

⁶Henry v. Illinois, etc. R. Co. 132 Fed. 715.

⁷Kelly v. Chicago, etc. R. Co. 122 Fed. 286.

⁸See Creagh v. Equitable, etc. Soc. 88 Fed. 1; Helms v. Northern Pac. R. Co. 120 Fed. 389; Henry v. Illinois, etc. R. Co. 132 Fed. 715; Warax v. Railroad Co. 72 Fed. 637; Hukill v. Railroad Co. 72 Fed. 745; McIntyre v. Southern Ry. 131 Fed. 985.

⁹See Railroad Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Southern R. Co. v. Carson, 194

U. S. 139, 48 L. ed. 910, 24 Sup. Ct. Rep. 609.

¹⁰Powers v. Chesapeake, etc. Ry. 169 U. S. 102, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

^{10½}Putnam v. Ingraham, 114 U. S. 59, 29 L. ed. 65, 5 Sup. Ct. Rep. 746.

¹¹Wilson v. Oswego Twp. 151 U. S. 66, 38 L. ed. 75, 14 Sup. Ct. Rep. 263.

¹²Boatmen's Bank v. Fritzleu, 135 Fed. 650, 68 C. C. A. 288; Keller v. Kansas, etc. Ry. 135 Fed. 202.

¹¹Ante, § 23.

¹²Boatmen's Bank v. Fritzleu, 135 Fed. 650, 68 C. C. A. 288.

¹³Keller v. Kansas, etc. Ry. 135 Fed. 202.

[d] — controversies in particular cases.

There has been held to be no separable controversy in the following cases: a suit for an undivided half interest in a tract of land held by two defendants;¹³ a suit by a stockholder against a corporation and its lessee to set aside lease;¹⁴ or to cancel shares of stock or determine their ownership;¹⁵ suits against a stockholder and the corporation to determine the ownership of certain stock;¹⁶ a suit to compel specific performance of contract for the sale of land, brought against the vendor and his grantee and the latter's grantee;¹⁷ a suit against a partnership on a joint contract;¹⁸ or by one partner for the settlement of partnership affairs;¹⁹ a suit to foreclose a mortgage brought against several mortgagors;²⁰ a suit brought by several plaintiffs, judgment creditors of the assignors, to set aside the assignments, where the only controverted facts were those tending to impeach the validity of the assignments.¹ The failure to serve one of the defendants with summons² or the default of a defendant³ does not make the controversy separable. Where one of the defendants enters a disclaimer it is said that such disclaimer does not leave a separable controversy as to the others.⁴ In any event, there is no separable controversy where the disclaiming defendant still retains an interest in the controversy.⁵

[e]. — suits concerning liens.

Suits by a judgment creditor to have his debtor's property sold after satisfying prior encumbrances, the holders of which are made defendants, presents no separable controversy, justifying removal, between the plaintiff and such holders.⁷ But a suit by a judgment creditor to subject land standing in name of the debtor to payment of judgment on the ground that purchase price was paid by debtor, was held to present a separable controversy.⁸ A cross bill brought by a defendant claiming interest in mortgaged property in a suit by the mortgagee to foreclose, presents merely matters of defense and such defendant has no right to remove.⁹ So

¹³*Knight v. Lumber Co.* 136 Fed. 406, 69 C. C. A. 248.

¹⁴*East Tennessee, etc. Ry. v. Grayson*, 119 U. S. 244, 30 L. ed. 382, 7 Sup. Ct. Rep. 190.

¹⁵*Vinal v. Construction Co.* 35 Fed. 673; and see *Crump v. Thurber*, 115 U. S. 56, 29 L. ed. 328, 5 Sup. Ct. Rep. 1154.

¹⁶*Rogers x. Van Nortwick*, 45 Fed. 513.

¹⁷*Smedley v. Smedley*, 110 Fed. 255.

¹⁸*Stone v. South Carolina*, 117 U. S. 433, 29 L. ed. 963, 6 Sup. Ct. Rep. 799.

¹⁹*Shainwald v. Lewis*, 108 U. S. 158, 27 L. ed. 691, 2 Sup. Ct. Rep. 385.

²⁰*Ayres v. Wiswall*, 112 U. S. 187, 28 L. ed. 694, 5 Sup. Ct. Rep. 90.

¹*Reineman v. Ball*, 33 Fed. 692.

²*Ames v. Railway Co.* 39 Fed. 881; *Patchen v. Hunter*, 38 Fed. 51.

³*Wilson v. Oswego Twp.* 151 U. S. 56, 38 L. ed. 70, 14 Sup. Ct. Rep. 259.

⁴*Hax v. Caspar*, 31 Fed. 500; *Davies v. Wells*, 134 Fed. 140.

⁵*Washington v. Columbus, etc. R. Co.* 53 Fed. 673.

⁷*Fidelity Safe Deposit Co. v. Huntington*, 117 U. S. 280, 29 L. ed. 898, 6 Sup. Ct. Rep. 733; *Graves v. Corbin*, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726.

⁸*Kalamazoo Wagon Co. v. Snavelly*, 34 Fed. 823.

⁹*Maish v. Bird*, 48 Fed. 607.

where a bill in equity is brought to establish a resulting trust in land in possession of a mortgagor, a non-resident mortgagee being made defendant, cannot remove.¹⁰ An action by a divorced woman against the heirs of her former husband to subject lands of which he died seised to payment of her alimony presents no separable controversy as to any of the defendants;¹¹ No separable controversy is presented as to a nonresident trustee of a railroad who intervenes in a suit in the nature of a creditors bill brought against the railroad.¹² Nor is such controversy presented in a suit brought to enforce a mechanic's lien against a railroad under a statute requiring all lien holders to be made parties and their claims and priorities adjudicated;¹³ nor in the case of a suit brought by a party who has replevied goods against one of several attaching creditors;¹⁴ nor in case of a bill brought by a creditor to compel satisfaction of his debt out of property of his deceased debtor, in the hands of the heirs, since all the heirs are indispensable parties to the suit.¹⁵

[f] — proceedings concerning wills.

An action to establish a will is a single and not a separable controversy.¹⁷ A proceeding brought in a probate court to contest the probate of a will by the heirs of the deceased is a single proceeding.¹⁸ So also a bill filed by an administrator for the construction of a will as against two beneficiaries, presents no separable controversy as between the non-resident beneficiary and the other beneficiary or the administrator.¹⁹

[g] — suits in ejectment and to quiet title.

One of several defendants charged with conspiracy in a scheme to raise a cloud on plaintiff's title cannot remove on ground of separable controversy.¹ So a suit brought against a lessor and lessee to quiet title cannot be removed by the lessor on grounds of separable controversy.² But a suit to quiet title requiring each of several defendants to set up any claim he may have, has been held to present a separable controversy.³

[h]. — condemnation proceedings.

A controversy between property owners and city on a proceeding for widening the city streets is held to be separable as each defendant owned a particular piece of land.⁵ But where the object of the suit is to condemn a single lot the controversy is held not to be separable although the

¹⁰Chester v. Chester, 7 Fed. 1.

¹⁸Fraser v. Jennison, 106 U. S.

¹¹Chapman v. Chapman, 28 Fed. 1. 191, 27 L. ed. 131, 1 Sup. Ct. Rep.

¹²In re San Antonio Ry. 44 Fed. 171.

145.

¹⁹Security Co. v. Pratt, 64 Fed.

¹³Sweeney v. Railroad Co. 61 405.
Fed. 3.

¹Little v. Giles, 118 U. S. 596, 30

¹⁴Temple v. Smith, 4 Fed. 392, 2 L. ed. 269, 7 Sup Ct. Rep. 32.

²Miller v. Sharp, 37 Fed. 161.

McCrary, 226.

¹⁵Lyddy v. Gano, 26 Fed. 177.

³Bates v. Carpenter, 98 Fed. 452;

¹⁷Anderson v. Appleton, 32 Fed. see also Bacon v. Felt, 38 Fed. 870.
855.

⁵Pacific Ry. Removal Cases, 115 U.

two defendants own distinct interests.⁶ A controversy between a state and a noncitizen owner in a condemnation proceeding in which the resident lessee of the owner is made codefendant is separable for removal purposes.⁷ A proceeding for the establishment and construction of a drain in which the main question is the right of the petitioners to establish such drain presents a single and entire controversy.⁸ Railroad condemnation proceedings are separable as to each separate owner.⁹

[i] Separable controversy, how to appear.

Whether an action involves a separable controversy must be determined by the allegations in the plaintiff's pleadings at the time when the petition for removal is filed,¹⁰ and not by the allegations in the petition,¹¹ or the subsequent proceedings in the circuit court.¹² Hence the removal of a cause cannot be had on the ground that facts may be developed at the trial which may exculpate the defendant,¹³ matters of defense not being available as a ground for removal.¹⁴ An exception to this rule exists, however, where the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal to the Federal court.¹⁵ To establish this it must appear not only that they were joined to defeat jurisdiction but that no cause of action is asserted against them, or that they are in law improperly joined, or that the averments of fact on which the joint liability is asserted, are so palpably untrue or unfounded as to make it improbable that the plaintiff could have inserted them in good faith.¹⁶ In determining whether the controversy is separable so as to allow removal, the allegations in the complaint are considered as confessed.¹⁷

[j] Petition for removal, what to contain.

The petition for removal must specify the separate controversy and claim the right of removal on that ground, and show that the suit is wholly between citizens of different States, and that it can be fully de-

S. 23, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113. 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Doremus v. Root, 94 Fed. 760.

⁶Bellaire v. Baltimore, etc. Ry. 146 U. S. 119, 36 L. ed. 911, 13 Sup. Ct. Rep. 16. But see Northern Pac. 123 Fed. 973.

⁷Terminal Co. v. Lowenberg, 18 Fed. 65, 38 L. ed. 74, 14 Sup. Ct. Rep. 259. ¹²Wilson v. Oswego Twp. 151 U. S. 339, 9 Sawy. 348.

⁸Sugar Creek, etc. Ry. v. McKell, 75 Fed. 36. ¹³Ward v. Franklin, 110 Fed. 794.

⁹In re Jarnecke Ditch, 69 Fed. 161. ¹⁴Riser v. Southern Ry. 116 Fed. 216.

¹⁰South Dakota Ry. v. Chicago, etc. Ry. 141 Fed. 578, 73 C. C. A. 176. ¹⁵Bryce v. Southern Ry. 122 Fed. 710; see also Prince v. Illinois, etc. R. Co. 98 Fed. 2; Railroad Co. v.

¹¹Harley v. Insurance Co. 125 Fed. 792; Wilson v. Oswego Twp. 151 U. S. 65, 38 L. ed. 74, 14 Sup. Ct. Rep. 259; Deere v. Chicago, etc. R. Co. 85 Fed. 876; Gableman v. Peoria, etc. R. Co. 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; Louisville, etc. R. Co. v. Wangelin, 132 U. S. 601, 7 Sup. Ct. Rep. 190.

¹²Wangelin, 132 U. S. 601, 7 Sup. Ct. Rep. 190. ¹⁶Hukill v. Maysville, etc. R. Co. 72 Fed. 750.

¹⁷East Tennessee, etc. R. R. v. Grayson, 119 U. S. 244, 30 L. ed. 382, 7 Sup. Ct. Rep. 190.

terminated as between them.¹ Where it fails to allege such jurisdictional facts it is insufficient.² So it is said that the averment of a separable controversy in the pleadings cannot make up for the failure to allege it in the petition.³ The omission in the petition of the averment of a separable controversy can be amended only in the State court.⁴

[k] Who may remove.

The controversy must be wholly between citizens of different States;⁵ and the suit is not removable if a necessary party defendant in a separable controversy is a citizen of the same State as the plaintiff.⁷ Moreover, since the controversy must be between citizens, an alien defendant is not given the power to remove a separable controversy in a suit by a State citizen,⁸ nor is a citizen given the power to remove where the suit is brought by an alien.⁹ The right is confined to parties "actually interested in the controversy" and no other party can apply.¹⁰ An intervenor cannot remove where the real questions at issue are between the original parties and the intervenor has rights only as he may be subrogated to those of the defendant.¹¹ Nor can he remove where he appears only to protect the rights of the original defendant and claims nothing independent of the original plaintiff or defendant.¹²

[l] Whole suit removed.

While under the act of 1866, only the separable controversy could be removed,¹⁴ there is nothing in the act of 1875 justifying the conclusion that Congress intended to leave any part of the suit in the State court;¹⁵ and where a suit involves a separable controversy under the above provision the suit is removable in its entirety.¹⁶

§ 136. Removal on ground of prejudice or local influence.

And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citi-

¹Sharkey v. Mill Co. 92 Fed. 425.

²See Smith v. Horton, 7 Fed. 270.

³Gates, etc. Works v. Pepper, 98 Fed. 451.

⁴Winnemans v. Edgington, 27 Fed. 326, as to petition for removal and procedure generally. See post, § 136 et seq.

⁵Hyde v. Ruble, 104 U. S. 407, 26 L. ed. 823.

⁷Scoutt v. Keck, 73 Fed. 900, 20 C. C. A. 103.

⁸Tracy v. Morel, 88 Fed. 801; King v. Cornell, 106 U. S. 398, 21 L. ed. 61, 1 Sup. Ct. Rep. 312; Woodrum v. Clay, 33 Fed. 897.

⁹Creagh v. Life Ins. Co. 88 Fed. 2; Deakin v. Lea, 11 Biss. 30, Fed. Cas. No. 3,695.

¹⁰Rand v. Walker, 117 U. S. 345, 29 L. ed. 907, 6 Sup. Ct. Rep. 769;

Merchants, etc. Co. v. Insurance Co. of N. A. 151 U. S. 387, 38 L. ed. 195, 14 Sup. Ct. Rep. 367.

¹¹Chicago v. Gage, 6 Biss. 472, Fed. Cas. No. 2,664.

¹²Bronson v. St. Croix Lumber Co. 35 Fed. 634.

¹⁴14 Stat. 306, c. 288.

¹⁵Barney v. Latham, 103 U. S. 213; 26 L. ed. 514. See also Brooks v. Clark, 119 U. S. 512, 30 L. ed. 482, 7 Sup. Ct. Rep. 301.

¹⁶See Hoge v. Canton Ins. Office, 103 Fed. 513, 515; Connell v. Smiley, 156 U. S. 341, 39 L. ed. 445, 15 Sup. Ct. Rep. 353.

zen of the State in which the suit is brought and a citizen of another State,^{[a]-[b]} any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district,^[c] at any time before the trial thereof,^[d] when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court,^[e] or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause:^[f] provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

Part of § 2, act of Mar. 3, 1875, c. 137, 18 Stat. 470, as amended act Mar. 3, 1887, c. 373, 24 Stat. 552, and corrected act Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 509.

[a] In general—history of provision.

The procedure on removal for prejudice or local influence is fully considered in a following section.¹ Under an act of Mar. 2, 1867² which first gave the right of removal on the ground of prejudice or local influence the right was confined to "such citizen of another State whether he be plaintiff or defendant."³ That provision was substantially re-enacted in the Revised Statutes.⁴ Nothing was contained in the act of 1875 as it stood originally, concerning removal on the ground of prejudice or local influence, and the provision of the Revised Statutes just referred to remained in force until the act of 1875 was revised and corrected in 1887-1888⁵ as set forth above. While the existing provision does not in terms set forth what suits are removable for prejudice or local influence, it does not describe a new class of suits but only specifies a distinct ground for removing one class of suits previously defined, viz., that class in which there is a controversy between citizens of different States.⁶ And as the controversy in such a case must exceed the sum or value of two thousand dollars,⁷ it must likewise do so where removal is attempted on the ground of prejudice or local influence.⁸ An appeal under a State law from an assessment of taxes

¹Post, § 1143.

²14 Stat. 558, c. 196.

³Thurber v. Miller, 67 Fed. 375, 14 C. C. A. 432.

⁴R. S. § 639, subsec. 3.

⁵Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207.

⁶Malone v. Richmond, etc. R. R. 35 Fed. 625; Cochran v. Montgomery Co. 199 U. S. 271, 50 L. ed. 187, 26 Sup. Ct. Rep. 58. See In re Cilley, 58 Fed. 980.

⁷Ante, § 134.[b]

⁸In re Pennsylvania Co. 137 U.

to a "county court" sitting without judicial powers is not a suit within the meaning of the section.⁹

[b] Citizenship of parties.

Under the above provision the plaintiff must be a citizen of the State where suit is brought. Where there are several plaintiffs each one must apparently be a citizen of that State.¹¹ In any event they must be citizens of the State if they are all jointly concerned in the cause of action against the defendant.¹² Since citizenship is essential the presence of an alien plaintiff whether sole, or one of several, will prevent removal.¹³ So, if it is found upon an arrangement of the parties according to the real controversy, that aliens and citizens of the same State as the defendants would be placed in the position of plaintiffs there can be no removal.¹⁴ None but defendants can remove;¹⁵ and no removal can be had for prejudice or local influence by a defendant, where a co-defendant is a citizen of the same State as the plaintiffs.¹⁶ The diverse citizenship necessary to jurisdiction, must exist both at the time the suit is commenced and at the time petition for removal is filed.¹⁷

[c] Application for removal.

Under the original act of 1867, as carried into the Revised Statutes¹ a petition for removal on the ground of prejudice or local influence was expressly required. No such express requirement is made in the above provision, however, which simply requires that the prejudice or local influence must be shown to the circuit court.² Such fact may appear by oral testimony or affidavits,³ but the court should be legally not merely morally satisfied as to the truth thereof.⁴ Legal satisfaction requires some proof suitable to the nature of the case. The amount and manner of the

S. 454, 34 L. ed. 740, 11 Sup. Ct. Rep. 143; *Todd v. Cleveland*, etc. Ry. 65 Fed. 148, 12 C. C. A. 521; *City of Detroit v. Detroit*, etc. Ry. 54 Fed. 5.

⁹*Upshur Co. v. Rich*, 135 U. S. 467, 34 L. ed. 196, 10 Supt. Ct. 651.

¹¹*Rike v. Floyd*, 42 Fed. 247; *Thouron v. East Tenn. etc. R. Co.* 38 Fed. 678; *Wilder v. Virginia*, etc. Co. 46 Fed. 676.

¹²*Gann v. Northeastern R. Co.* 57 Fed. 417.

¹³*Cohn v. Louisville*, etc. R. 39 Fed. 227.

¹⁴*Adelbert College v. Toledo*, etc. R. Co. 47 Fed. 836.

¹⁵*Tullock v. Webster Co.* 40 Fed. 706.

¹⁶*Cochran v. Montgomery Co.* 199 U. S. 272, 50 L. ed. 188, 26 Sup. Ct. Rep. 58; *Anderson v. Bowers*, 43 Fed. 321; *Campbell v. Milliken*, 119 Fed. 982. There have been a

number of cases contra: *Whelan v. New York*, 35 Fed. 849, 1 L.R.A. 65; *Jackson, etc. Co. v. Pearson*, 60 Fed. 113; *Hall v. Chattanooga*, etc. Works, 48 Fed. 599; *Tacoma v. Wright*, 84 Fed. 836; *Wilder v. Virginia*, etc. Co. 46 Fed. 676; *Boatmen's Bank v. Fritzleu*, 135 Fed. 650, 68 C. C. A. 288; *Parker v. Vanderbilt*, 136 Fed. 246; *Haire v. Rome R. Co.* 57 Fed. 321; *Holmes v. Southern R. Co.* 125 Fed. 301.

¹⁷*Young v. Parker*, 132 U. S. 267, 33 L. ed. 352, 10 Sup. Ct. Rep. 75.

¹R. S. § 639, subd. 3.

²*Short v. Chicago*, etc. Ry. Co. 33 Fed. 116.

³*Short v. Chicago*, etc. Ry. Co. 33 Fed. 116.

⁴*Ex parte Pennsylvania Co.* 137 U. S. 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 143; *Tacoma v. Wright*, 84 Fed. 838.

proof required must be left to the discretion of the court.⁵ Under the act of 1867 the affidavit was required to state merely that the party "has reason to believe and does believe that he will be unable to obtain justice."⁶ But under the present act an *ex parte* affidavit merely alleging the existence of local prejudice without stating any facts tending to show it, has been held insufficient.⁷ On the other hand a bare statement of the fact of prejudice in the language of the statute has been held a sufficient *prima facie* showing.⁸ But if such statement is made on information and belief only it is insufficient.⁹ Where, however, the facts supporting a statement on information and belief are fully set forth it is held that personal knowledge is not necessary.¹⁰ While there is no requirement that the application be made by petition, that is the usual method of procedure. The petition should distinctly aver the prejudice or local influence, and as a consequence thereof the inability of the defendant to obtain justice in the State court.¹¹ A petition and affidavit merely alleging that the defendant is unable to obtain justice are not sufficient.¹² Notice to the opposite party, of the application for removal while not required is perhaps the better practice.¹³ An order of removal by the circuit court is necessary. The mere finding that a party is entitled to remove, is no order and does not work a removal.¹⁴

[d] Removal to be before State court trial.

Under a provision of the act of 1867 as substantially embodied in the Revised Statutes, the petition for removal was required to be filed at any time fore the trial or final hearing;¹⁵ and a cause might be removed even after the trial court had granted a new trial, or after reversal and remand by the State supreme court.¹⁷ But removal, under the above provision, may be had "at any time before the trial." This means before or at the term at which the cause could first be tried, and before the trial thereof.¹⁸ The right of removal remains up to the time of the first trial on the merits.¹⁹ A hearing on a special demurrer as to formal de-

⁵In *re* Pennsylvania Co. 137 U. S. 454, 34 L. ed. 741, 11 Sup. Ct. Rep. 143.

⁶See R. S. § 639, subdiv. 3.

⁷*Schwenk v. Strang*, 59 Fed. 211, 8 C. C. A. 92. See also *Malone v. Railroad Co.* 35 Fed. 625.

⁸*Short v. Railroad Co.* 34 Fed. 227; *Franz v. Wahl*, 81 Fed. 10.

⁹*Short v. Chicago, etc. Co.* 33 Fed. 116; *Collins v. Campbell*, 62 Fed. 851; *In re Pennsylvania Co.* 137 U. S. 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 143.

¹⁰*Detroit v. Detroit, etc. R. Co.* 54 Fed. 1.

¹¹*Goldworthy v. Chicago, etc. L. Co.* 38 Fed. 769.

¹²*Ellison v. Louisville, etc. R. Co.* 112 Fed. 805, 50 C. C. A. 530.

¹³*Adelbert College v. Toledo, etc. R. Co.* 47 Fed. 836.

¹⁴*Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. ed. 441, 13 Sup. Ct. Rep. 591.

¹⁵R. S. § 639, subdiv. 3.

¹⁷See *Fisk v. Henorie*, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207, and cases cited.

¹⁸*McDonnell v. Jordan*, 178 U. S. 238, 44 L. ed. 1052, 20 Sup. Ct. Rep. 886; *Fisk v. Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207; *Thurber v. Miller*, 67 Fed. 378, 14 C. C. A. 432. But see *Detroit v. Detroit, etc. R. Co.* 54 Fed. 11.

¹⁹See *Durkee v. Illinois, etc. R. Co.* 81 Fed. 1; *Huskins v. Cincinnati, etc. R. Co.* 37 Fed. 504, 3 L.R.A. 545.

fects does not prevent removal,²⁰ although it is held otherwise where the hearing is on a demurrer alleging that no cause of action is stated,¹ such being deemed a hearing on the merits.² The filing of an answer is not a trial within the meaning of the provision;³ nor is a hearing before a board of arbitrators under a compulsory arbitration law;⁴ nor a hearing before commissioners the result of which is subject to affirmance or rejection.⁵ No mere attempt of one party to get himself upon the record as having commenced the trial will be enough to cut off removal.⁶ Hence an application for removal is in time although made during the trial of an interlocutory application, in which the plaintiff offers evidence on the merits.⁷ The trial on the merits having once begun an application for removal comes too late, even though a mistrial results.⁸ The time of the application, however, is not jurisdictional and may be waived by the parties.⁹

[e] The showing of prejudice or local influence.

Prejudice or local influence may relate to the person of the litigant or the subject matter of the litigation. In either case there must exist improper bias, partiality or hostility, which will prevent the party seeking removal from obtaining justice.¹¹ The prejudice may be either against the party seeking removal or in favor of the opposite party;¹² and the moral justification therefor is immaterial.¹³ But it must lie between the opposite parties to the suit, and one of two or more defendants cannot remove for alleged prejudice as between himself and the other defendants.¹⁴ Either prejudice or local influence are grounds for removal, the words being used disjunctively.¹⁵ The fact that the only question at issue is one of law does not affect the defendant's right of removal under the above section, since the prejudice or local influence is not limited to that which would operate upon a jury, but relates to suits both at law and equity.¹⁶ The inquiry should be whether the prejudice exists and whether the local

²⁰Richards v. Rock Rapids, 31 Fed. 507.

¹Hobart v. Illinois, etc. R. Co. 81 Fed. 5; Maher v. Hotel Co. 94 Fed. 225; Lookout Mountain v. Houston, 32 Fed. 711.

²See Wilson v. Rock Island, etc. Co. 20 Fed. 705.

³Durkee v. Illinois, etc. R. Co. 81 Fed. 1.

⁴Thorne v. Tanning Co. 15 Fed. 289.

⁵Hess v. Reynolds, 113 U. S. 80, 28 L. ed. 930, 5 Sup. Ct. Rep. 377; Carson v. Hyatt, 118 U. S. 289, 30 L. ed. 170, 6 Sup. Ct. Rep. 1050.

⁶Removal Cases, 100 U. S. 473, 25 L. ed. 599.

⁷Idem.

⁸Davis v. Chicago, etc. R. Co. 46

Fed. 307. See Farmers, etc. Bank v. Schuster, 86 Fed. 161, 29 C. C. A. 649.

⁹Knight v. International, etc. R. Co. 61 Fed. 90, 9 C. C. A. 376.

¹¹Adelbert College v. Toledo, 47 Fed. 836.

¹²Neal v. Foster, 31 Fed. 53, 12 Sawy. 424; Parks v. Southern Ry. 90 Fed. 4.

¹³Bartlett v. Gates, 117 Fed. 362.

¹⁴Hanrick v. Hanrick, 153 U. S. 196, 38 L. ed. 688, 14 Sup. Ct. Rep. 835.

¹⁵Huskens v. Cincinnati R. Co. 37 Fed. 504, 3 L.R.A. 545.

¹⁶Detroit v. Detroit, etc. R. Co. 54 Fed. 1. See also Bonner v. Meikle, 77 Fed. 845.

judge is exposed to it.¹⁷ Removal may be allowed although the evidence does not justify the finding that he cannot or will not treat the defendants fairly.¹⁸

[f] "In any other State court to which defendant may . . . remove."

Before the circuit court can order a removal on the ground of local influence or prejudice it must appear that the defendant cannot obtain justice in any State court to which he may remove the cause under the State laws.¹ Where, however, under the State law, an order of removal to another county on the ground of prejudice or local influence, is discretionary with the State court the defendant may apparently remove to the circuit court without showing prejudice or local influence in other counties of the State.² Where the existence of prejudice on the part of the local judge is relied upon, the fact that he might preside at the trial of the cause if tried in any other county is sufficient to justify a removal order.³

§ 137. Removal of causes against persons denied any civil rights.

When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending.

Part of R. S. § 641, U. S. Comp. Stat. 1901, p. 520.

The remainder of the section prescribes the procedure and is given in

¹⁷Montgomery Co. v. Cochran, 116 Fed. 985.

¹⁸Tacoma v. Wright, 84 Fed. 838; Detroit v. Detroit, etc. R. Co. 54 Fed. 18.

¹Southworth v. Reid, 36 Fed. 451; Rike v. Floyd, 42 Fed. 247.

²Smith v. Crosby, etc. Co. 46 Fed. 824; Tacoma v. Wright, 84 Fed. 838.

See also Bonner v. Meikle, 77 Fed. 485; Herndon v. Southern R. Co. 73 Fed. 307. But see Robison v. Hardy, 38 Fed. 49.

³Walcott v. Watson, 46 Fed. 529.

another chapter.⁵ Acts of 1887 and 1888, amending the removal laws, expressly declared that this section was not to be deemed repealed or affected.⁶ The above provision, giving the right of removal to the Federal court of a cause commenced in a State court against a person who is denied or cannot enforce his civil rights, has reference to a denial of those rights or an impediment to their enforcement arising from some State law, statute or regulation.⁷ The maladministration of the laws by the State officers is of itself no ground for removal.⁸ Hence the fact that the State court, in a particular case, may not enforce the right to equal protection under the law, is no ground for removal, where the State laws do not stand in the way of equal protection.⁹ The fact that the local prejudice is so great that the defendant may not have a fair trial, is no ground for removal under this section;¹⁰ nor is the fact that colored persons,¹¹ or persons of the same political belief as the defendant,¹² are excluded from juries, such exclusion not being by virtue of State law. The fact that the defendant has been unable to secure an attorney or has been unable to have the case tried on account of postponements by the plaintiff,¹³ does not make out a case within this section. A State statute prescribing punishment for acts committed in one place and not for the same acts committed elsewhere, is not within the meaning of the above provision, the legislation not being directed against any particular class of persons.¹⁴

§ 138. Removal of causes against revenue and registration officers.

When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or

⁵Post, § 1145.

⁶§ 5, act March 3, 1887, c. 375, 24 Stat. 555, as corrected Aug. 13, 1888, c. 866, § 5, 25 Stat. 436.

⁷Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387; Ex. parte Wells, 3 Woods, 132, Fed. Cas. No. 17,386; Neal v. Delaware, 103 U. S. 392, 393, 26 L. ed. 567; Bush v. Kentucky, 107 U. S. 116, 27 L. ed. 357, 1 Sup. Ct. Rep. 625; Strauder v. West Virginia, 100 U. S. 309, 25 L. ed. 666; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Scott v. Kenney Co. 137 Fed. 1011.

⁸Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387; California v. Chue Fan, 42 Fed. 865.

⁹Gibson v. Mississippi, 162 U. S.

582, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

¹⁰Texas v. Gaines, 2 Woods, 342, Fed. Cas. No. 13,847; Fowlkes v. Fowlkes, 21 Int. Rev. Rec. 358, Fed. Cas. No. 5,005.

¹¹Murray v. Louisiana, 163 U. S. 106, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; Gibson v. Mississippi, 162 U. S. 584, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; Neal v. Delaware, 103 U. S. 392, 26 L. ed. 567.

¹²Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387.

¹³Scott v. Kenney Co. 137 Fed. 1010.

¹⁴People v. Bennett, 113 Fed. 515.

of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; . . . the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner.^{[a]-[b]}

Part of R. S. § 643, U. S. Comp. Stat. 1901, p. 521.

[a] In general.

The remainder of the section prescribes the procedure and is given in another chapter.¹⁶ Acts of 1887 and 1888 amending the removal laws expressly declared that this section was not to be deemed repealed or affected,¹⁷ and the original act of 1875, was not inconsistent with its provisions.¹⁸ The section should be given a liberal construction.¹⁹ It covers all suits against Federal revenue officers for acts done by them under color of the revenue laws,²⁰ and all suits against any person acting under, or by authority of such officer;¹ but it does not extend the right of removal to persons who are being prosecuted merely on account of a right or authority claimed under a revenue law.² The amount in dispute is immaterial.³ Where the action is criminal and under the State laws must be prosecuted by indictment, removal cannot be had until such indictment is found.⁴ Hence removal cannot be had by a person arrested and imprisoned, to await the action of the grand jury.⁵ But in case of a misdemeanor, nonindictable under State law, removal may be had from the court of the justice of the peace.⁶ Removal may be had at "any time before the trial or final hearing." This is said to refer to the court of original jurisdiction where the suit is brought.⁷ The right is not taken away by an allegation in the defense that the act charged was not in fact done.⁸

¹⁶Post, § 1146.

¹⁷§ 5, act March 3, 1887, c. 373, 24 Stat. 555, as corrected Aug. 13, 1888, c. 866, § 5, 25 Stat. 436.

¹⁸See *Venable v. Richards*, 105 U. S. 638, 26 L. ed. 1197.

¹⁹*Ward v. Congress, etc. Co.* 99 Fed. 604, 39 C. C. A. 669; *State v. Sullivan*, 50 Fed. 594.

²⁰*Findley v. Satterfield*, 3 Woods, 504, Fed. Cas. No. 4,792; *Johnson v. Wells Fargo, etc. Co.* 98 Fed. 7.

¹*Johnson v. Wells Fargo, etc. Co.* 98 Fed. 7.

²Idem.

³*Venable v. Richards*, 105 U. S. 637, 26 L. ed. 1197.

⁴*Virginia v. Paul*, 148 U. S. 120, 37 L. ed. 391, 13 Sup. Ct. Rep. 536.

But see *State v. Bolton*, 11 Fed. 217.

⁵*Virginia v. Paul*, 148 U. S. 119, 37 L. ed. 391, 13 Sup. Ct. Rep. 536.

⁶*Virginia v. Bingham*, 88 Fed. 564.

⁷*Brice v. Somers*, 1 Flip. 578, Fed. Cas. No. 1,856.

⁸*Cleveland, etc. R. Co. v. McClung*, 119 U. S. 454, 30 L. ed. 465, 7 Sup. Ct. Rep. 262.

[b] Removal in particular cases.

Removal under the above provision was allowed in the following cases: action to enjoin the construction of a postoffice, under contract made with the Secretary of the Treasury;¹⁰ a proceeding in ejectment to recover possession of premises used as a warehouse by internal revenue officers;¹¹ action against revenue officer for contempt in refusing to allow sheriff to levy goods in warehouse;¹² prosecutions against United States marshals, their deputies or assistants, for acts done while attempting to enforce revenue laws;¹³ action against revenue collector to recover back taxes paid under protest.¹⁴ It was refused in case of a prosecution of a deputy marshal for a crime not committed under color of his official duty;¹⁵ and a suit against an express company for refusing to accept a package because the shipper would not furnish the Federal revenue stamp.¹⁶

§ 139. Concurrent jurisdiction with court of claims.

The circuit courts of the United States shall have such concurrent jurisdiction [with the Court of Claims] in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury. The jurisdiction hereby conferred upon the said circuit . . . courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof.

Part of § 2, act June 27, 1898, c. 503, 30 Stat. 494, amending § 3, act Mar. 3, 1887, c. 359, 24 Stat. 505, U. S. Comp. Stat. 1901, p. 753.

This section also gave concurrent jurisdiction to the district court, of claims not exceeding one thousand dollars.¹ The amendment of June 27, 1898 consisted in the addition of the provision beginning "The jurisdiction hereby conferred." In order to prevent this amendment from abating actions already pending the act of Feb. 26, 1900² was passed, providing that such actions should not abate or be affected. Before the passage of the latter act it was held by some courts that the amendment thus taking away jurisdiction from the circuit and district courts in the cases men-

¹⁰Ward v. Congress, etc. Co. 99 Fed. 598, 39 C. C. A. 669.

¹¹Gallatin v. Sherman, 77 Fed. 337.

¹²McCullough v. Large, 20 Fed. 309.

¹³Davis v. South Carolina. 107 U. S. 597, 27 L. ed. 574, 2 Sup. Ct. Rep. 636; Virginia v. DeHart, 119 Fed. 33. 626.

¹⁴Venable v. Richards, 105 U. S. 636, 26 L. ed. 1196.

¹⁵Illinois v. Fletcher. 22 Fed. 776.

¹⁶Johnson v. Wells Fargo, etc. Co. 98 Fed. 3.

¹Post, § 212.

²Act Feb. 26, 1900, c. 25, 31 Stat.

tioned applied to pending suits,³ and by others that it did not.⁴ Under this section an assignee can sue on a claim if his assignor could have done so.⁵ The rejection of a claim for a tobacco rebate, by a commissioner of Internal Revenue is cognizable by the circuit court under the above provision.⁶ It does not apply, however, to a suit by a marshal for disbursements in procuring bailiffs as that is not "fees, salary or compensation."⁷ The amount claimed must exceed one thousand dollars but if made in good faith, the fact that recovery is less than that amount is immaterial.⁸

§ 140. Jurisdiction over revenue decisions of general appraisers.

If the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them, may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1933.

The remainder of § 15 provides the mode of proceeding on such appeals and is given in a later chapter.¹⁰

§ 141. Jurisdiction of partition suits where United States are parties.

The several circuit courts of the United States shall have jurisdiction of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suit to be brought in the circuit court of the district in which such land is situate.

§ 1, act May 17, 1898, c. 339, 30 Stat. 416, U. S. Comp. Stat. 1901, p. 516.

³Amsden v. United States, 111 Fed. 1, 55 L.R.A. 364; United States v. Kelly, 97 Fed. 460, 38 C. C. A. 275; United States v. Marsh, 92 Fed. 689, 34 C. C. A. 619.

⁴United States v. Jacobus, 96 Fed. 260, 37 C. C. A. 466; Strong v. United States, 93 Fed. 257.

⁵Emmons v. United States, 48 Fed. 44.

⁶Hyams v. United States, 139 Fed. 997.

⁷United States v. Swift, 139 Fed. 225, (C. C. A.)

⁸Idem.

¹⁰Post, § 1443.

§ 142. Over proceedings under anti-trust act of 1890.

The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act.

Part of § 4 act July 2, 1890, c. 647, 26 Stat. 209, U. S. Comp. Stat. 1901, p. 3201.

The omitted portion of the section prescribes the duty of the district attorney and the procedure to be followed.¹⁴ There is now a special provision for the speedy hearing of such cases by three judges sitting together at circuit.¹⁵ The power given by the section to restrain violation of the act is not an unwarranted invasion of the right to jury trial.¹⁶

§ 143. Jurisdiction to enforce injunction in copyright cases.

The circuit courts or judges thereof shall have jurisdiction to enforce said injunction [restraining the unauthorized performance or representation of any dramatic or musical composition for which copyright has been obtained], and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit in which said motion is made.

Part of R. S. § 4966, as amended 1897, act of Jan. 6. 1897, c. 4, 29 Stat. 481, U. S. Comp. Stat. 1901, p. 3415.

The circuit courts are given general jurisdiction over patent and copyright suits by a previous section.¹⁷

§ 144. Jurisdiction to prevent combinations restraining import trade.

The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act [declaring unlawful combinations and conspiracies in restraint of import trade].

Part of § 74, act Aug. 27, 1894, c. 349, 28 Stat. 570, U. S. Comp. Stat. 1901, p. 3203.

The omitted portion of the above section, making it the duty of the district attorneys to prevent violations of the act, and prescribing procedure in such cases, is given in following chapters.¹ Parties injured by violations of this act may sue in circuit court in the district where the defendant resides or is found, without regard to the amount in controversy.²

¹⁴Post, §§ 536, 1345.

¹⁵Post, § 1345, et seq.

¹⁶United States v. Elliott, 64 Fed.

27; United States v. Agler, 62 Fed. 324.

¹⁷Ante, § 127.

¹Post, §§ 535, 1345.

²Post, § 418.

§ 145. To remove structures obstructing navigation.

The removal of any structures or parts of structures erected in violation of the provisions of the said sections [sections nine, ten and eleven of the same act, respecting the construction of a bridge, dam, dike or causeway, over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States] may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Part of § 12, act March 3, 1899, c. 425, 30 Stat. 1151, U. S. Comp. Stat. 1901, p. 3542.

A bill for obstruction will lie though there is no proof of actual use of a navigable stream in interstate or foreign commerce.⁴

§ 146. To mandamus marshals, clerks, etc., to make return of fees.

The circuit courts of the United States, for the purposes of this act [an act regulating fees and costs and providing for auditing and proving cost bills and accounts of district attorneys, clerks, marshals, and commissioners] shall have power to award the writ of mandamus, according to the course of the common law, upon motion of the Attorney General or the district attorney of the United States, to any officer thereof, to compel him to make the returns and perform the duties in this act required.

§ 4 act Feb. 22, 1875, c. 95, 18 Stat. 333, U. S. Comp. Stat. 1901, p. 649.

§ 147. Jurisdiction over suits for penalties under alien immigrant laws.

For every violation of any of the provisions of section one of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States, its Territories, or the District of Columbia, to perform labor or service of any kind under contract or agreement, express or implied, parol or special, with such alien or aliens, foreigner or foreigners, previous to becoming residents

⁴United States v. Wishkah B. Co.
136 Fed. 42, 68 C. C. A. 592.

or citizens of the United States, shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States or by any person who shall first bring his action therefor including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the circuit courts of the United States; the proceeds to be paid into the Treasury of the United States; and separate suits may be brought for each alien or foreigner being a party to such contract or agreement aforesaid.

Part of § 3, act Feb. 26, 1885, c. 164, 23 Stat. 333, U. S. Comp. Stat. 1901, p. 1291.

The omitted portion of the above section making it the duty of the district attorney to prosecute such suits, is given in a following chapter.¹ Proceedings brought under this provision cannot be settled, compromised or discontinued without consent of the court, entered of record.² The soliciting of alien immigration by transportation companies and owners of vessels is made subject to the penalties above prescribed.³ Notwithstanding the reference to the circuit court in the above provision, it is settled that the jurisdiction of such suits is in the district court under its general jurisdiction over suits for penalties and forfeitures.⁴

§ 148. Over suit on defaulting paper contractor's bond.

In case of the default of any contractor to furnish paper, he and his sureties shall be responsible for any increase of cost to the government in procuring a supply of such paper which may be consequent upon such default. The public printer shall report every such default, with a full statement of all the facts in the case, to the Solicitor of the Treasury, who shall prosecute the defaulting contractor and his sureties upon their bond, in the circuit court of the United States in the district in which such defaulting contractors reside.

§ 10, act Jan. 12, 1895, c. 23, 28 Stat. 602, U. S. Comp. Stat. 1901, p. 2539.

Similar provisions contained in the Revised Statutes⁵ are superseded by the above section.

§ 149. Jurisdiction of suits to determine right to Indian allotments.

All persons who are in whole or in part of Indian blood or descent

¹Post, § 541.

²Post, § 1391.

³§ 4, act March 3, 1891, c. 551, 26 Stat. 1084.

⁴Lees v. United States, 150 U. S. 475, 37 L. ed. 1151, 14 Sup. Ct. Rep.

⁵R. S. §§ 3776, 3777.

who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant, and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency; provided, that the right of appeal shall be allowed to either party as in other cases.

§ 1 act Feb. 6, 1901, c. 217, 31 Stat. 760, amending Indian Appropriation act Aug. 15, 1894, c. 290, 28 Stat. 305.

The provision confers on the circuit court jurisdiction to hear and determine the complaint of any person in whole or in part of Indian blood, who claims to have been unlawfully denied or excluded from an allotment of land, to which he claims to be lawfully entitled by act of Congress.⁸ It is held that the United States is not a necessary party to the suit.⁹ The amendment of 1901, however, expressly provides that the United States shall be party defendant.

§ 150. Circuit and district court jurisdiction over government condemnation suits.

The United States circuit or district courts of the district wherein such real estate [as the Secretary of the Treasury or other governmental officer is authorized to procure for public uses] is located, shall have jurisdiction of proceedings for . . . condemnation [in cases where in his opinion it is necessary or advantageous to

⁸Hy-yu-tse-kin v. Smith, 119 Fed.

115, 55 C. C. A. 216.

⁹Idem.

the Government to procure the same for the United States by condemnation under judicial process].

Part of § 1 act Aug. 1, 1888, c. 728, 25 Stat. 357, U. S. Comp. Stat. 1901, p. 2516.

§ 151. — over damage suits under interstate commerce act.

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

Part of § 9 act Feb. 4, 1887, c. 104, 24 Stat. 382, U. S. Comp. Stat. 1901, p. 3159.

The act also declares various acts and practices to be misdemeanors and provides the punishment resulting "upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed."¹¹ In 1889 the circuit and district courts were further authorized to issue mandamus against a carrier to compel him to transport freight for relator without discrimination.¹² Suits arising under the provisions of the interstate commerce act are suits under the Federal laws and the citizenship of the parties is immaterial.¹³ The provisions of the judiciary act of 1887-1888 limiting the place of bringing suit to the district whereof the defendant is an inhabitant does not apply to the above section and suits thereunder may be brought in any district where the defendant may be found.¹⁴ State courts are given no jurisdiction under the section, the Federal jurisdiction being exclusive.¹⁵ There is no limitation as to the time of bringing suit, however, and the State provisions in that respect are to be followed.¹⁶ Thus in Missouri the action, under the State statutes of limitations, must be brought within three years,¹⁷ and in Louisiana, within one year.¹⁸ The authorities are

¹¹See § 10, act Feb. 4, 1887, c. 104, 24 Stat. 382, U. S. Comp. Stat. 1901, p. 3160.

¹²See following section.

¹³Toledo, etc. Ry. v. Pennsylvania Co. 54 Fed. 732, 19 L.R.A. 387; In re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658.

¹⁴Van Patten v. Chicago, etc. R. Co. 74 Fed. 981.

¹⁵Van Patten v. Chicago, etc. R. Co. 74 Fed. 981; Edmunds v. Illinois, etc. R. Co. 80 Fed. 79.

¹⁶Ratican v. Terminal, etc. Assn. 114 Fed. 668.

¹⁷Idem.

¹⁸Copp v. Louisville, etc. R. Co. 50 Fed. 164.

not uniform on the question whether the remedy given by the section is exclusive or supplemental.¹⁹

§ 152. — of mandamus to compel equal facilities to shippers.

The circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation [i. e., by discrimination, preferences, etc.,] by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ.

Part of § 10 act Mar. 2, 1889, c. 382, 25 Stat. 862, U. S. Comp. Stat. 1901, p. 3172.

Other portions of the section authorize issuance of peremptory mandamus upon security given, notwithstanding undetermined issues of fact;¹ and declare that the remedy is cumulative and not exclusive of others.² Unjust discrimination is the wrong which Congress intended to remedy by the above provision. Such discrimination must not only be pleaded but must be proved by the relator or the writ will be denied.³

§ 153. — under alien immigrant laws.

The circuit and district courts of the United States are hereby invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act. [An act excluding certain classes of alien immigrants and punishing persons guilty of bringing or encouraging such immigrants, etc.]

§ 29 act Mar. 3, 1903, c. 1012, 32 Stat. 1220, U. S. Comp. Stat. Supp. 1905, p. 289.

The above section supersedes a similar provision in an act of Mar. 3, 1891.⁵ In interpreting the superseded section it was held that its inten-

¹⁹That they are exclusive; *Central Stock Yards Co. v. Louisville*, 112 Fed. 823. See *Van Patten v. Chicago, etc. R. Co.* 74 Fed. 981. That they are merely supplemental; *Tift v. Southern R. Co.* 123 Fed. 789; *Littie Rock, etc. R. Co. v. East Tennessee, etc. R. Co.* 47 Fed. 772.

¹Post, § 846.

²Post, § 847.

³*United States v. Norfolk, etc. R. Co.* 109 Fed. 831.

⁵Act March 3, 1891, c. 551, § 13, 26 Stat. 1086.

tion was to vest concurrent jurisdiction, in the circuit and district courts of cases arising under the act of 1891 and that it could not be construed as giving jurisdiction to determine matters which the act expressly committed to the final determination of execution officers.⁶ Hence, the Federal courts would not intervene by habeas corpus to prevent a deportation by such officers, under the provisions of that act.⁷

§ 154. — of suits for unlawful occupancy of public lands.

Jurisdiction is . . . hereby conferred on any United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed [i. e., public lands unlawfully inclosed], or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act [to prevent unlawful occupancy of the public lands]; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

Part of § 2 act Feb. 25, 1885, c. 149, 23 Stat. 321, U. S. Comp. Stat. 1901, p. 1525.

The omitted portion of the section makes it the duty of the district attorney to abate unlawful inclosures of public land.⁹

§ 155. — over crimes on Indian reservation in South Dakota.

The circuit and district courts of the United States for the district of South Dakota are hereby given jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dan-

⁶Nishimura Ekiu v. United States, S. 86, 47 L. ed. 724, 23 Sup. Ct. Rep. 142 U. S. 664, 35 L. ed. 1150, 12 Sup. 613.

Ct. Rep. 336.

⁹Post, § 534.

⁷Japanese Immigrant Case, 189 U.

gerous weapon committed within the limits of any Indian reservation in the State of South Dakota.

§ 1 of act Feb. 2, 1903, c. 351, 32 Stat. 793, U. S. Comp. Stat. Supp. 1905, p. 719.

§ 156 — over alien enemies.

After any such proclamation [i. e. of war or attempted invasion by a foreign government] has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized, and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed.

R. S. § 4069, U. S. Comp. Stat. 1901, p. 2762.

The above section was originally enacted in 1789.¹¹

§ 157. — over offenses committed upon the great lakes.

The circuit and district courts of the United States, respectively, are hereby vested with the same jurisdiction in respect of the offenses mentioned in the first section of this act [i. e. offenses committed upon the great lakes] that they by law have and possess in respect of the offenses in said chapter and title in the first section of this act mentioned [i. e. chapter III. of title 70, R. S. punishing crimes arising within the maritime and territorial jurisdiction of the United States], an said courts, respectively, are also for the purposes of this act vested with all and the same jurisdiction they, respectively, have by force of title thirteen, chap-

¹¹Act July 6, 1789, c. 66, § 2, 1 Stat. 577.

ter three, and title thirteen, chapter seven, of the Revised Statutes of the United States.

§ 2, act Sept. 4, 1890, c. 874, 26 Stat. 424, U. S. Comp. Stat. 1901, p. 3628.

The criminal jurisdiction of the Federal courts, prior to the above enactment, did not extend to the great lakes.¹⁴ Federal courts having no common law jurisdiction in criminal cases are confined to the terms of the particular statute. So there can be no constructive larceny as it exists at common law, under the provisions of the above section.¹⁵

§ 158. — to enforce awards of foreign consuls.

The district and circuit courts, and the commissioners of the circuit courts, shall have power to carry into effect, according to the true intent and meaning thereof, the award, or arbitration, or decree of any consul, vice-consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice-consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge; application for the exercise of such power being first made to such court or commissioner by petition of such consul, vice-consul, or commercial agent.

Part of R. S. § 728, U. S. Comp. Stat. 1901, p. 584.

The section of the Revised Statutes of which the above provision is a part, was originally enacted in 1846.¹⁷ The office of circuit court commissioner is abolished by an act of 1896,¹⁸ and, the office of United States commissioner takes its place. The above provision embraces all consular agents whose government gives them jurisdiction; but neither under international law nor under the United States statute law has such a consular agent the right to sit as judge unless the consent of the United States has been given either by express statute or treaty stipulation.¹⁹

§ 159. Jurisdiction to mandamus Union Pacific Railroad.

The proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law.

R. S. § 5262, U. S. Comp. Stat. 1901, p. 3577.

The above section was carried into the Revised Statutes from an act

¹⁴See Ex parte Byers, 32 Fed. 404.

¹⁸Act May 28, 1896, c. 252, § 19.

¹⁵United States v. Rogers, 46 Fed. See post, § 671.

3.

¹⁹In re Aubrey, 26 Fed. 850.

¹⁷Act Aug. 8, 1846, c. 105, 9 Stat. 78.

of 1873.¹ It was passed because the circuit court has no such jurisdiction unless especially conferred by statute.² So far as the railroad owes duties to the general public enforceable by mandamus the proceedings should be instituted by the attorney general, but where the duty neglected is one which the company owes the public, and individuals suffer from such neglect, the court should not refuse the writ merely because the attorney general does not move for it.³

§ 160. Removal of suits by aliens against Federal officers.

Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the circuit court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.⁴

R. S. § 644, U. S. Comp. Stat. 1901, p. 523.

This section was carried into the Revised Statutes from an act of 1872.⁵

§ 161. Jurisdiction of circuit courts over creditors' bills affecting national banks.

By an act of 1876 creditors' bills may be maintained in equity in the proper Federal court to subject assets to payment of claims or to enforce stockholder's liability.⁷

Author's section.

§ 162 — of suits respecting trademarks.

The circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction . . . of all suits at law or in equity respecting trademarks registered in accordance with the provisions of this act,

¹Act March 3, 1873, c. 226, § 4, 17 Stat. 509.

²People v. Colorado, etc. R. Co. 42 Fed. 638; United States v. Union Pac. R. Co. 3 Dill. 524, Fed. Cas. No. 16,600.

³Hall v. Union Pac. R. Co. 3 Dill.

515, Fed. Cas. No. 5,950. See also People v. Colorado, etc. R. Co. 42 Fed. 638.

⁴See post, § 1146.

⁵Act March 30, 1872, c. 72, 17 Stat. 44.

⁷See post, § 964.

arising under the present act, without regard to the amount in controversy.

Part of § 17, act Feb. 20, 1905, c. 592, 33 Stat. 723, U. S. Comp. Stat. 1905, p. 675.

The omitted portion of the section provides the appellate jurisdiction.⁸ Other portions of the act are to be found in the chapter on procedure in trademark cases.⁹

§ 163. — of circuit and district courts over proceedings under civil rights act of 1875.

The district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States, or territorial court, as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: Provided, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall wilfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: And provided further, That a judgment for the penalty in favor of

⁸Ante, § 87.

⁹Post, § 1177, et seq.

the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

§ 3 of act Mar. 1, 1875, c. 114, 18 Stat. 336, U. S. Comp. Stat. 1901, p. 1260.

The first and second sections of the act have been declared unconstitutional²¹ and it may be questioned whether the foregoing provision is in force. General jurisdiction over suits for violation of civil rights is conferred upon the district²² and circuit²³ courts by provisions of the Revised Statutes.

§ 164. — jurisdiction over naturalization proceedings.

Exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

The naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal, shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of Immigration and Naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said Bureau.

§ 3, act June 29, 1906, c. 3592, 34 Stat. 596.

The procedure for naturalization provided by the act of 1906 is set forth in a subsequent portion of this Code.²⁵

²¹Civil Rights Cases, 109 U. S. 25,
27 L. ed. 835, 3 Sup. Ct. Rep. 18.

²²Post, § 203, et seq.

²³Ante, § 127.

²⁵Post, § 2380, et seq.

CHAPTER 6.

THE DISTRICT COURT—ORGANIZATION AND POWERS.

- § 166. Various cross-references.
- § 167. Appointment of district judges for various districts.
- § 168. In some cases one judge for two or more districts.
- § 169. In some cases two or more district judges in a district.
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- § 171. —in Oregon.
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- § 173. Designation of additional district judge to assist with accumulated business.
- § 174. When Chief Justice shall make such designation.
- § 175. When new designations and appointments may be made.
- § 176. Duty of district judge to comply with designation.
- § 177. Duty of circuit judge to designate and of district judge to act.
- § 178. Judge of one Florida district to act in other in case of disability.
- § 179. What district judge to act in case of disability in a New York district.
- § 180. District judge of Eastern New York district may sit in Southern.
- § 181. Continuances by vacancy in office of district judge.
- § 182. But another district judge in state may act in vacant district.
- § 183. District court clerk's power to make orders, etc., in admiralty, during judge's disability.
- § 184. Assignment of judge for northern district of Alabama.

§ 166. Various cross-references.

Provisions respecting the salaries and expenses of district judges,¹ and their qualification and tenure of office,² will be found elsewhere; also provisions respecting clerks, marshals and bailiffs.³ In some instances Congress has conferred jurisdiction in general terms upon circuit and district courts and the statutory provisions in question are embodied in a preceding chapter.⁴

Author's section.

¹Post, §§ 469, 473-475.

²Post, § 467.

³Post, §§ 567, et seq; 618 et seq.

⁴Ante, §§ 150-158, 163.

§ 167. Appointment of district judges for various districts.

A district judge shall be appointed for each district, except in the cases hereinafter provided. Every such judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

R. S. § 551, U. S. Comp. Stat. 1901, p. 446.

Subsequent statutes establishing additional judicial districts contain provisions for the appointment of additional judges therefor.⁷ So also the acts admitting new States into the Union constitute each State a judicial district, and provide for the appointment of a district judge. In some districts the appointment of an additional district judge has been authorized.⁸ The judicial districts of each State and the divisions thereof, are given in a following chapter.⁹ Besides the above requirement that every district judge shall reside in the district for which he is appointed, every clerk of the circuit or district court,¹⁰ marshal,¹¹ and district attorney¹² is required to reside permanently in the district in which his official duties are to be performed.

§ 168. In some cases one judge for two or more districts.

There shall be appointed in each of the States of Alabama, Georgia, Mississippi, South Carolina, and Tennessee, one district judge, who shall be district judge for each of the districts included in the State for which he is appointed, and shall reside within some one of the said districts. And for offending against this provision, such judges shall be liable as in the preceding section.

R. S. § 552, U. S. Comp. Stat. 1901, p. 447.

Alabama and Tennessee are divided into three districts; and South Carolina, Georgia and Mississippi into two each.¹⁴ An act of 1882¹⁵ gave Georgia a district judge for each district. A statute of 1878¹⁶ gave Tennessee a district judge for the western District, the older appointee continuing to have jurisdiction in the middle and eastern districts. An act of 1886¹⁷ gave Alabama a new district judge in the southern district and continued the powers of the existing judge in the middle and northern districts.

§ 169. In some cases two or more district judges in a district.

In the southern district of New York there are now three dis-

⁷See U. S. Comp. Stat. 1901, p. 316-446 *passim*; also U. S. Comp. Stat. 1905, p. 89, 112, 126.

⁸Post, § 170.

⁹Post, §§ 257, et seq.

¹⁰Post, § 571.

¹¹Post, § 623.

¹²Post, § 506.

¹⁴Post, §§ 257, 263, 274, 284, 286.

¹⁵Act April 25, 1882, c. 87.

¹⁶Act June 14, 1878, c. 196.

¹⁷Act Aug. 2, 1886, c. 842.

trict judges.¹⁸ In the Minnesota district,¹⁹ in the northern district of Illinois,²⁰ eastern district of Pennsylvania,¹ the district of New Jersey,² and the northern district of Texas³ there are two district judges. But the law authorizing the additional judge in the Texas district provided that no vacancy in the office of the then existing district judge should be filled and after such vacancy the district should have only one district judge.⁴

Author's section.

§ 170. Circuit judge may act for district judge in Tennessee.

In the case of the non-attendance⁵ of the district judge of Tennessee at any term of the district court in either of the districts thereof, the circuit justice, or circuit judge of the circuit to which such district belongs, may hold such term, and shall have and exercise the jurisdiction and powers given by law to a district judge.

R. S. § 582, U. S. Comp. Stat. 1901, p. 477.

By an act of 1878,⁶ a district judge was appointed for the western district of Tennessee so that there are now two district judges instead of one.

§ 171 — in Oregon.

In case of the absence of the United States district judge for the district of Oregon from said district, or of his disability, a circuit judge of the United States of the circuit to which such district belongs may hold the district court and perform the duties of the district judge.

Act Apr. 28, 1904, c. 1775, 33 Stat. 527, U. S. Comp. Stat. 1905, p. 138.

§ 172. Another district judge may be designated to act for disabled judge.

When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, or of the circuit court in his district in the absence of the other judges, and that fact is made to appear by the certificate of the clerk, under

¹⁸Act Feb. 9, 1903, c. 527, 32 Stat. 805; act May 26, 1906, c. 2557, 34 Stat. 202. necessary orders for the division of business and assignment of cases.

²⁰Act March 3, 1905, c. 1427, § 2.

¹Act April 1, 1904, c. 851.

²Act March 3, 1905, c. 1418.

³Act Feb. 9, 1898, c. 15, 30 Stat. 240.

⁴Ibid.

⁶Act June 14, 1878, c. 196.

¹⁹Act Feb. 4, 1903, c. 402, 32 Stat. 795. The act further provided that the senior circuit judge of the eighth circuit or the resident circuit judge within the district shall make all

the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said courts, and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the district clerk to the judge so designated and appointed.

R. S. §. 591, U. S. Comp. Stat. 1901, p. 480.

There is a special provision in the case of the northern district of Alabama.⁷ Under the above provision the circuit justice or judge may appoint an outside district judge to hold both the circuit and the district courts.⁸ Such judge when so appointed is judge *de jure*, of the district. If upon the death of the disabled judge, he holds court until a successor is appointed, he is at least a judge *de facto* during that time and his acts are not open to collateral attack.⁹ While the section provides that the appointment should be filed in the clerk's office, the filing is not essential to the validity thereof.¹⁰

§ 173. Designation of additional district judge to assist with accumulated business.

When, from the accumulation or urgency of business in any district court, the public interest require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof; and each of the said district judges may, in case of such appointment, hold separately at the same time a district or circuit court in such district, and discharge all the judicial duties of a district judge therein; but no such judge shall hear appeals from the district court.

R. S. § 592, U. S. Comp. Stat. 1901, p. 481.

⁷Post, § 184.

118, 35 L. ed. 377, 11 Sup. Ct. Rep.

⁸National Home, etc. v. Butler, 33 Fed. 374.

761.
¹⁰National Home, etc. v. Butler,

⁹Ball v. United States, 140 U. S. 33 Fed. 374.

§ 174. When Chief Justice shall make such designation.

If the circuit judge and circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the courts and transact the business for which he is designated, the district clerk shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint, in the manner aforesaid, the judge of any district within such circuit or within any circuit next contiguous; and said appointment shall be transmitted to the district clerk, and be acted upon by him as directed in the preceding section.

R. S. § 593, U. S. Comp. Stat. 1901, p. 481.

§ 175. When new designations and appointments may be made.

The circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of and other district judge within the said circuits, for the duties, and with the powers mentioned in the three preceding sections, and to revoke any previous designation and appointment.

R. S. § 594, U. S. Comp. Stat. 1901, p. 481.

§ 176. Duty of district judge to comply with designation.

It shall be the duty of the district judge who is designated and appointed under either of the four preceding sections, to discharge all the judicial duties for which he is so appointed, during the continuance of such disability, or, in the case of an accumulation of business, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

R. S. § 595, U. S. Comp. Stat. 1901, p. 482.

§ 177. Duty of circuit judge to designate and of district judge to act.

It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section five hundred and ninety-one,¹ the district judge of any judicial district within

¹Ante, § 172.

his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit; and it shall be the duty of the district judge so designated and appointed, to hold the district or circuit as aforesaid, without any other compensation than his regular salary as established by law, except in the case provided in the next section.²

R. S. § 596, U. S. Comp. Stat. 1901, p. 482.

The omission of the word "court" after the words "district or circuit" in the last clause is apparently unintentional. By an act of 1881,³ so much of the above provision as forbids the payment of the expenses of district judges while holding court outside of their districts, is expressly repealed.

The provision gives the circuit judge power to act whenever in his judgment the public interests require,⁴ and this power apparently extends to an appointment of a judge to fill an existing vacancy.⁵ In any event a judge so appointed is judge de facto if not de jure, and his actions are not open to question so far as they affect third persons.⁶ It contemplates that an appointment made under it should state what court the appointee is to hold and whether it is in place of the district judge or in aid of him.⁷

§ 178. Judge of one Florida district to act in other in case of disability.

When a certificate of the judge of either of the districts of Florida, stating that he is disabled to hold any regular, special, or adjourned term of the court of such district, and requesting the judge of the other district to hold the same, is filed in the clerk's office of the place where it is to be held, the judge of the other district is authorized to hold such courts, and to exercise all the powers of district judge, in the district of the judge so certifying.

R. S. § 598, U. S. Comp. Stat. 1901, p. 483.

This provision was originally enacted in 1855.⁹

§ 179. What district judge to act in case of disability in a New York district.

Whenever the judge of the northern district of New York is disabled to perform the duties of his office, it shall be the duty of

²Post, § 473.

³March 3, 1881, c. 133, 21 Stat.

454.

⁴McDowell v. United States, 159 U. S. 596, 40 L. ed. 271, 16 Sup. Ct. Rep. 111.

⁵Idem; see also United States v. Murphy, 52 Fed. 896.

⁶McDowell v. United States, 159

U. S. 596, 40 L. ed. 271, 16 Sup. Ct. Rep. 111.

⁷Ball v. United States, 140 U. S. 128, 35 L. ed. 382, 11 Sup. Ct. Rep. 761; National Home, etc. v. Butler, 33 Fed. 374.

⁹Act Feb. 24, 1855, c. 125, 10 Stat. 615.

the judge of the southern district, upon receiving from him notice thereof, to hold the district court, and to perform all the duties of district judge for such district. And whenever the judge of the southern district is so disabled, it shall be the duty of the judge of the eastern district, upon like notice, to hold the district court, and to perform all the duties of district judge for the southern district. In such cases the said judges, respectively, shall have the same powers as are vested in the judge so disabled.

R. S. § 599, U. S. Comp. Stat. 1901, p. 483.

§ 180. District judge of eastern New York district may sit in southern.

Whenever the judge of the southern district of New York deems it desirable, on account of the pressure of public business or other cause, that the judge of the eastern district shall perform the duties of a district judge in the southern district, an order to that effect may be entered upon the records of the district court thereof; and thereupon the judge of the eastern district shall have power to hold the district court, and to perform all the duties of district judge for the southern district.

R. S. § 600, U. S. Comp. Stat. 1901, p. 483.

This section was carried into the Revised Statutes from an act of 1865.¹²

§ 181. Continuances by vacancy in office of district judge.

When the office of judge of any district court is vacant, all process, pleadings, and proceedings pending before such court shall be continued of course until the next stated term after the appointment and qualification of his successor; except when such first-mentioned term is held as provided in the next section.

R. S. § 602, U. S. Comp. Stat. 1901, p. 484.

The exception above stated relates to a vacancy in any district in a State containing two or more districts and does not apply where there is only one district in a State. Hence in the latter case, during a vacancy in the office of judge of the district court, all judicial action must remain in abeyance until the vacancy be filled, unless a judge shall have been appointed pursuant to law to exercise during the vacancy, the powers and duties of a district judge.¹⁴ Whether the law authorizes such an ap-

¹²Act Feb. 25, 1865, c. 54, 13 Stat. 438.

¹⁴United States v. Murphy, 82 Fed. 896.

pointment is not altogether clear.¹⁵ The section is remedial, and its general purpose is that the administration of justice by a district court shall not, through a vacancy in the office of judge, be defeated or unduly impeded.¹⁶ The term "process" while not including the whole cause, embraces among other things, all means provided by law for compelling one arrested and held on a criminal charge to appear in court. Imprisonment under a commitment by a commissioner to answer a criminal charge is "process." "Process pending before" the court includes process the object of which has not been fully accomplished.¹⁷ A recognizance is such process. The application of this section to a recognizance, executed after its enactment, does not in any legal sense either extend the undertaking of, or impose additional burdens upon the recognizers.¹⁸

§ 182. But another district judge in State may act in vacant district.

When the office of district judge is vacant in any district in a State containing two or more districts, the judge of the other or of either of the other districts may hold the district court, or the circuit court in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurs, and discharge all the judicial duties of judge of such district, during such vacancy; and all the acts and proceedings in said courts, by or before such judge of an adjoining district, shall have the same effect and validity as if done by or before a judge appointed for such district.

R. S. § 603, U. S. Comp. Stat. 1901, p. 484.

This provision was enacted in 1861.¹ It applies only when a vacancy exists. If a district judge is merely out of the State leave to institute suit against a receiver, granted by a district judge of another district is of no effect.²

§ 183. District court clerk's power to make orders, etc., in admiralty during judge's disability.

When the business of a district court is certified into the circuit court on account of the disability of the district judge, the district clerk shall be authorized, by order of the circuit judge, or, in his absence, of the circuit justice within whose circuit such district is included, to take, during such disability, all examinations and depo-

¹⁵See *McDowell v. United States*, 159 U. S. 596, 40 L. ed. 272, 16 Sup. Ct. Rep. 111.

¹⁶*United States v. Murphy*, 82 Fed. 896.

¹⁷*United States v. Murphy*, 82 Fed. 900.

¹⁸*Idem*.

¹Act Aug. 6, 1861, c. 59, 12 Stat. 318.

²*American, etc. Co. v. East, etc. R. Co.* 40 Fed. 182.

sitions of witnesses, and make all necessary rules and orders, preparatory to the final hearing of all causes of admiralty and maritime jurisdiction.

R. S. § 590, as amended in 1875, U. S. Comp. Stat. 1901, p. 480.

The amendment of 1875 consisted in the insertion of the word "district" where it occurs in the first line instead of the word "circuit," in the section as originally enacted.⁴

§ 184. Assignment of judge for northern district of Alabama.

Whenever the judge for the northern district of Alabama deems it advisable, on account of disability or absence, or of the accumulation of business therein, or for any other cause, that said court should be held by the judge of some other district or circuit court, he shall, in writing, request the presiding judge for the fifth judicial circuit of the United States to assign a judge to hold the term or terms of said court.

§ 2 act Apr. 14, 1906, c. 1625, 34 Stat. 114.

⁴Act Feb. 18, 1875, c. 18, 18 Stat. 317.

CHAPTER 7.

THE DISTRICT COURT—JURISDICTION.

- § 193. Jurisdiction over Federal crimes and offenses.
- § 194. Jurisdiction over piracy.
- § 195. Over suits for penalties and forfeitures.
- § 196. Over common law suits by the United States or its officer.
- § 197. Over equity suits to enforce lien for revenue tax.
- § 198. Over suits for forfeitures for debts to United States.
- § 199. Over actions under postal laws.
- § 200. Over admiralty causes and non admiralty seizures
- § 201. Over proceedings for condemnation as prize.
- § 202. Over suits on debentures for drawback of duties.
- § 203. Over suits for damages for conspiracy against civil rights.
- § 204. Over suits to redress deprivation of Federal right.
- § 205. Suits to recover office where denial of Federal rights involved. ,
- § 206. Over quo warranto suits against office holders contrary to Fourteenth Amendment.
- § 207. Suits by or against national banks.
- § 208. Suits by aliens for tort against treaty or law of nations.
- § 209. Over suits against consuls.
- § 210. In Bankruptcy.
- § 211. Over prosecutions for violation of sealing laws.
- § 212. Concurrent jurisdiction with Court of Claims.
- § 213. Jurisdiction in cases transferred from Territorial courts.
- § 214. Jurisdiction under interstate commerce, alien immigrant, and alien enemies laws.
- § 215. Jurisdiction as to suits for unlawful inclosure of public lands, and for condemnation, and over crimes upon South Dakota reservations and upon great lakes, etc.
- § 216. Jurisdiction over offenses against submarine cable law.

§ 193. Jurisdiction over Federal crimes and offenses.

The district courts shall have jurisdiction as follows:

First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, ex-

cept in the cases mentioned in section fifty-four hundred and twelve, Title "Crimes."

First paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 455.

Other sections of the Revised Statutes provide for the transfer of criminal cases from the district to the circuit court, where difficult questions of law are involved, or in capital cases; and also provide generally for the transfer of causes to or from the circuit courts from or to the district courts.¹ R. S. § 5412, above referred to, makes punishable the act of secretly or fraudulently placing any document in the archives of the surveyor general's office in California. Federal jurisdiction of crimes and offenses cognizable under the authority of the United States is exclusive of State courts.² As between the circuit and district courts, the jurisdiction in such cases is concurrent, except in the case of capital offenses, where the jurisdiction is exclusively in the circuit court.³ Federal courts have no common law jurisdiction in criminal cases⁴ and the above provision confers no jurisdiction on the district court of a crime not otherwise defined by some Federal statute.⁵ The authority to punish for manslaughter on the navigable waters of the United States is found in the constitutional grant of power to regulate commerce.⁶ Perjury as defined by R. S. § 5392, is punishable under this section.⁷

The jurisdiction of a district court is coextensive with the particular district,⁸ and the fact that such district is divided by act of Congress into two or more divisions does not affect the criminal jurisdiction of that court, unless otherwise provided.⁹ In dividing a district however, Congress may provide that crimes committed in a particular division may be prosecuted only in that division.¹⁰ And this provision will be followed although the crime was committed before the division took place, if the indictment was not brought until afterward.¹¹

§ 194. Jurisdiction over piracy.

The district courts shall have jurisdiction . . .

Second. Of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.

Second paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 456.

¹Ante, § 116, et seq.

²Ante, § 15.

³See ante, § 132; United States v. Plumer, 3 Cliff. 28, Fed. Cas. No. 16,056.

⁴United States v. Rogers, 46 Fed. 1; United States v. Worrall, 2 Dall. 384, 1 L. ed. 426; United States v. Hudson, 7 Cranch. 32, 2 L. ed. 259; United States v. Coolidge, 1 Wheat. 415, 4 L. ed. 124.

⁵United States v. Lewis, 36 Fed. 449, 13 Sawy. 532.

⁶United States v. Beacham, 29 Fed. 284.

⁷Caha v. United States, 152 U. S. 216, 38 L. ed. 418, 14 Sup. Ct. Rep. 513.

⁸Rosencrans v. United States, 165 U. S. 257, 41 L. ed. 708, 17 Sup. Ct. Rep. 302.

⁹United States v. Kessell, 63 Fed. 434; Rosencrans v. United States, 165 U. S. 257, 41 L. ed. 708, 17 Sup. Ct. Rep. 302.

¹⁰Post, § 406.

¹¹Post v. United States, 161 U. S. 583, 40 L. ed. 816, 16 Sup. Ct. Rep. 611.

§ 195. Over suits for penalties and forfeitures.

The district courts shall have jurisdiction . . .

Third. Of all suits for penalties and forfeitures incurred under any law of the United States.

Third paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 456.

Jurisdiction over suits for penalties and forfeitures incurred under Federal laws, has been vested in the district court from the time of the judiciary act of 1789.¹⁴ Under that act the jurisdiction was exclusive. Now, however, the circuit court has jurisdiction in certain cases;¹⁵ though always given by special act and the general jurisdiction has been and still is vested in the district court.¹⁶ So, where a statute imposes a penalty and forfeiture the latter court has jurisdiction unless it is in express terms placed exclusively elsewhere.¹⁷ Thus a suit for a penalty for importing alien contract laborers under an act of 1885¹⁸ is within the meaning of the provision, although the act provides that the penalty may be recovered, "as debts of like amount are now recovered in the circuit courts."¹⁹ Such provision refers to the form of the action rather than to the court in which the suit is to be brought.²⁰ Whether the act just mentioned gives the circuit court jurisdiction at all seems questionable.¹

The jurisdiction of the district court under the above provision is not repealed or modified by the act of 1875 as amended 1887-1888, giving the circuit courts original jurisdiction of all suits arising under the Federal laws or in which the United States are plaintiffs or petitioners.² Forfeitures under this provision, include the forfeitures of a bail bond in suit for violation of internal revenue laws;³ penalties in a suit against a national bank for taking illegal interest;⁴ and penalties and forfeitures under the customs laws are also within the section.⁵ In the latter case the jurisdiction vests exclusively in the district court.⁶

¹⁴Act Sept. 24, 1879, c. 20, § 9, 1 Stat. 76.

¹⁵Ante, §§ 124, [c] 125.

¹⁶Lees v. United States, 150 U. S. 478, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163.

¹⁷Idem.

¹⁸Ante, § 147.

¹⁹Lees v. United States, 150 U. S. 478, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Rosenberg v. Union, etc. Works, 109 Fed. 845; United States v. Bedstead Co. 45 Fed. 90. But see United States v. Banister, 70 Fed. 45. See ante, § 147.

²⁰Lees v. United States, 150 U. S. 478, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163.

¹See ante, § 147.

²Ante, §§ 129, 130; Helwig v. 427.

United States, 188 U. S. 605, 47 L. ed. 614, 23 Sup. Ct. Rep. 427; United States v. Bedstead Co. 45 Fed. 90. See also United States v. Mooney, 116 U. S. 106, 29 L. ed. 550, 6 Sup. Ct. Rep. 304.

³Insley v. United States, 150 U. S. 515, 37 L. ed. 1165, 14 Sup. Ct. Rep. 158.

⁴First Nat. Bank of Charlotte v. Morgan, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37.

⁵Helwig v. United States, 188 U. S. 605, 47 L. ed. 614, 23 Sup. Ct. Rep. 427; United States v. Mooney, 116 U. S. 106, 29 L. ed. 551, 6 Sup. Ct. Rep. 304.

⁶Helwig v. United States, 188 U. S. 610, 47 L. ed. 614, 23 Sup. Ct. Rep.

§ 196. Over common law suits by the United States or its officer.

The district courts shall have jurisdiction . . .

Fourth. Of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue.

Paragraph 4, R. S. § 563, U. S. Comp. Stat. 1901, p. 456.

The circuit courts are also given jurisdiction of the suits mentioned in this section.⁹ Suits under this provision include an action of trover brought by a United States marshal to recover official moneys found by the defendant;¹⁰ an action to recover a penalty under the navigation law for employing an unlicensed pilot;¹¹ a set-off imposed by the government in a suit by a district attorney to recover fees;¹² a suit brought by United States under a State statute, on a sheriff's bond to recover damages for negligently allowing the escape of a Federal prisoner;¹³ a suit by a national bank receiver.¹⁴

§ 197. Over equity suits to enforce lien for revenue tax.

The district courts shall have jurisdiction . . .

Fifth. Of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title or interest.

Fifth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 456.

The above provision was enacted in 1868.¹⁵ The venue of suits arising thereunder is stated in a following section.¹⁷ Jurisdiction of all cases arising under internal revenue laws is given also to the circuit court.¹⁸

§ 198. Over suits for forfeitures for debts to United States.

The district courts shall have jurisdiction . . .

Sixth. Of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and nintey, Title "Debts due by or to the United States;" and such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.

Sixth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 456.

⁹Ante §§ 124, 130.

¹⁰Henry v. Sowles, 28 Fed. 481.

¹¹United States v. Bougher, 6 McLean, 277, Fed. Cas. No. 14,627.

¹²Tuthill v. United States, 38 Fed. 538.

¹³Tennessee v. Hill, 60 Fed. 1005, 9 C. C. A. 326, 24 L.R.A. 170.

¹⁴Ante, § 124, note.[b] Freling-

huysen v. Baldwin, 12 Fed. 395;

Stephens v. Bernays, 44 Fed. 642.

¹⁵Act July 20, 1868, c. 186, § 106,

15 Stat. 167.

¹⁷Post, § 420.

¹⁸Ante, § 124. [c]

This provision was originally part of an act of 1863,¹ R. S. § 3490, above mentioned subjects persons making false claims against the United States to a two thousand dollar forfeiture and double damages.

§ 199. Over actions under postal laws.

The district courts shall have jurisdiction . . .

Seventh. Of all causes of action arising under the postal laws of the United States.

Seventh paragraph, R. S. § 563, U. S. Comp. Stat. 1901, p. 457.

This provision was enacted in 1845.³ Jurisdiction over the same suits is given also to the circuit courts.⁴

§ 200. Over admiralty causes and non-admiralty seizures.

The district courts shall have jurisdiction . . .

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.

Eighth paragraph R. S. § 563, as amended 1875, U. S. Comp. Stat. 1901, p. 457.

The amendment of 1875,⁶ consisted in the addition of the last sentence above set forth. Paragraph 6 of R. S. § 629, mentioned supra, gives the circuit court jurisdiction of proceedings for the condemnation of property which has been taken as prize because employed in aid of insurrection.⁷ Federal jurisdiction of admiralty and maritime cases, and cases of seizures is made exclusive of the State courts.⁸ The whole subject of jurisdiction in such cases is considered in a previous chapter.⁹ Under this section the district court has jurisdiction to entertain a petition for the award of salvage against the United States.¹⁰

¹Act March 2, 1863, c. 67, § 4, 12 Stat. 698.

²Act March 3, 1845, c. 43, § 20, 5 Stat. 739.

⁴Ante, § 124.

⁶Act Feb. 18, 1875, c. 80, 18 Stat. 317.

⁷Ante, § 125.

⁸Ante, § 15.

⁹Ante, §§ 2, [k]-[kk] 15. [d]-[j]

¹⁰United States v. Wishkah B. Co. 136 Fed. 42, 68 C. C. A. 592.

§ 201. Over proceedings for condemnation as prize.

The district courts shall have jurisdiction . . .

Ninth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, Title, "Insurrection."

Ninth paragraph R. S. § 563, as amended 1875, U. S. Comp. Stat. 1901, p. 457.

The section was originally enacted in 1861.¹¹ The amendment of 1875,¹² consisted in changing the section above mentioned from 5376 to 5308. Concurrent jurisdiction in the cases mentioned is given to the circuit courts.¹³

§ 202. Over suits on debentures for drawback of duties.

The district courts shall have jurisdiction . . .

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person for whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Tenth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 458.

The section was carried into the Revised Statutes from an act of 1799,¹⁵ R. S. § 3039, authorizes suits on the debentures herein described. Jurisdiction of such suits is given also to the circuit courts.¹⁶

§ 203. Over suits for damages for conspiracy against civil rights.

The district courts shall have jurisdiction . . .

Eleventh. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty-five, Title, "Civil rights."

Eleventh paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 458.

This section was enacted in 1871.¹⁸ Jurisdiction over the suits mentioned herein is given also to the circuit courts.¹⁹ Section nineteen hundred and eighty-five" above mentioned does not have to do with conspiracy. R. S. § 1980, is apparently meant.

¹¹Act Aug. 6, 1861, c. 60 § 2, 12 Stat. 319.

¹²Act Feb. 18, 1875, c. 80, 18 Stat. 317.

¹³Ante, § 125.

¹⁵Act March 2, 1799, c. 22, 1 Stat. 687.

¹⁶Ante, § 125.

¹⁸Act April 20, 1871, c. 22, § 2, 17 Stat. 13.

¹⁹Ante, § 127.

§ 204. Over suits to redress deprivation of Federal rights.

The district courts shall have jurisdiction . . .

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

Twelfth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 458.

Jurisdiction of suits mentioned in this section is given also to the circuit courts.¹ Under its provisions the district court has jurisdiction to determine whether colored children, refused admission to school, are denied the equal protection of the law.²

§ 205. Suits to recover office where denial of Federal rights involved.

The district courts shall have jurisdiction . . .

Thirteenth. Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Thirteenth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 458.

This section was carried into the Revised Statutes from an act of 1870.⁴ Jurisdiction of suits mentioned therein is given also to the circuit court.⁵ Such suits were authorized by R. S. § 2010. That section was repealed, however, in 1894.⁶

¹Ante, § 127.

²Davenport v. Cloverport, 72 Fed. 689.

⁴Act May 31, 1870, c. 114, § 23, 16 Stat. 146.

⁵Ante, § 127.

⁶Act Fed. 8, 1894, c. 25, § 1, 28 Stat. 36.

§ 206. Over quo warranto suits against office holders contrary to Fourteenth Amendment.

The district courts shall have jurisdiction . . .

Fourteenth. Of all proceedings by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

Fourteenth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 459.

The above provision has become inoperative by the removal of the disability imposed by the constitutional amendment, above mentioned.⁸

§ 207. Suits by or against national banks.

The district courts shall have jurisdiction . . .

Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held.

Fifteenth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 459.

This provision was originally enacted in 1864.¹⁰ The circuit courts are also given jurisdiction of suits by and against national banks.¹¹ But since an act of 1887 the circuit and district courts have not had jurisdiction over suits by and against national banks, other than such as they would have in cases between individual citizens of the same State. That act, however, expressly excepts suits commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.¹²

§ 208. Suits by aliens for tort against treaty or law of nations.

The district courts shall have jurisdiction . . .

Sixteenth. Of all suits brought by any alien for a tort only in violation of the law of nations, or of a treaty of the United States.

Sixteenth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 459.

The above provision was enacted in 1789.¹⁴

⁸Act June 6, 1898, c. 389, 30 Stat. 432.

¹⁰Act June 3, 1864, c. 106, § 57, 13 Stat. 116.

¹¹Ante, § 127.

¹²Ante, § 24; *Petri v. National Bank*, 142 U. S. 649, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325.

¹⁴Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76.

§ 209. Over suits against consuls.

The district court shall have jurisdiction . . .

Seventeenth. Of all suits against consuls or vice consuls, except for offenses above the description aforesaid.

Seventeenth paragraph R. S. § 563, U. S. Comp. Stat. 1901, p. 459.

The clause in the above section, "except for offenses above the description aforesaid" was taken from an act of 1789,¹⁶ and referred to a provision of that act, providing "that the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts or upon the high seas, where no other punishment than whipping, not exceeding thirty stripes, or a fine not exceeding \$100, or a term of imprisonment not exceeding six months is to be inflicted."¹⁷ The jurisdiction over suits against consuls is considered elsewhere.¹⁸

This provision is constitutional, the "original jurisdiction" given by the Constitution to the Supreme Court, over all cases affecting ambassadors and consuls, not being exclusive.¹⁹ Under it a district court has jurisdiction in equity and hence may take cognizance of a suit to foreclose a mortgage.²⁰ It does not however apply to a suit against a United States consul such person having no official character in his own country.¹ All suits or proceedings against consuls or vice-consuls were made exclusive of the State courts by the judiciary act of 1789.² That provision, which was carried into the Revised Statutes,³ was directly repealed by an act of 1875,⁴ and under the present law there is no statute which in terms makes the Federal jurisdiction exclusive of State courts in such cases.⁵ The act just referred to, however, in no way diminishes the jurisdiction of the district court.⁶

§ 210. In bankruptcy.

The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.

18th paragraph, R. S. § 563, U. S. Comp. Stat. 1901, p. 459.

This provision was carried into the Revised Statutes from the Bank-

¹⁶Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76.

¹⁷Ibid.

¹⁸Ante, § 2.

¹⁹Davis v. Packard. 7 Pet. 281, 8 L. ed. 687; Pooley v. Luco. 76 Fed. 147; State v. Lewis. 14 Fed. 67. See ante, § 2.

²⁰Pooley v. Luco, 76 Fed. 147.

¹Milward v. McSaul, 17 Fed. Cas. No. 9,624.

²Act Sept. 24, 1785, c. 20, § 9, 1 Stat. 76.

³R. S. § 711 paragraph 8.

⁴Act Feb. 18, 1875, c. 20, 18 Stat. 318.

⁵Börs v. Preston. 111 U. S. 252, 23 L. ed. 419, 4 Sup. Ct. Rep. 407.

⁶Froment v. Duclos, 30 Fed. 385.

rupt act of 1867.⁸ The language is broad and general, and covers the two general classes of cases which arise; first, proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge of, or the refusal to discharge the bankrupt; second, suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt or to claims alleged to be due from or to him.⁹ A general discussion of the jurisdiction of the district courts and other courts as courts of bankruptcy, as defined in the Bankruptcy act of 1898¹⁰ will be found in a following chapter.¹¹

§ 211. Over prosecutions for violation of sealing law.

Any violation of this act, [i e., regulating seal fishing] or of the regulations made thereunder, may be prosecuted either in the district court of Alaska or in any district court of the United States in California, Oregon or Washington.

§ 9 of act April 6, 1894, c. 57, 28 Stat. 54., U. S. Comp. Stat. 1901, p. 3009.

An act of 1897 contained the same provision as to jurisdiction.¹²

§ 212. Concurrent jurisdiction with Court of Claims.

The district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section¹⁴ [claims against the United States growing out of contract, etc.] where the amount of the claim does not exceed one thousand dollars. . . . The jurisdiction hereby conferred upon the said . . . district courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof.

Part of § 2, act Mar. 3, 1887, 24 Stat. 505, as amended June 27, 1898, c. 503, 30 Stat. 495, U. S. Comp. Stat. 1901, 753.

This section also gave concurrent jurisdiction to the circuit courts over suits exceeding one thousand dollars in amount and not exceeding ten thousand dollars.¹⁵ The amendment of 1898 consisted in the addition of the last sentence above set forth. Whether this amendment applied to pending suits so as to require their dismissal for want of jurisdiction

⁸Act March 2, 1867, c. 176, § 1, 14 Stat. 517.

⁹Lathrop v. Drake, 91 U. S. 517, p. 3012.
23 L. ed. 415.

¹⁰Act July 1, 1898, c. 541, § 2.

¹¹Post, § 2163, et seq.

¹²§ 5, of act Dec. 29, 1897, c. 3, 30 Stat. 227, U. S. Comp. Stat. 1901,

¹⁴See post, § 229.

¹⁵Ante, § 139.

was a mooted question.¹⁶ It was finally settled in 1900¹⁷ by an act providing that no suit pending in the circuit or district courts should abate or be affected by the amendment. A letter carrier is a United States officer within the meaning of the amendment, and hence a suit brought by him to recover for services is not within the jurisdiction of the district court.¹⁸ A claim against the United States for salvage is one for unliquidated damages not sounding in tort within the section referred to in the above provision; and the jurisdiction is not defeated where the salvage was of sugar in customs officers' possession, upon the theory that the case is one under the revenue laws.¹⁹

§ 213. Jurisdiction in cases transferred from territorial courts.

When any Territory is admitted as a State, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the superior court of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court, and shall proceed to hear and determine the same.

R. S. § 569, U. S. Comp. Stat. 1901, p. 462.

The several acts passed since the Revised Statutes, admitting new States into the Union, constitute each State a judicial district and contain special provisions similar to the above, for the transfer of pending cases¹

§ 214. Jurisdiction under interstate commerce, alien immigrant, and alien enemies' laws.

Jurisdiction is conferred in general terms upon the circuit and district courts by provisions of the interstate commerce,² alien immigrant,³ and alien enemies' laws,⁴ and others,⁵ which are set forth in the chapter dealing with the circuit court's jurisdiction.

Author's section.

¹⁶Ante, § 139.

¹⁷Act Feb. 26, 1900, c. 25, 31 Stat. 33.

¹⁸United States v. McCrory, 91 Fed. 296, 33 C. C. A. 515.

¹⁹United States v. Cornell S. Co. 202 U. S. 184, 50 L. ed. 987, 26 Sup. Ct. Rep. 648.

¹See Ames v. Colorado, etc. R. Co. 4 Dill. 251, Fed. Cas. No. 324. See

also Forsyth v. United States, 9 How. 571, 13 L. ed. 262; McNulty v. Batty, 10 How. 72, 13 L. ed. 333. See act June 19, 1906, c. 3335, § 16, 34 Stat. 276, admitting Oklahoma.

²Ante, §§ 151, 152.

³Ante, § 153.

⁴Ante, § 156.

⁵Ante, § 163.

§ 215. Jurisdiction as to suits for unlawful occupancy of public lands, and for condemnation, and over crimes upon South Dakota reservations and upon great lakes.

Jurisdiction is also conferred in general terms upon the circuit and district courts by statutes respecting suits for unlawful inclosure of public lands,⁶ for condemnation for government uses,⁷ and over crimes upon South Dakota reservations⁸ and upon the great lakes.⁹ Another provision confers jurisdiction over suits on the bond of a deputy marshal of Owensboro, Kentucky.¹⁰

Author's section.

§ 216. Jurisdiction over offenses against submarine cable law.

The district courts of the United States shall have jurisdiction over all offenses against this act and of all suits of a civil nature arising thereunder, whether the infraction complained of shall have been committed within the Territorial waters of the United States or outside of the said waters: Provided, That in case such infraction is committed outside of the Territorial waters of the United States the vessel on board of which it has been committed is a vessel of the United States. From the decrees and judgments of the district courts in actions and suits arising under this act appeals and writs of error shall be allowed as now provided by law in other cases. This section also provides for the venue in such cases.¹²

Part of § 13 of act Feb. 29, 1888, c. 17, 25 Stat. 42, U. S. Comp. Stat. 1901, p. 3589'.

⁶Ante, § 154.

⁷Ante, § 150.

⁸Ante, § 155.

⁹Ante, § 157.

¹⁰Post, § 632.

¹²See post, § 425.

CHAPTER 8.

THE COURT OF CLAIMS.

- § 221. Cross-references.
- § 222. Organization and constitution.
- § 223. —power of judges and clerks.
- § 224. —power to establish rules, punish contempts, etc.
- § 225. Seal of court.
- § 226. Court rooms, etc., how provided.
- § 227. Quorum of the court.
- § 228. Officers of the court.
- § 229. Jurisdiction under act of 1887—what claims against government cognizable.
- § 230. —jurisdiction in matter of set-offs, etc., and proviso as to time of suit and suits by Federal officers.
- § 231. Jurisdiction as defined by Revised Statutes.
- § 232. —claims of disbursing officers for relief from unavoidable loss.
- § 233. —claims for captured and abandoned property.
- § 234. Jurisdiction over petitions and bills for claims transmitted from Congress.
- § 235. Claims pending before Congress may be transmitted to Court of Claims.
- § 236. Jurisdiction over claims referred by executive departments.
- § 237. —on referred claims under act of 1887.
- § 238. —on referred claims under act of 1883.
- § 239. Jurisdiction to render judgment on a referred claim.
- § 240. Duty to report to Congress on referred claim.
- § 241. Jurisdiction over claims for Indian depredations.
- § 242. Jurisdiction to adjust indebtedness to United States, alleged and unsettled, on behalf of debtor or his bondsmen.
- § 243. Jurisdiction over particular claims or classes of claims.
- § 244. Over suits by aided railroads, for transportation furnished.
- § 245. Claims not cognizable—war claims.
- § 246. —no jurisdiction over claims pending in other courts.
- § 247. —nor over claims growing out of treaties.

§ 221. Cross-references.

Elsewhere will be found provisions forbidding members of Congress to practice in the Court of Claims;¹ conferring concurrent

¹Post, § 498.

jurisdiction on the circuit and district courts;² defining the procedure in the Court of Claims;³ providing for offsets against a judgment recovered in Court of Claims;⁴ for suits by aliens therein;⁵ and prescribing the time for suit;⁶ and for interest on judgments against the United States.⁷

Author's section.

§ 222. Organization and constitution.

The Court of Claims, established by the act of February 24, 1855, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office.

Part of R. S. § 1049, U. S. Comp. Stat. 1901, p. 729.

The remainder of the section provides the salaries of such judges.⁸

§ 223. — power of judges and clerks.

The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same.

R. S. § 1071, U. S. Comp. Stat. 1901, p. 741.

The above section was carried forward into the Revised Statutes from an act of 1863.¹⁰

§ 224. — power to establish rules, punish contempts, etc.

The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law.

R. S. § 1070, U. S. Comp. Stat. 1901, p. 740.

The above section was originally enacted in 1863.¹² Although the court cannot delegate its judicial powers there is no reason why it cannot refer

²Ante, §§ 139, 212.

³Post, § 1448, et seq.

⁴Post, § 1449, et seq.

⁵Post, § 1454.

⁶Post, § 873.

⁷Post, § 1860.

⁸Post, § 469.

¹⁰Act March 3, 1863, c. 92, § 4, 12 Stat. 765.

¹²Act March 3, 1863, c. 92, § 4, 12 Stat. 765.

complicated accounts to a commissioner.¹³ Exceptions should be taken if a party is not satisfied with the commissioner's finding.¹⁴ The rules of the Court of Claims are set forth in an appendix.

§ 225. Seal of court.

The Court of Claims shall have a seal, with such device as it may order.

R. S. § 1051, U. S. Comp. Stat. 1901, p. 729.

This provision was enacted in 1863.¹⁵

§ 226. Court rooms, etc., how provided.

It shall be the duty of the speaker of the House of Representatives to appropriate such rooms in the Capitol, at Washington, for the use of the Court of Claims, as may be necessary for their accommodation, unless it appears to him that such rooms cannot be so appropriated without interfering with the business of Congress. In that case the court shall procure, at the city of Washington, such rooms as may be necessary for the transaction of their business.

R. S. § 1051, U. S. Comp. Stat. 1901, p. 729.

This provision was carried into the Revised Statutes from the original act establishing the Court of Claims.¹⁸

§ 227. Quorum of the court.

Any three judges of the Court of Claims shall constitute a quorum; provided, that the concurrence of three judges shall be necessary to the decision of any case.

Act June 23, 1874, c. 468, 18 Stat. 252, U. S. Comp. Stat. 1901, p. 730.

§ 228. Officers of the court.

The said Court [of Claims] shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or, if not, at the next ses-

¹³Intermingled Cotton Cases, 92 U. S. 651, 23 L. ed. 756.

¹⁴Boright v. United States, 12 Ct. Cl. 646.

¹⁵March 3, 1863, c. 92, 12 Stat. 766.

¹⁸Act Feb. 24, 1855, c. 122, § 10, 10 Stat. 614.

sion. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.

R. S. § 1053, U. S. Comp. Stat. 1901, p. 730.

The clerk of the Court of Claims and his deputy or assistant are forbidden to act as solicitors, proctors, attorneys or counsel in any cause depending in that court.¹

§ 229. Jurisdiction under act of 1887—what claims against government cognizable.

The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the^a Constitution of the United States or any law of Congress,^[b] except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied,^[c] with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort,^[d] in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned, i. e., jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected,^[e] or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Part of § 1, act Mar. 3, 1887, c. 359, 24 Stat. 505, U. S. Comp. Stat. 1901, p. 752.

[a] In general—history of Court of Claims.

The above provision is ampler in terms than the first paragraph of R. S. § 1059,² and thus virtually supersedes it. The proviso as to "war claims" is similar to that annexed to the fourth paragraph of the same section.³ The act from which this provision is taken is intended to be an enlargement and not a restriction of the Court of Claims' jurisdiction.⁴ It is remedial and therefore should be liberally construed.⁵ Cases whether arising under the first paragraph of R. S. § 1059, or under this provision will be considered here. The Court of Claims is a national not a local court

¹Post, §§ 496, 499, as to bond of court of claims clerk, see post, § 573; salary, post, § 578.

²Post, § 231.

³Post, § 233.

Fed. Proc.—26.

⁴Ingram v. United States, 32 Ct. Cl. 147.

⁵Southern Pacific R. Co. v. United States, 38 Fed. 55.

and its jurisdiction extends throughout the United States.⁶ As between rival claimants to a fund it is competent for the State court to determine which one is entitled and the Court of Claims has jurisdiction to give effect to such determination.⁷ Whether an assignee of a claim can sue, under the above provision is not clear. Before the Court of Claims was established there was a statutory provision that all transfers and assignments thereafter made of any claim against the United States should be null and void unless made after the allowance of the same.⁸ It was subsequently held that this provision applied to the Court of Claims.⁹ Under the terms of the above provision however it has been held that an assignee can sue.¹⁰ Under the acts of 1855 and 1863 establishing the Court of Claims it was held that money claims only were cognizable in that court,¹¹ and the same interpretation is given the above provision the law merely being extended so as to include claims for money arising out of equitable and maritime, as well as legal demands.¹²

The United States cannot be sued in their courts without their consent, and in granting such consent Congress has absolute discretion to specify the cases in which the liability of the government is to be submitted to the courts for determination.¹⁴ Jurisdiction in such cases is given to the Court of Claims,¹⁵ which was established in 1855.¹⁶ Prior to that time the only recourse of claimants was in an appeal to Congress.¹⁷ The act was passed for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting claimants by affording them a certain mode of examining their claims.¹⁸ Originally the court was a court merely in name, its powers extending only to the preparation of bills to be submitted to Congress. By an act of 1863, however,¹⁹ it was authorized to render final judgment subject to appeal to the Supreme Court. But that act contained a provision that "no money shall be paid out of the Treasury upon any claim passed upon by the Court of Claims, until after an appropriation therefor shall be estimated for by the Secretary of the Treasury."²⁰ This provision the Supreme Court deemed

⁶United States v. Borchertling, 185 U. S. 234, 46 L. ed. 890, 22 Sup. Ct. Rep. 607; Kings Case, 27 Ct. Cl. 529.

⁷See United States v. Borchertling, 185 U. S. 232, 233, 46 L. ed. 889, 22 Sup. Ct. Rep. 607.

⁸Act 1853, § 1, 10 Stat. 170.

⁹United States v. Gillis, 95 U. S. 407, 24 L. ed. 503.

¹⁰Emmons v. United States, 48 Fed. 44.

¹¹United States v. Alire, 6 Wall. 573, 18 L. ed. 947. See also Bonner v. United States, 9 Wall. 156, 19 L. ed. 666.

¹²United States v. Jones, 131 U. S. 18, 33 L. ed. 92, 9 Sup. Ct. Rep. 669. See also United States v. Drew,

131 U. S. 21, 33 L. ed. 93, 9 Sup. Ct. Rep. 672.

¹⁴Schillinger v. United States, 155 U. S. 166, 39 L. ed. 110, 15 Sup. Ct. Rep. 85. See ante, § 2.

¹⁵See Johnson v. United States, 160 U. S. 549, 40 L. ed. 529, 16 Sup. Ct. Rep. 377.

¹⁶Act Feb. 24, 1855, c. 122, 10 Stat. 612.

¹⁷Schillinger v. United States, 155 U. S. 166, 39 L. ed. 110, 15 Sup. Ct. Rep. 85; United States v. Klein, 13 Wall. 144, 20 L. ed. 524.

¹⁸United States v. Klein, 13 Wall. 144, 20 L. ed. 524.

¹⁹Act March 3, 1863, c. 92, 10 Stat. 766.

²⁰See § 14 of act above mentioned.

"inconsistent with the finality essential to judicial decisions,"¹ and it was thereafter repealed.² Since that time the Court of Claims has exercised all the functions of a court from whose judgments appeals regularly lie to the Supreme Court.³

[b] Claims founded on any law of Congress.

The grant of jurisdiction to the Court of Claims, of all claims founded . . . upon any law of Congress" is given also by R. S. § 1059.⁵ While apparently broad enough to include every claim created by statute, it does not extend to cases for which a specific jurisdiction has been provided by an earlier statute.⁶ Thus jurisdiction has been denied the Court of Claims, over a suit to recover payment of revenue duties on the ground that a right of action was given against the collector by an earlier statute.⁷ That remedy has been modified by subsequent statutes however, and for duties exacted upon goods not imported at all there is a remedy as upon a claim founded on a law of Congress.⁸ The Court of Claims has jurisdiction also in the following cases: over a suit to recover amount allowed by internal revenue commissioner upon a brewer's claim for excess of stamps used in payment of special tax;⁹ over suit for return of excess paid as purchase price for public lands even though the Secretary of the Interior is required to make such return.¹⁰

[c] Contracts express or implied.

Jurisdiction over claims against the government arising from contract is vested in the Court of Claims.¹² The contract must be one to which the United States is a party in the same sense in which an individual might be, and the ordinary principles of contracts must and should apply.¹³ Thus there can be no recovery under a secret service contract since the bringing of suit is itself a breach of the implied condition of secrecy.¹⁴ So also the court has no jurisdiction to allow mere extra allowances in a case where there is no promise express or implied to that effect.¹⁵

An implied contract may be inferred against the United States and suit

¹United States v. Klein, 13 Wall. 144, 20 L. ed. 524; Gordon v. United States, 2 Wall. 561, 17 L. ed. 921.

²Act March 17, 1866, c. 19, § 1, 14 Stat. 9.

³Great Falls Mfg. Co. v. Attorney General, 124 U. S. 599, 31 L. ed. 533, 8 Sup. Ct. Rep. 631; United States v. Klein, 13 Wall. 145, 20 L. ed. 524; United States v. Jones, 119 U. S. 477, 30 L. ed. 440, 7 Sup. Ct. Rep. 283.

⁵Post, § 231.

⁶Foster v. United States, 32 Ct. Cl. 184, collecting and classifying cases of claims under laws of Congress.

⁷Nichols v. United States, 7 Wall. 122, 19 L. ed. 125.

⁸Dooley v. United States, 182 U. S. 224, 45 L. ed. 1079, 21 Sup. Ct. Rep. 762.

⁹United States v. Kaufman, 96 U. S. 568, 24 L. ed. 792.

¹⁰Medbury v. United States, 173 U. S. 492, 43 L. ed. 780, 19 Sup. Ct. Rep. 503.

¹²Case v. Terrell, 11 Wall. 203, 20 L. ed. 134.

¹³Smoots Case, 15 Wall. 45, 21 L. ed. 107.

¹⁴Totten v. United States, 92 U. S. 107, 23 L. ed. 605.

¹⁵Hawkins v. United States, 96 U. S. 698, 24 L. ed. 607.

brought thereon.¹⁶ Thus the salvage of Federal property,¹⁷ or the giving of a receipt and voucher by a Federal officer for army provisions furnished¹⁸ or the taking of private property at a time of war or impending danger,¹⁹ raise implied contracts enforceable in the Court of Claims. But the appropriation by the government of private property raises no implied contract to pay therefor unless the government admits that it is private property.²⁰ In case of services the promise to pay can be implied only when the court can see that they were performed under such circumstances as would authorize the claimant to entertain reasonable expectation of their payment.¹ Where a greater sum has been paid voluntarily, for public lands, than the law requires the excess cannot be recovered in a Court of Claims on the ground of implied contract.² A claim for damages made by a government contractor for improper interference on the part of the government agent, with a contract made by such agent, is justiciable under this provision.³

Where the claimant prays reformation of a contract and then for damages for breach of such contract as reformed, the case is cognizable in the Court of Claims notwithstanding the prerequisite need of equitable aid to establish it.⁴

[d] Cases sounding in tort.

The jurisdiction of the Court of Claims does not extend to cases of tort⁵ nor can such a suit be maintained by framing the claim on an implied contract.⁷ Hence it has no jurisdiction over a suit for damages for injuries suffered by reason of defect in public building,⁸ nor for injury caused by diversion of a water course.⁹ Nor has it jurisdiction over a suit for infringement of a patent by the United States,¹⁰ nor for the appropriation

¹⁶*Coleman v. United States*, 152 U. S. 99, 38 L. ed. 368, 14 Sup. Ct. Rep. 473.

¹⁷*United States v. Morgan*, 99 Fed. 570, 39 C. C. A. 653.

¹⁸*Salomon v. United States*, 19 Wall. 17, 22 L. ed. 46.

¹⁹*United States v. Russell*, 13 Wall. 623, 20 L. ed. 474.

²⁰*United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011.

¹*Coleman v. United States*, 152 U. S. 96, 38 L. ed. 368, 14 Sup. Ct. Rep. 473.

²*United States v. Edmondston*, 181 U. S. 500, 45 L. ed. 972, 21 Sup. Ct. Rep. 718.

³*Bowe v. United States*, 42 Fed. 761.

⁴*United States v. Milliken Imp. Co.* 202 U. S. 168, 50 L. ed. 980, 26 Sup. Ct. Rep. 572.

⁵*Reed v. United States*, 11 Wall. 603, 20 L. ed. 220; *German Bank v. United States*, 148 U. S. 580, 37 L. ed. 564, 13 Sup. Ct. Rep. 702; *Schillinger v. United States*, 155 U. S. 167, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *Russell v. United States*, 182 U. S. 530, 45 L. ed. 1215, 21 Sup. Ct. Rep. 899.

⁷*Hill v. United States*, 149 U. S. 598, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011.

⁸*Bigby v. United States*, 103 Fed. 597.

⁹*Mills v. United States*, 46 Fed. 738, 12 L.R.A. 673.

¹⁰*Russell v. United States*, 182 U. S. 535, 45 L. ed. 1217, 21 Sup. Ct. Rep. 899; *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *United States v. Berdan, etc. Co.* 156 U. S. 565, 39 L. ed. 533, 15 Sup. Ct. Rep. 420.

of private property where the United States asserts title thereto.¹¹ But where the suit is for compensation for the use of a patented invention, the plaintiff's right in which is admitted, the suit arises on an implied contract and the Court of Claims has jurisdiction.¹²

[e] Claims heretofore rejected.

The disallowance of an account by the First Comptroller of the Treasury is not a rejection or disallowance of a claim by "any court department or commission," within the meaning of this provision;¹⁴ nor is the disallowance of a district attorney's claim, by the department having such accounts in charge.¹⁵

§ 230. — jurisdiction in matter of set-offs, etc., and proviso as to time of suit, and suits by Federal officers.

The Court of Claims shall have jurisdiction to hear and determined the following matters: . . . Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: provided, that no suit against the government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made: provided further, that no suit, against the government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this act unless an account for said fees shall have been rendered and finally acted upon according to the provisions of the act of July 31, 1894 (chapter 174, 28th Statutes at Large, page 162), unless the proper accounting officer of the treasury fails to finally act thereon within six months after the account is received in said office.

Part of § 1 of act Mar. 3, 1887, c. 359, 24 Stat. 505, as amended June 27, 1898, c. 503, § 1, 30 Stat. 494 and act July 1, 1898, c. 546, § 3, 30 Stat. 597, U. S. Comp. Stat. 1901, p. 752.

The first clause of the above provision is almost identical with para-

¹¹Langford v. United States, 101 U. S. 341, 25 L. ed. 1011.

¹²United States v. Palmer, 128 U. S. 269, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; Hollister v. Benedict, Burnham, etc. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717. See also Schillinger v. United States, 155 U. S. 169, 39 L. ed. 108, 15 Sup. Ct. Rep. 85.

¹⁴United States v. Harmon, 147 U. S. 273, 37 L. ed. 167, 13 Sup. Ct. Rep. 327. Prior to this decision the contrary view had obtained in some circuit courts. Bliss v. United States, 34 Fed. 781; Rand v. United States, 36 Fed. 671; Preston v. United States, 37 Fed. 417.

¹⁵Stanton v. United States, 37 Fed. 254.

graph 2 of R. S. § 1059;¹ and it has been contended that it violates the Seventh Amendment providing that in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved. Its constitutionality has however been sustained.² The period of limitations set forth above is the same as that prescribed for the bringing of claims against the United States by R. S. § 1069.³ It is jurisdictional and cannot be waived by government officers.⁴ Where any part of a claim arises before the six years prior to the filing of the petition the claimant is barred as to such part.⁵ The act from which the above provision is taken superseded only such previous legislation as was inconsistent with its provisions, hence it did not bar that provision of R. S. § 1069,⁶ extending the period of limitations in certain cases, and it must be interpreted as if the latter provision were added to it.⁷

§ 231. Jurisdiction as defined by Revised Statutes.

The Court of Claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States, and all claims which may be referred to it by either House of Congress. Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States against any person making claim against the government in said court.

Paragraphs 1 and 2, R. S. § 1059, U. S. Comp. Stat. 1901, pp. 734, 735. These provisions are virtually superseded by the act of 1887.⁹

§ 232. — claims of disbursing officers for relief from unavoidable loss.

The Court of Claims shall have jurisdiction to hear and determine the following matters: . . . Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, rec-

¹Post, § 231.

²McElrath v. United States, 102 U. S. 440, 26 L. ed. 191.

³Post, § 873.

⁴Finn v. United States 123 U. S. 233, 31 L. ed. 130, 8 Sup. Ct. Rep. 82.

⁵Timmonds v. United States, 84 Fed. 933, 28 C. C. A. 570.

⁶Post, § 873.

⁷United States v. Greathouse, 166 U. S. 601, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701.

⁹Ante, §§ 229, 230.

ords, or papers in his charge, and for which such officer was and is held responsible.

Paragraph 3, R. S. § 1059, U. S. Comp. Stat. 1901, p. 736.

This provision was carried into the Revised Statutes from an act of 1866¹¹ The jurisdiction is subsequently enlarged and defined by the act of 1887¹² in such a way that this provision may be deemed superseded.

§ 233. — claims for captured and abandoned property.

The Court of Claims shall have jurisdiction to hear and determine the following matters: . . . Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, chapter one hundred and twenty, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," or by the act of July 2, 1864, chapter two hundred and twenty-five, being an act in addition thereto: Provided, That the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said acts from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: Provided also, That the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion.

Paragraph 4, R. S. § 1059, as amended act Feb. 18, 1875, c. 80, 18 Stat. 318, U. S. Comp. Stat. 1901, p. 736.

The amendment of 1875 consisted in the addition of the last proviso, providing that the court's jurisdiction shall not extend to war claims. Similar provisions are found in other sections of this chapter.¹⁴ Under the captured and abandoned property act above mentioned the Court of Claims may render judgment not only generally for the claimant but for a specific sum as due to him.¹⁵

§ 234. Jurisdiction over petitions and bills for claims transmitted from Congress.

All petitions and bills praying or providing for the satisfaction

¹¹Act May 9, 1866, c. 75, § 1, 14 Stat. 44.

¹²Ante, §§ 229, 230.

¹⁴Post, § 244; ante, § 230.

¹⁵United States v. Anderson, 9 Wall. 72, 19 L. ed. 619.

of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the house in which they are introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims.

R. S. § 1060, U. S. Comp. Stat. 1901, p. 736.

This section was enacted in 1863.¹⁷ The jurisdiction of the Court of Claims over cases referred to it by either House of Congress, is subject to the general statute of limitations regulating its jurisdiction.¹⁸

§ 235. Claims pending before Congress may be transmitted to Court of Claims.

Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either house of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the house by which the case was transmitted for its consideration.

§ 1, act Mar. 3, 1883, c. 116, 22 Stat. 485, U. S. Comp. Stat. 1901, p. 748.

Jurisdiction to render judgments or decrees in cases referred to it under the above section is given to the Court of Claims where under the existing law it can exercise such jurisdiction.¹ The act from which this section is taken is known as the "Bowman act." It is remedial in character and should be liberally construed.² It is the duty of the court acting under this section to settle the ultimate facts so that Congress may assume them as a basis for its legislative judgment and discretion.³ These facts should be ascertained in strict conformity to the rules of judicial procedure from competent evidence properly taken.⁴ Cross-examination should be as prescribed in R. S. § 1083.⁵ The object of the provision as to the trans-

¹⁷Act March 3, 1863, c. 92, § 2, 12 Stat. 765.

¹⁸Ford v. United States, 116 U. S. 218, 29 L. ed. 610, 6 Sup. Ct. Rep. 360.

¹Post, § 238.

²Duplantier v. United States, 27 Ct. Cl. 323.

³Moore v. United States, 25 Ct. Cl. 82.

⁴West Virginia v. United States, 37 Ct. Cl. 201.

⁵Post, § 1465; Smith v. United States, 19 Ct. Cl. 692.

mission of vouchers and papers was evidently to take from Congress everything relating to the claim without subjecting the particular Congressional committee to the duty of determining the relevancy and competency of the papers as legal evidence.⁶

§ 236. Jurisdiction over claims referred by executive departments.

Whenever any claim is made against any executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any auditor or Comptroller of the Treasury, direct any account, matter, claim, of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: provided, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.

R. S. § 1063, U. S. Comp. Stat. 1901, p. 738.

Procedure in such cases is stated elsewhere.⁸ This section is not repealed, expressly or by implication, either by § 12 of the "Tucker act"⁹ or by § 2 of the "Bowman act."¹⁰ The latter act should be construed as if it were a proviso of this section.¹¹ A claim must be pending in an executive department before it can be referred.¹² When properly referred, the Court of Claims has jurisdiction over a claim although the rights of conflicting

⁶See *Brannen v. United States*, 20 551, 16 Sup. Ct. Rep. 402.
Ct. Cl. 221.

⁸Post, § 1476, et seq.

⁹Post, § 237.

¹⁰Post, § 238; *United States v. New York*, 160 U. S. 598, 40 L. ed. Ct. Cl. 168.

¹¹*United States v. New York*, 160 U. S. 610, 40 L. ed. 551, 16 Sup. Ct. Rep. 402.

¹²*Armstrong v. United States*, 29

claimants are involved.¹³ But a war claim cannot be referred under this provision so as to give the court jurisdiction.¹⁴ Nor can a claim already adjudicated against the claimant.¹⁵ So also a diplomatic claim presented by a foreign government cannot be considered by the Court of Claims.¹⁶

§ 237. —on referred claims under act of 1887.

When any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted.

§ 12, act Mar. 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 756.

As stated in the preceding section the above provision does not supersede that section, but refers only to claims which the head of an Executive Department, with the express consent of the claimant may send to the Court of Claims in order to obtain a report of facts and law.¹ This the department may regard as only advisory² and the matter is not appealable.³

§ 238. — on referred claims under act of 1883.

When a claim or matter is pending in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted for its guidance and action.

§ 2, act Mar. 3, 1883, c. 116, 22 Stat. 485, U. S. Comp. Stat. 1901, p. 748.

This provision does not repeal R. S. § 1063,⁵ nor is it in conflict with

¹³Borcherling v. United States, 35 Ct. Cl. 342.

¹⁴United States v. Winchester, etc. R. Co. 163 U. S. 244, 41 L. ed. 146, 16 Sup. Ct. Rep. 993.

¹⁵Baltimore, etc. R. Co. v. United States, 34 Ct. Cl. 484.

¹⁶Berger v. United States, 36 Ct. Cl. 243.

¹United States v. New York. 160 U. S. 613, 40 L. ed. 556, 16 Sup. Ct. Rep. 402.

²In re Sanborn, 148 U. S. 226, 37 L. ed. 431, 13 Sup. Ct. Rep. 577.

³In re Sanborn, 148 U. S. 222, 37 L. ed. 431, 13 Sup. Ct. Rep. 577.

⁵Ante, § 236.

a somewhat similar provision of the "Tucker act."⁶ By a provision of the "Tucker act" cases referred to the Court of Claims under the above provision may be adjudicated by that court, and judgment rendered, where under the existing law such court has jurisdiction.⁷

§ 239. Jurisdiction to render judgment on a referred claim.

In every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," approved March 3rd, 1883, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either house of Congress or to the department by which the same was referred to said court.

§ 13, act Mar. 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 757.

This provision is mandatory and if the court has power to render judgment it is its duty to do so.⁸ The object of the provision is to save time by adjudicating the cases referred, at once, where possible instead of first remitting them to the department.¹⁰

§ 240. Duty to report to Congress on referred claims.

Whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the house in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same in accordance with the provisions of the act approved March 3rd, 1883, entitled an "Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," and report to such house the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying

⁶Ante, § 237.

⁷Post, § 239.

⁹United States v. New York, 160

U. S. 614, 40 L. ed. 556, 16 Sup. Ct. Rep. 402.

¹⁰Ibid.

for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.

§ 14, act Mar. 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 757.

With the exception of bills for pensions, the jurisdiction here conferred is unrestricted. The reference to the act of 1883, known as the "Bowman act" is not a jurisdictional limitation, but is intended to indicate the procedure to be followed.¹²

§ 241. Jurisdiction over claims for Indian depredations.

In addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely: First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for. Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the interior department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five,¹³ and under subsequent acts, subject however, to the limitations hereinafter provided. Third. All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination.

§ 1 act Mar. 3, 1891, c. 538, 26 Stat. 851, U. S. Comp. Stat. 1901, pp. 758-760.

By the act of 1885,¹⁴ referred to in the second clause of the above section, Congress set aside the sum of ten thousand dollars "for the investigation of certain Indian depredation claims," and provided that a list of all such claims should be filed in the Department of the Interior. Subsequent ap-

¹²Dowdy v. United States, 26 Ct. Stat. 376, U. S. Comp. Stat. 1901, p. Cl. 220.

¹³See act March 3, 1885, c. 341, 23

¹⁴Ibid.

appropriations for continuing the investigation of Indian claims were made in 1886, 1887, 1888, 1889, 1890 and 1891.¹⁵ Pursuant to these appropriation acts the Secretary of the Interior had examined and allowed numerous claims, and a greater number were pending when the above act was passed. By this act jurisdiction was for the first time conferred upon a court to adjudicate upon Indian claims which theretofore had been exclusively before Congress.¹ By its terms, however, the claim must have been one arising prior to the passage of the act, and must have been presented within three years after its passage. The act also contained various provisions as to procedure. In view of the fact that the act of 1891 is limited and temporary in character these further provisions are omitted. The claimant must be a "citizen of the United States."² This term is used in its broad sense, however, and includes a corporation organized under State laws.³ But the claimant must be such citizen at the time the depredation was committed,⁴ and his subsequent naturalization cannot give the court jurisdiction.⁵ It is necessary also that the depredation be committed within the United States, and destruction of property of a United States citizen in Mexico cannot give the Court of Claims jurisdiction.⁶ Since the property must be "taken or destroyed" mere consequential damages resulting from the taking of other property cannot be considered.⁷ The Indians must belong to a band or tribe which is in amity with the United States in order that a right of action will lie, hence where they themselves constitute a hostile tribe, there can be no recovery for depredations;⁸ and the fact that the hostilities were carried on for a special purpose is immaterial.⁹

§ 242. Jurisdiction to adjust indebtedness to United States, alleged and unsettled, on behalf of debtor or his bondsmen.

Whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of

¹⁵Act May 15, 1886, c. 333, 24 Stat. 44; act March 2, 1887, c. 320, 24 Stat. 464; act June 29, 1888, c. 503, 25 Stat. 234; act March 2, 1889, c. 412, 25 Stat. 998; act Aug. 19, 1890, c. 807, 26 Stat. 356; act March 3, 1891, c. 453, 26 Stat. 1009, U. S. Comp. Stat. 1901, p. 759.

¹Corralitos Co. v. United States, 178 U. S. 286, 44 L. ed. 1072, 20 Sup. Ct. Rep. 941.

²Johnsons Case, 29 Ct. Cl. 1.

³United States v. Northwestern, etc. Co. 164 U. S. 686, 41 L. ed. 599, 17 Sup. Ct. Rep. 206.

⁴Valks Case, 28 Ct. Cl. 241.

⁵Johnson v. United States, 160 U. S. 546, 40 L. ed. 530, 16 Sup. Ct. Rep. 377.

⁶Corralitos v. United States, 178 U. S. 280, 44 L. ed. 1069, 20 Sup. Ct. Rep. 941.

⁷Price v. United States, 174 U. S. 377, 43 L. ed. 1013, 19 Sup. Ct. Rep. 765. See also Brice v. United States, 32 Ct. Cl. 23.

⁸Montoya v. United States, 180 U. S. 261, 45 L. ed. 521, 21 Sup. Ct. Rep. 358.

⁹Leighton v. United States, 161 U. S. 291, 40 L. ed. 704, 16 Sup. Ct. Rep. 495.

any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper department of the government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the Attorney General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account.

The Attorney General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

§ 3, act Mar. 3, 1887, c. 359, 24 Stat. 505, U. S. Comp. Stat. 1901, p. 754.

While a judgment cannot be rendered against the government under this provision, the court may determine that nothing is due either party.¹¹

§ 243. Jurisdiction over particular claims or classes of claims.

Congress has from time to time passed laws conferring jurisdiction over particular claims or classes of claims upon the Court of Claims. Thus an act of 1885¹³ authorized presentation of French spoliation claims to that tribunal within two years thereafter, and

¹¹*Gerding v. United States*, 28 Ct. Cl. 531.

¹³Act Jan. 20, 1885, c. 25, 23 Stat. 283; act March 3, 1899, c. 426, 30 Stat. 1167.

a large number of acts have been passed conferring jurisdiction to decide or investigate claims by Indians or Indian tribes. These statutes are special and temporary in character and it would serve no useful purpose to include them herein. An examination of late volumes of the statutes at large will show such as are still operative.¹⁴

Author's section.

§ 244. Jurisdiction over suits by aided railroads for transportation furnished.

Any such company [i. e., railroad company to which United States bonds have been issued, the interest on which has not been paid] may bring suit in the Court of Claims to recover the price of such freight and transportation, [i. e., which has been withheld to the amount of interest due on bonds, and five percentum of net earnings due United States] and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them; and either party to such suit may appeal to the Supreme Court; and both said courts shall give such cause or causes precedence of all other business.

R. S. § 5261, U. S. Comp. Stat. 1901, p. 3576.

This section was originally enacted in 1873.¹⁶ Under it the right of the railroad to sue, accrues when the money is improperly withheld.¹⁷ Appeals under this section differ in no way from ordinary appeals from the Court of Claims, and it is proper for the Supreme Court to require the findings of fact and the supporting evidence to be sent up.¹⁸

§ 245. Claims not cognizable—war claims.

The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or

¹⁴As to repayment of Porto Rico duties, see act April 29, 1902, c. 640, 32 Stat. 176. As to claims of particular individuals referred, see act May 27, 1902, c. 887, 32 Stat. 243. Indian land controversy referred for adjustment, see act July 1, 1902, c. 1362, 32 Stat. 649. Indian allotments adjusted, see act July 1, 1902, c. 1375, 32 Stat. 718. Cherokee claims referred, see act July 1, 1902, c. 1375, 32 Stat. 726. Claims for refund of duties referred, see act Jan. 9, 1903, c. 61, 32 Stat. 764. Claims of registers and receivers of land office for commissions on Indian lands referred, see act March 3, 1903, c. 994, 32 Stat. 1010. See generally U. S. Comp. Stat. 1901, p. 732, et seq. U. S. Comp. Stat. 1905, p. 165, et seq.

¹⁶Act March 3, 1873, c. 226, 17 Stat. 508.

¹⁷Central Pac. R. Co. v. United States, 24 Ct. Cl. 145.

¹⁸Union Pac. R. Co. v. United States, 116 U. S. 157, 29 L. ed. 586, 6 Sup. Ct. Rep. 325.

damage to property by the army or navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the United States in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States.

§ 3, act Mar. 3, 1883, c. 116, 22 Stat. 485, U. S. Comp. Stat. 1901, p. 748.

A similar provision as to war claims will be found in a previous section.¹

§ 246. — no jurisdiction over claims pending in other courts.

No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

R. S. § 1067, U. S. Comp. Stat. 1901, p. 739.

This provision was first enacted in 1868.²

§ 247. — nor over claims growing out of treaties.

The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

R. S. § 1066, U. S. Comp. Stat. 1901, p. 739.

This section was originally enacted in 1863.⁵ It excludes claims under treaty stipulations from the general jurisdiction of the Court of Claims. If such jurisdiction is given by a special act the authority of the court to hear and determine is limited by that special act.⁶ In order for a claim to grow out of or be dependent on a treaty stipulation, the right which is the foundation of the claim must have its origin in such stipulation.⁷

¹Ante, § 229.

²Act June 25, 1868, c. 71, 15 Stat. 77.

⁵Act March 3, 1863, c. 92, 12 Stat. 767.

⁶Ex parte Atocha, 17 Wall. 444, 21 L. ed. 698.

⁷United States v. Weld, 127 U.

S. 51, 32 L. ed. 62, 8 Sup. Ct. Rep. 1000. See, however, Great Western Ins. Co. v. United States, 112 U. S. 193, 28 L. ed. 687, 5 Sup. Ct. Rep. 99; Alling v. United States, 114 U. S. 562, 29 L. ed. 272, 5 Sup. Ct. Rep. 1080.

CHAPTER 9.

JUDICIAL CIRCUITS AND JUDICIAL DISTRICTS.

- § 255. The nine circuits and the districts comprising them.
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- § 257. —Alabama, three districts, one having two and one having four divisions.
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- § 262. —Florida, two districts.
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- § 265. —Illinois, three districts, two having two divisions each.
- § 266. —Indiana, one district.
- § 267. —Iowa, two districts, each of four divisions.
- § 268. —Kansas, one district of three divisions.
- § 269. —Kentucky, two districts and Owensboro division.
- § 270. —Louisiana, two districts, one of two and other of five divisions.
- § 271. —Maine, Maryland and Massachusetts, one district each.
- § 272. —Michigan, two districts, each of two divisions.
- § 273. —Minnesota, one district of six divisions.
- § 274. —Mississippi, two districts of two and four divisions.
- § 275. —Missouri, two districts of three and five divisions.
- § 276. —Montana, Nebraska, Nevada, New Hampshire and New Jersey. each one district.
- § 277. —New York, four districts.
- § 278. —North Carolina, two districts.
- § 279. —North Dakota, one district of five divisions.
- § 280. —Ohio, two districts of two divisions each.
- § 281. —Oklahoma, two districts.
- § 282. —Oregon, one district.
- § 283. —Pennsylvania, three districts.
- § 284. —Rhode Island, one district.
- § 285. —South Carolina, one district of two divisions.
- § 286. —South Dakota, one district of four divisions.
- § 287. —Tennessee, three districts, one having three and others two divisions.
- § 288. —Texas, as divided into four districts.
- § 289. —Texas districts as subdivided into divisions.
- § 290. —Utah, one district of two divisions.

- § 291. —Vermont, one district.
- § 292. —Virginia, two districts.
- § 293. —Washington, two districts.
- § 294. —West Virginia, two districts.
- § 295. —Wisconsin, two districts.
- § 296. —Wyoming, and Yellowstone National Park, one district.

§ 255. The nine circuits and the districts comprising them.

The judicial districts of the United States are divided into nine circuits, as follows:

First. The first circuit includes the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.

Second. The second circuit includes the districts of Vermont, Connecticut, and New York.

Third. The third circuit includes the districts of Pennsylvania, New Jersey, and Delaware.

Fourth. The fourth circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth. The fifth circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth. The sixth circuit includes the districts of Ohio, Michigan, Kentucky, and Tennessee.

Seventh. The seventh circuit includes the districts of Indiana, Illinois, and Wisconsin.

Eighth. The eighth circuit includes the districts of Colorado, Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, North Dakota, South Dakota, Utah, Wyoming and Oklahoma.

Ninth. The ninth circuit includes the districts of California, Oregon, Nevada, Washington, Idaho, and Montana.

author's section.

For appellate purposes Arizona, Hawaii and Alaska have been assigned to the ninth circuit, and New Mexico, to the eighth.¹ Porto Rico and the Philippines have not as yet been assigned to any circuit.

§ 256. Judicial districts and divisions in general.

Upon the organization of the Federal judiciary in 1789³ Congress divided the United States into judicial districts for Federal jurisdictional purposes, and has since from time to time created

¹See ante, §§ 80, 81.

Stat. 73, U. S. Comp. Stat. 1901, p.

²§ 1, act Sept. 24, 1789, c. 20, 1 316.

new districts and redefined the old. The policy has been to make the boundaries of one or more of these judicial districts coterminous with a State, but never to include more than a single State within a single district. Hence while a State may be divided into two or more complete districts it never comprises less than one entire district. And while a district does not always comprise an entire State, it never comprises land situate in two States. Upon the admission of new States to the union, Congress has provided Federal judicial districts therein; and has provided such division and revision, or alteration of the boundaries of the various districts created as increase of litigation and the growth of the country have seemed to demand. During the past twenty-five years Congress has frequently adopted the plan of dividing districts having an extensive geographical area, into divisions, sometimes merely for district court purposes, but often for both circuit and district court. The policy has generally been to designate some place for holding court in each such division, to make process issued against parties in the counties embraced therein returnable there, and the cause there triable, to make crimes within the said counties cognizable there, to make causes removed from State courts therein, triable there, and to summon jurors for service at these designated places of trial, only from counties within such division. Congress has, in general, either required, or in the discretion of the court, permitted the establishment of a deputy clerk's office in each such division. The lack of uniformity in the legislation upon this subject renders it necessary for the practitioner to ascertain the provisions governing proceedings in any particular division of a district.

Author's section.

Where a State boundary is changed by the assent of Congress the judicial district ipso facto expands or contracts accordingly.⁵ But the change of a State boundary⁶ or the organization of new counties⁷ by State legislation cannot affect such district. Attaching territory to another State for judicial purposes does not constitute such territory part of the State.⁸

⁵In *re Devoe Mfg. Co.* 108 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894. ⁷*Hyde v. Victoria Land Co.* 125 Fed. 971.

⁸*United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746.

⁶*Hall v. Devoe Mfg. Co.* 14 Fed. 191.

§ 257. — Alabama, three districts, one having two and one having four divisions.

The State of Alabama is divided into three districts, the southern, middle and northern. The southern district, as constituted at the time of the adoption of the Revised Statutes and modified later by the act of 1884,¹⁰ comprised the counties of Mobile, Washington, Baldwin, Clarke, Marengo, Wilcox, Monroe, and Conecuh, as they then existed. On March 3, 1905, the counties of Dallas, Hale, Marengo, Perry, and Wilcox, were constituted the northern division of the southern district, and all the other counties of the district were constituted the southern division, with Mobile as the place of holding court.¹¹ The middle district is composed of the counties of Montgomery, Autauga, Coosa, Chambers, Randolph, Macon, Russell, Barbour, Pike, Henry, Dale, Coffee, Covington, Lowndes, Perry, Butler, and Tallapoosa.¹² The northern district includes the remaining counties of the State. In 1884¹³ the counties of Sumter, Greene, Pickens, and Hale were detached from the southern district, and Tuscaloosa, Bibb, Shelby, and Talladega were detached from the middle district, and attached to the northern district. The northern district is divided into four divisions. The southern division thereof includes the counties of Hale, Lamar, Fayette, Walker, Jefferson, Blount, Shelby, Saint Clair, and De Kalb, as they existed May, 2, 1884, when the district was reorganized and subdivided. The western division was created March 3, 1905,¹⁴ by detaching the counties of Tuscaloosa, Bibb, Greene, Sumter, and Pickens, as they then existed, with Tuscaloosa as the place of holding court. The eastern division includes the counties of Etowah, Calhoun, Cleburne, Clay, Talladega, and Cherokee, as they existed February 16, 1903, when the division was created, with Anniston as the place for holding court.¹⁵ The remaining counties of the northern district constitute the northern division.¹⁶

Author's section.

¹⁰R. S. § 532, Act May, 2, 1884, c. 38, 23 Stat. 18, U. S. Comp. Stat. 1901, p. 317, 318.

¹¹Act Mar. 3, 1905, c. 1419, 33 Stat. 987, U. S. Comp. Stat. 1905, p. 77.

¹²See R. S. § 532, and act May 2, 1884, cited *supra*.

¹³Act May 2, 1884, c. 38, 23 Stat. 18.

¹⁴Act Mar. 3, 1905, c. 1419, § 8, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 79.

¹⁵Act Feb. 16, 1903, c. 554, 32 Stat. 832, U. S. Comp. Stat. 1905, p. 76.

¹⁶*Ibid*.

§ 258. — Arkansas, two districts of three divisions each.

The State of Arkansas is divided into two districts, which are called the eastern and western districts of Arkansas. The western district includes the counties of Benton, Washington, Crawford, Sebastian, Scott, Polk Sevier, Little River, Howard, Yell, Logan, Franklin, Johnson, Madison, Newton, Carroll, Boone, Pike, Hempstead, Miller, La Fayette, Nevada, Columbia, Union, Ouachita, and Calhoun. The eastern district includes the residue of said State. The eastern district is divided into three divisions, known as the western, eastern, and northern divisions of the eastern district of Arkansas. The eastern division consists of the following counties, to wit: Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Poinsett, Greene, Cross, Saint Francis, and Monroe, as constituted February 20, 1897, when the divisions were created, courts to be held at the city of Helena. The counties of Independence, Cleburne, Stone, Izard, Baxter, Searcy, Marion, Sharp, Fulton, Randolph, Lawrence and Jackson as they then existed constitute the northern division, the courts to be held at the city of Batesville. The remaining counties of the eastern district of the State constitute the western division, the courts to be held at the city of Little Rock. The western district now contains three divisions, the Texarkana, Fort Smith, and Harrison. The Harrison division embraces the counties of Baxter, Boone, Carroll, Madison, Marion, Newton, and Searcy, as they existed March 18, 1902, when the division was created.¹ The counties of Sevier, Howard, Pike, Little River, Hempstead, Miller, La Fayette, Columbia, Nevada, Ouachita, Calhoun, and Union, as they existed February 20, 1897, when the division was created, constitute the Texarkana division, the courts to be held at Texarkana. The remaining counties of the western district of the State constitute the Fort Smith division, the courts to be held at the city of Fort Smith.²

Author's section.

§ 259. — California, two districts, one having two divisions.

California is divided into two districts. All that portion of the State of California comprised in the counties of San Diego, San Bernardino, Los Angeles, Ventura, Santa Barbara, San Luis Obispo, Fresno, Tulare, and Kern, upon August 5, 1886, and that

¹Act Mar. 18, 1902, c. 222, 32 Stat. 72. ²Act Feb. 20, 1897, c. 269, 29 Stat. 590, U. S. Comp. Stat. 1901, p. 321.

portion comprised in Inyo, Mariposa, and Merced counties, on May 29, 1900, constitute the southern district of California. The northern district of California consists of all the remaining counties in the State. The southern district is divided into a northern division consisting of Inyo, Mariposa, Tulare, Merced, Madera, Fresno, Kings, and Kern counties, as constituted on May 29, 1900, and a southern division, consisting of Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura counties, as constituted on May 29, 1900. The State was divided into two districts by act of 1886⁵ and the enlargement and division of the southern district was by act of 1900.⁶

Author's section.

§ 260. — Colorado, one district.

The State of Colorado constitutes one judicial district, called the district of Colorado.⁸

Author's section.

Other enactments provide for terms of court,⁹ the summoning and attendance of jurors,¹⁰ and district court records¹¹ in Colorado.

§ 261. — Connecticut and Delaware, one district each.

The States of Connecticut and Delaware each constitute one judicial district.

Author's section.

Terms of court therein are elsewhere stated.¹⁵

§ 262. — Florida, two districts.

The State of Florida is divided into two districts, called the northern and southern districts of Florida. The southern judicial district embraces the counties of Hernando, Hillsborough, Polk, Manatee, and Monroe, as they existed February 3, 1879, and the counties of Alachua, Baker, Bradford, Brevard, Clay, Columbia, Dade, Duval, Hamilton, Lake, Madison, Marion, Nassau, Orange, Osceola, Putnam, St. John, Sumpter, Suwannee, and Volusia, as

⁵Act Aug. 5, 1886, c. 928, 24 Stat. 309, U. S. Comp. Stat. 1901, n. 324.

⁶Act May 29, 1900, c. 594, 31 Stat. 219, U. S. Comp. Stat. 1901, p. 326.

⁸See act June 26, 1876, c. 147, 19 Stat. 61.

⁹Post, § 317.

¹⁰Post, §§ 1722, 1724, 1725.

¹¹Post, § 381.

¹⁵Post, § 318.

they existed July 23, 1894. All the territory within the remaining counties constitutes the northern judicial district.¹⁷

Author's section.

§ 263. — Georgia, two districts, one of four and one of five divisions.

The State of Georgia is divided into two districts, which are known as the northern and southern districts of Georgia. The northern district contains four divisions. The northern division includes the counties of Campbell, Carroll,¹⁸ Clayton, Cobb, Coweta, Cherokee, DeKalb, Douglass, Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns, and Union. The eastern division was created February 28, 1901, and includes the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Walton, and White, as then constituted. The western division was created March 3, 1891, and includes the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster as then constituted. The northwestern division of the northern district was created April 12, 1900, and includes the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield, as then constituted. The southern district of Georgia is divided into five divisions. The eastern division was created on January 29, 1880, and embraces the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Liberty, Montgomery, McIntosh, Screven, Tatnall, and Wayne, as then constituted. The southwestern division is composed of the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Irwin, Lowndes, Thomas, and Ware, as they existed June 30, 1902, when the division was created,²⁰ the county of Pierce being added in 1904.¹

The Albany division was created by act of March 3, 1905, as cor-

¹⁷See R. S. § 534; Act Feb. 3, 1879, *rett v. United States*, 169 U. S. 228, c. 43, 20 Stat. 280; Act July 23, 1894, 42 L. ed. 726, 18 Sup. Ct. Rep. 327, c. 149, 28 Stat. 117, U. S. Comp. Stat. 1901, p. 331, 332. where "district" is construed as "division."

¹⁸See act, Feb. 26, 1902, c. 33, 32 Stat. 42. The act transfers it to the northern district but peresumably means northern division. See Bar-
²⁰Act June 30, 1902, c. 1338, 32 Stat. 550. U. S. Comp. Stat. 1903, p. 84.
¹Act Apr. 7, 1904, c. 941, 33 Stat. 161, U. S. Comp. Stat. 1905, p. 87.

rected June 28, 1906, and comprises the counties of Tift, Turner, Crisp, Colquitt, Miller, Baker, Calhoun, Dougherty, Lee, Mitchell, and Worth, as then constituted, with Albany as the place of holding court.² The northeastern division was created February 15, 1889, and is composed of the counties of Warren, Glascock, McDuffie, Columbia, Richmond, Burke, Jefferson, Johnson, Washington, Lincoln, Wilkes, and Taliaferro, as then constituted. The western division of the southern district was created January 29, 1880, and consists of the counties of Bibb, Monroe, Jones, Twiggs, Houston, Crawford, Baldwin, Wilkenson, Laurens, Pulaski, Dooly, Macon, Upson, Pike, Butts, Jasper, Putnam, Hancock, Dodge, Wilcox, Telfair, and Sumter as then constituted.

Author's section.

By R. S. § 535 Georgia was divided into two districts without any further provision for divisions therein. An act of 1880³ divided the southern district into an eastern and a western division; and a northeastern division was created in 1889.⁴ In the northern district a northern and a western division were created by act of 1891,⁵ a northwestern division by act of 1900,⁶ and an eastern division by act of 1901.⁷ The error in the act of March 3, 1905, in speaking of the new division created thereby as the "southwestern" when there was an existing southwestern division was sought to be cured by act of June 28, 1906, cited in the footnote by amending so as to call the new division the Albany division. The former counties which are designated in the act of June 28, 1906, by the names "Tift, Turner and Crisp," and attached to the Albany division should of course be excluded from enumeration among the counties included in some other division.

§ 264. — Idaho, one district of three divisions.

For the purpose of holding terms of the district court, Idaho, which constitutes but one district, is divided into three divisions, known as the northern, the central and southern divisions. The territory composing the counties of Idaho, Kootenai, Latah, Nez Percés, and Shoshone, including any and all Indian reservations within such territory, constitute the northern division, the court for which must be held at the town of Moscow. The territory composing

²Act Mar. 3, 1905, c. 1431, 33 Stat. 999, U. S. Comp.Stat. 1905, p. 87, as amended, act June 28, 1906, c. 3577, 34 Stat. 547.

³Act Jan. 29, 1880, c. 17, 21 Stat. 62.

⁴Act Feb 15, 1889, c. 168, 25 Stat. 671.

⁵Act Mar. 3, 1891, c. 566, 26 Stat. 1110.

⁶Act Apr. 12, 1900, c. 185, 31 Stat. 73.

⁷Act Feb. 28, 1901, c. 621, 31 Stat. 818. See U. S. Comp. Stat. 1901, p. 333 et seq.

the counties of Ada, Boisé, Blaine, Cassia, Canyon, Lincoln, Elmore, Owyhee, and Washington, including any and all Indian reservations within said territory, constitute the central division, the court for which must be held at Boisé City. The territory composing the counties of Bingham, Bannick, Bear Lake, Custer, Fremont, Lemhi, and Oneida, including any and all Indian reservations within such territory, constitute the southern division, the court for which must be held at the town of Pocatello. New counties created remain part of the division out of which it or the larger portion thereof was created, but if part of county is detached and added to another in another division, it becomes part of such latter division.

Author's section.

The above subdivision of the district was made by act of 1892 as modified by act of 1898.⁹

§ 265. — Illinois, three districts, two having two divisions each.

Illinois was divided into three districts, viz., the northern, southern and eastern by act of March 3, 1905.¹¹ The northern district is composed of the counties of Lake, McHenry, Boone, Winnebago, Stephenson, Jo Daviess, Carroll, Whiteside, Lee, Ogle, DeKalb, La-salle, Grundy, Kendall, Kane, Dupage, Will and Cook. Of these the western division consists of the counties of Boone, Winnebago, Stephenson, Jo Daviess, Carroll, Whiteside, Lee and Ogle with Freeport as the place of holding court, and the eastern division comprises the remaining counties. The southern district is composed of the counties of Rock Island, Henry, Bureau, Mercer, Knox, Stark, Putnam, Marshall, Henderson, Warren, Peoria, Woodford, Livingston, McLean, Tazewell, Fulton, McDonough, Hancock, Dewitt, Logan, Mason, Schuyler, Adams, Brown, Cass, Menard, Macon, Sangamon, Christian, Morgan, Montgomery, Pike, Scott, Macoupin, Greene, Calhoun, Jersey, Bond and Madison. Of these, the following comprise the northern division, to wit: Peoria, Bureau, Stark, Henry, Rock Island, Mercer, Henderson, Warren, Knox, McDonough, Fulton, Putnam, Marshall, Woodford, Tazewell and Livingston with Peoria as the place for holding court. The remaining counties of the southern district constitute the southern

⁹Act July 5, 1892, c. 145, 27 Stat. 72, as amended, act June 1, 1898, c. 369, 30 Stat. 423, U. S. Comp. Stat. 1901, p. 342. ¹¹C. 1427, 33 Stat. 993, U. S. Comp. Stat. 1905, p. 89 et seq.

division. The eastern district consists of the following counties, to wit: Kankakee, Iroquois, Ford, Vermilion, Champaign, Piatt, Moultrie, Douglas, Edgar, Shelby, Coles, Clark, Cumberland, Effingham, Fayette, Marion, Clay, Jasper, Crawford, Lawrence, Richland, Clinton, Saint Clair, Washington, Jefferson, Wayne, Edwards, Wabash, White, Hamilton, Franklin, Perry, Randolph, Monroe, Gallatin, Saline, Williamson, Jackson, Hardin, Pope, Johnson, Union, Alexander, Pulaski, and Massac, with Cairo, Danville and East St. Louis as the places of holding court.

Author's section.

§ 266. — Indiana, one district.

Indiana constitutes but one judicial district, although terms of court are held at Indianapolis, Fort Wayne, Hammond, Evansville, and New Albany.¹³

Author's section.

§ 267. — Iowa, two districts, each of four divisions.

The State of Iowa is divided into two judicial districts called the northern and southern. The northern district is divided into four divisions, viz., the Cedar Rapids, the eastern, central and western divisions. The Cedar Rapids division was created Feb. 24, 1891, and comprises the counties of Cedar, Johnston, Iowa, Tama, Grundy, Hardin, Benton, Linn, Jones, as then constituted, (Clinton being withdrawn to the Davenport division in 1906)¹⁵ the terms of court for which are held at the city of Cedar Rapids. The other three divisions were created July 20, 1882. The counties of Jackson, Black Hawk, Buchanan, Delaware, Dubuque, Clayton, Fayette, Bremer, Floyd, Chickasaw, Mitchell, Howard, Winneshiek, and Alama-kee as then constituted, comprise the eastern division, the courts for which are held at the city of Dubuque. The counties of Hamilton, Webster, Calhoun, Pocahontas, Palo Alto, Emmett, Kossuth, Humboldt, Wright, Hancock, Winnebago, Worth, Cerro Gordo, Franklin, and Butler as then constituted, comprise the central division, the courts for which are held at Fort Dodge. The counties of Monona, Woodbury, Plymouth, Sioux, Lyon, Osceola, O'Brien, Cherokee, Ida, Sac, Buena Vista, Clay and Dickinson as then constituted,

¹³Post, § 323.

¹⁵Act June 19, 1906, c. 3437, 34 Stat. 304.

comprise the western division, the courts for which are held at Sioux City. The southern district contains five divisions, viz., the southern, eastern, central, western and Davenport divisions. The southern division of that district was created June 1, 1900, and comprises the counties of Lucas, Clarke, Union, Adair, Adams, Tremont, Page, Taylor, Ringgold, Decatur and Wayne, as then constituted.¹⁶ The eastern, central, and western divisions were created July 20, 1882. The counties of Louisa, Davis, Wapello, Jefferson, Van Buren, Henry, Des Moines, and Lee as then constituted and the county of Appanoose added in 1906¹⁷ comprise the eastern division, for which the courts are held at the city of Keokuk. The counties of Poweshiek, Mehaska, Jasper, Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Madison, Warren, Marion, and Monroe, as then constituted, comprise the central division, for which the courts are held at the city of Des Moines. The counties of Carroll, Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, as then constituted, comprise the western division, in which the courts are held at the city of Council Bluffs. The Davenport division was created April 28, 1904, by taking the counties of Scott, Muscatine, Washington and Keokuk out of the eastern division;¹⁸ Clinton county was added in 1906.¹⁹

Author's section.

By R. S. § 537, Iowa comprised but one judicial district divided into four divisions. An act of July 20, 1882,²⁰ divided the State into two districts of three divisions each. In 1891 the Cedar Rapids division was created in the northern district,¹ and in 1900, the southern division in the southern district.²

§ 268. — Kansas, one district of three divisions.

The judicial district of Kansas is divided into three divisions known as the first, second and third. The first and second divisions were created June 9, 1890. The second division now comprises the counties of Cowley, Butler, Harvey, McPherson, Rice, Ellsworth, Barton, Rush, Ness, Lane, Scott, Wichita, Greely, Hamilton,

¹⁶Act Apr. 21, 1906, c. 1648, 34 Stat. 127.

¹⁷Act Apr. 21, 1906, c. 1648, 34 Stat. 127.

¹⁸Act Apr. 28, 1904, c. 1800, 33 Stat. 546, U. S. Comp. Stat. 1905, p. 97.

¹⁹Act June 19, 1906, c. 3437, 34 Stat. 304.

²⁰C. 312, 22 Stat. 172, U. S. Comp. Stat. 1901, p. 349.

¹Act Feb. 24, 1891, c. 282, 26 Stat. 767, U. S. Comp. Stat. 1901, p. 352.

²Act June 1, 1900, c. 601, 31 Stat. 249, U. S. Comp. Stat. 1901, p. 353.

Kearny, Finny, Garfield, Hodgeman, Pawnee, Stafford, Reno, Kingman, Pratt, Kiowa, Edwards, Ford, Gray, Haskell, Grant, Stanton, Morton, Sedgwick, Stevens, Seward, Meade, Clark, Comanche, Harper, Barber, and Sumner, as then constituted, courts to be held at Wichita. The third division was created May, 3, 1892, and comprises the counties of Miami, Linn, Bourbon, Crawford, Cherokee, Labette, Neosho, Allen, Anderson, Coffey, Woodson, Wilson, Montgomery, Chautauqua, Elk and Greenwood, as then constituted, courts to be held at Fort Scott. The remaining counties embraced in the district of Kansas constitute the first division thereof, courts to be held at Leavenworth and Topeka.

Author's section.

By R. S. § 531, Kansas is constituted one judicial district. An act of 1890⁵ created two divisions, and an act of 1892 a third.⁶ The jurisdiction formerly exercised over Indian Territory by the Kansas district was taken away in 1898.⁷

§ 269. — Kentucky, two districts and Owensboro division.

Kentucky has been divided into two districts, an eastern and a western, since Feb. 12, 1901.⁹ The eastern district includes the territory then embraced in the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, Harrison and the waters thereof. The residue of the State of Kentucky with the waters thereof constitutes the western district. From the portion of Kentucky that is now the western district, a division known as the Owensboro division had previously been created on Aug. 8, 1888.¹⁰ That division is expressly continued by the act creating the two districts. It comprises the counties of Daviess,

⁵Act June 9, 1890, c. 403, 26 Stat. 129.

⁶Act May 3, 1892, c. 59, 27 Stat. 24, U. S. Comp. Stat. 1901, pp. 356, 357.

⁷Act Mar. 1, 1895, c. 146, 28 Stat. 699.

⁹Act Feb. 12, 1901, c. 355, 31 Stat. 781, U. S. Comp. Stat. 1901, p. 360.

¹⁰Act Aug. 8, 1888, c. 792, 25 Stat. 389, U. S. Comp. Stat. 1901, p. 359.

Henderson, Union, Christian, Todd, Hopkins, Webster, McLean, Muhlenberg, Logan, Butler, Grayson, Ohio, Hancock and Breckenridge as then constituted.

Author's section.

§ 270. — Louisiana, two districts, one of two and other of five divisions.

Louisiana has been divided into an eastern and a western district since March 3, 1881.¹² The western district was divided into four divisions on August 8, 1888,¹³ which are known as the Opelousas, Alexandria, Shreveport, and Monroe divisions; a fifth division with terms of court at Lake Charles was created in 1905, comprising the parishes of Acadia, Calcasieu, Cameron, and Vernon.¹⁴ Subject to the creation of this new Lake Charles division, Opelousas division comprises the parishes of Saint Landry, Saint Martin, Lafayette, and Vermillion as then constituted. The Alexandria division comprises the parishes of Rapides, Avoyelles, Catahoula, Grant and Winn as then constituted. The Shreveport division comprises the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine, and Red River as then constituted. The Monroe division comprises the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson and Lincoln as then constituted. The eastern district was divided into two divisions on Aug. 13, 1888,¹⁵ known as the New Orleans and Baton Rouge divisions. The New Orleans division comprises the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne and Washington as then constituted. The Baton Rouge division comprises the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge and West Feliciana as then constituted.

Author's section.

§ 271. — Maine, Maryland and Massachusetts, one district each.

The States of Maine, Maryland and Massachusetts each constitute

¹²Act Mar. 3, 1881, c. 144, 21 Stat. 507, U. S. Comp. Stat. 1901, p. 363.

¹⁴Act Mar. 2, 1905, c. 1308, 33 Stat. 941, U. S. Comp. Stat. 1905, p. 100.

¹³Act Aug. 8, 1888, c. 789, 25 Stat. 388, U. S. Comp. Stat. 1901, p. 365.

¹⁵Act Aug. 13, 1888, c. 869, 25 Stat. 438, U. S. Comp. Stat. 1901, p. 366.

one Federal judicial district.¹⁷ While terms are held at different places in all of them except Massachusetts, they have never been parceled into judicial divisions as in the case of so many districts.

Author's section.

§ 272. — Michigan, two districts, each of two divisions.

The State of Michigan is divided into two districts, known as the eastern and western districts of Michigan. Since April 30, 1894, the eastern district of Michigan has been divided into two divisions, known as the northern division and the southern division, respectively. The following named counties, as then constituted, comprise the northern division: Cheboygan, Presque Isle, Otsego, Montmorency, Alpena, Crawford, Oscoda, Alcona, Roscommon, Ogemaw, Iosco, Clare, Gladwin, Arenac, Isabella, Midland Bay, Tuscola, Huron, Gratiot, Saginaw, Shiawassee, and Genesee. The following named counties, as then constituted, comprise the southern division: Saint Clair, Lapeer, Sanilac, Macomb, Oakland, Livingston, Ingham, Clinton, Jackson, Washtenaw, Wayne, Branch, Hillsdale, Lenawee, Calhoun and Monroe.¹ The remainder of the State of Michigan and its waters have since June 19, 1878, constituted the western district of Michigan. Upon that date it was enlarged to its present size and divided into two divisions, a northern and a southern. The northern division of the western district comprises all the territory and waters of the entire upper peninsula of Michigan. The southern division of the western district comprises all that portion of said district lying and being in the lower peninsula of said state.²

Author's section.

§ 273. — Minnesota, one district of six divisions.

Minnesota constitutes one judicial district.⁴ For the purpose of holding terms of court the district of Minnesota has been divided since April 26, 1890, into six divisions, known as the first, second, third, fourth, fifth and sixth divisions. The portion of the State of Minnesota comprising the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore and Houston, as then constituted, comprise the first division, the courts of which are held at Winona.

¹⁷See R. S. § 531.

²Act June 19, 1878, c. 326, 20 Stat.

¹Act Apr. 30, 1894, c. 66, 27 Stat. 175, U. S. Comp. Stat. 1901, p. 370.

67, U. S. Comp. Stat. 1901, p. 372.

⁴R. S. § 531.

The counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Wantonwan, Blue Earth, Waseca, Le Sœur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley and Lac Qui Parle, as then constituted, comprise the second division, the courts of which are held at Mankato. The counties of Chicago, Washington, Ramsey, Dakota, Goodhue, Rice and Scott, as then constituted, comprise the third division, the courts of which are held at Saint Paul. The counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Santi, as then constituted, comprise the fourth division, the courts of which are held at Minneapolis. The counties of Cook, Lake, Saint Louis, Itasca, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison and Benton, as then constituted, comprise the fifth division, the courts of which are held at Duluth. The counties of Stearns, Pope, Stevens, Big Stone, Traverse, Grant, Douglas, Todd, Otter Tail, Wilkin, Clay, Becker, Wadena, Norman, Polk, Marshall, Kittson, Beltrami and Hubbard, as then constituted, comprise the sixth division, the courts of which are held at Fergus Falls.⁶

Author's section.

§ 274. — Mississippi, two districts of two and four divisions.

Mississippi is divided into a northern and a southern district.⁸ Since June 15, 1882, the northern district has been divided into an eastern and a western division. The eastern division of the northern district comprises the counties of Chickasaw, Winston, Attala, Tishomingo, Alcorn, Prentiss, Itawamba, Lee, Monroe, Lowndes, Oktibbeha, Choctaw, Pontotoc, and Clay¹ as then constituted. The western division of the northern district comprises the counties of Benton, Coahoma, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Quitman, Tallahatchie, Tate, Tippah, Tunica, Union, Webster and Yalabusha as then constituted. The southern district of Mississippi is divided into four divisions, known as the southern, eastern, western and Jackson divisions. The southern division of the southern district was created April 4, 1888,⁹ and comprises the counties of Hancock,

⁶Act Apr. 26, 1890, c. 167, 26 Stat. c. 218, 22 Stat. 101, U. S. Comp. Stat. 72, U. S. Comp. Stat. 1901, p. 374. 1901, p. 377.

⁸R. S. § 539, act June 15, 1882, ⁹Act Apr. 4, 1888, c. 58, 25 Stat. 78, U. S. Comp. Stat. 1901, p. 381.

Harrison, Jackson, Marion, Perry and Green as then constituted. The eastern division was created July 18, 1894, and comprises the counties of Lauderdale, Kemper, Noxubee, Leake, Neshoba, Newton, Jasper, Clarke, Wayne and Jones as then constituted, courts to be held at Meridian.¹⁰ The western division of the southern district was created Feb. 28, 1887, and comprises the counties of Washington, Sharkey, Isaquena and Warren, as then constituted,¹¹ and Claiborne county as constituted March 2, 1899, when it was added to the western division;¹² and Bolivar and Sunflower counties as constituted April 11 1888, when they were added to the western division.¹³ The remaining counties of the southern district seem not to have been organized as or declared a division of that district; but such is the effect of the creation of other divisions out of that district. These counties are Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson and Yazoo, and terms of circuit and district courts therefor are held at Jackson.¹⁴

Author's section.

§ 275. — Missouri, two districts of three and five divisions.

Missouri is divided into two districts an eastern and a western.¹⁶ On February 28, 1887,¹⁷ the eastern district was divided into a northern and an eastern division, and on January 31, 1905, a new division known as the southeastern division was created comprising the counties of Cape Girardeau, Scott, Mississippi, New Madrid, Pemiscot, Dunklin, Stoddard, Butler, Ripley, Carter, Oregon, Shannon, Reynolds, Wayne, Madison, Bollinger and Perry with terms of court at Cape Girardeau.¹⁸ Subject to this new division, the eastern division of the eastern district now comprises the city of Saint Louis and the counties of Saint Louis, Franklin, Gasconade, Jefferson, Crawford, Washington, Saint Francois, Saint Genevieve, Dent, Iron, Montgomery, Lincoln, War-

¹⁰Act July, 18, 1894, c. 144, 28 Stat. 114, U. S. Comp. Stat. 1901, p. 382.

¹¹Act Feb. 28, 1887, c. 279, 24 Stat. 430, U. S. Comp. Stat. 1901, p. 380.

¹²Act Mar. 2, 1899, c. 379, 30 Stat. 995, U. S. Comp. Stat. 1901, p. 384.

¹³Act Apr. 11, 1888, c. 81, 25 Stat. 84, U. S. Comp. Stat. 1901, p. 380.

¹⁴See R. S. § 658.

¹⁶R. S. § 540, Act Apr. 8, 1878, c. 51, 20 Stat. 35, U. S. Comp. Stat. 1901, p. 385.

¹⁷Act Feb. 28, 1887, c. 271, 24 Stat. 424, U. S. Comp. Stat. 1901, p. 385.

¹⁸Act Jan. 31, 1905, c. 287, 33 Stat. 626, U. S. Comp. Stat. 1905, p. 103.

ren, Audrain, and Saint Charles as then constituted, the courts for which are now held at the city of Saint Louis. The counties of Linn and Chariton were transferred from the western to the eastern district on April 8, 1904,¹⁹ but whether to the eastern or northern division, does not appear. The northern division of said district, the courts for which are held at the city of Hannibal, comprises the counties of Adair, Clark, Knox, Lewis, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland and Shelby, as then constituted. The western district was divided Feb. 28, 1887,²⁰ into the Saint Joseph, the western, central, and southern divisions; and on Jan. 24, 1901, a fifth division, known as the southwestern, was created. The southwestern division comprises counties of Jasper, Newton, Barton, Vernon, Barry, Lawrence, McDonald and Stone, as constituted at the time of the creation of the division. The western division comprises the counties of Clay, Ray, Carroll, Chariton, Sullivan, Jackson, La Fayette, Saline, Cass, Johnston, Bates, Henry, Putnam, Caldwell, Livingston, Grundy, Mercer, Linn and Saint Clair, as constituted Feb. 28, 1887, the courts for which are held at the city of Kansas. The St. Joseph division comprises the counties of Atchison, Nodaway, Holt, Andrew, Buchanan, Platte, Clinton, Harrison, Daviess, De Klab, Gentry and Worth as constituted Feb. 28, 1887; the courts therefor are held at the city of Saint Joseph. The southern division comprises the counties of Cedar, Polk, Dallas, Laclede, Pulaski, Dade, Greene, Webster, Wright, Texas, Christian, Douglas, Howell, Taney and Ozark, the courts for which are held at Springfield. Formerly the counties of the southern division were divided for circuit court purposes between the western and the central divisions. But since April 19, 1892,¹ terms of the circuit court have been held at Springfield. The central division comprises the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Maries, Miller, Moniteau, Morgan, Osage, Pettis, and Phelps, as constituted Feb. 28, 1887.

Author's section.

The act creating these various divisions (except the one last created) created a separate circuit and district court in each such division, con-

¹⁹Act Apr. 8, 1904, c. 947, 33 Stat. 164, U. S. Comp. Stat. 1905, p. 102.

²⁰Act Feb. 28, 1887, c. 271, 24 Stat. 424, U. S. Comm. Stat. 1901, p. 385.

¹Act Apr. 19, 1892, c. 50, 27 Stat. 20, N. S. Comp. Stat. 1901, p. 388.

trary to the usual policy of Congress in providing one circuit and one district court in each district.²

§ 276. — Montana, Nebraska, Nevada, New Hampshire & New Jersey, each one district.

The States of Montana, Nebraska, Nevada, New Hampshire and New Jersey each constitute one judicial district. In none of them are there any judicial divisions of such districts, though there were at one time two divisions in Montana⁴ and terms are held in different places.⁵

Author's section.

§ 277. —New York, four districts.

The State of New York was on May 12, 1900,⁷ divided into four districts, called the western, northern, eastern, and southern districts of New York. The western district includes the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming and Yates as then constituted, with the waters thereof. The northern district includes the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren and Washington, as then constituted, with the waters thereof. The eastern district includes the counties of Richmond, Kings, Queens, Nassau and Suffolk, as then constituted, with the waters thereof. The southern district includes the residue of said State, with the waters thereof.

Author's section.

In 1833 the States of New York and New Jersey entered into an agreement changing the boundary line between them. This agreement was approved by Congress in 1834⁸ and became operative in determining the territorial limit of the Federal courts of those States.⁹ Since by that agreement waters of the Hudson river lying west of Manhattan Island are

²See ante, § 103, note.

⁴Act July 20, 1892, c. 208, 27 Stat. 252, repealed July 7, 1898, c. 571, 30 Stat. 685, U. S. Comp. Stat. 1901, p. 391.

⁵Post, § 333 et seq.

⁷Act May 12, 1900, c. 391, 31 Stat. 175, U. S. Comp. Stat. 1901, p. 395.

⁸Act June 28, 1834, 4 Stat. 708.

⁹Devoe Mfg. Co. Petitioner, 108 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894; *The Norma*, 32 Fed. 411; *Pine v. The Hungarian*, 41 Fed. 109.

within the exclusive jurisdiction of New York, they are waters of that State within the meaning of this provision.¹⁰ The cession of West Point to the Federal government did not take it out of the State so as to except it from the judicial district in which it is located.¹¹

§ 278. — North Carolina, two districts.

The State of North Carolina was divided into two districts, June 4, 1872,¹³ called the eastern and western districts of North Carolina. The western district includes the counties of Mecklenburg, Cabarras, Stanly, Montgomery, Davie, Davidson, Randolph, Guilford, Rockingham, Stokes, Forsyth, Union, Anson, Caswell, Alamance, Orange, Clay, Cherokee, Swain, Macon, Jackson, Graham, Haywood, Transylvania, Henderson, Buncombe, Madison, Yancey, Mitchell, Watauga, Ashe, Alleghany, Caldwell, Burke, McDowell, Rutherford, Polk, Cleveland, Gaston, Lincoln, Catawba, Alexander, Wilkes, Surry, Iredell, Yadkin and Rowan and all territory embraced therein which may after said June 4, 1872, be erected into two new counties. The eastern district includes the residue of said State, the counties of Person, Durham, Chatham, Moore and Richmond were transferred thereto from the western district on Aug. 9, 1894.¹⁴

Author's section.

§ 279. — North Dakota, one district of five divisions.

The State of North Dakota constitutes one district. But for the purpose of holding terms of the district court said district was on June 29, 1906, divided into five divisions, known as the southwestern, southeastern, northeastern, northwestern, and western divisions. That portion of the State comprising the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, as then constituted, and all the territory in said State of North Dakota lying west of the Missouri River and south of the twelfth standard parallel constitutes the southwestern division, the court for which is held at the city of Bismarck. That portion of the State comprising the counties of Cass, Richland, Barnes, Dickey, Sargent, Lamoure, Ransom, Griggs and Steele,

¹⁰See *The Norma*, 32 Fed. 414. As to jurisdiction over vessel at anchor in the Hudson River, see *The Sarah E. Kennedy*, 25 Fed. 569.

¹¹*Beekman v. Hudson River, etc.* R. Co. 35 Fed. 3.

¹³R. S. § 543, U. S. Comp. Stat. 1901, p. 397.

¹⁴Act Aug. 9, 1894, c. 244, 28 Stat. 274, U. S. Comp. Stat. 1901, p. 398.

as they then existed, constitutes the southeastern division, the court for which is held at the city of Fargo. That portion of the State comprising the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier and Nelson as they then existed constitutes the northeastern division, the court for which is held at the city of Grand Forks. That portion of the State comprising the counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce and McHenry as they then existed constitutes the northwestern division, the court for which is held at the city of Devils Lake. That portion of the State comprising the counties of Ward and Williams as they then existed and all that territory lying west of the Missouri River and north of the twelfth standard parallel in the State of North Dakota constitutes the western division, the court for which is held at the city of Minot.¹⁶

Author's section.

While the act only creates divisions for the purpose of holding terms of the district court, it fixes circuit court terms at the same times and places.

§ 280. — Ohio, two districts of two divisions each.

The State of Ohio is divided into two districts, called the northern and southern districts of Ohio.¹⁸ On June 8, 1878,¹⁹ the northern district was divided into two divisions, known as the eastern and western division of the northern district of Ohio. The western division consists of the counties of Williams, Defiance, Paulding, Van Wert, Mercer, Auglaise, Allen, Putnam, Henry, Fulton, Lucas, Wood, Hancock, Hardin, Marion, Wyandotte, Seneca, Sandusky, Ottawa, Erie and Huron as then constituted. The eastern division consists of the counties of Ashland, Ashtabula, Cayahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull and Wayne as then constituted. On Feb. 4, 1880,²⁰ the southern district was divided into two divisions, known as the eastern and the western divisions of the southern district of Ohio. The eastern division consists of the counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, Jefferson, Madison, Fayette, Franklin, Pick-

¹⁶Act June 29, 1906, c. 3595, 34 Stat. 609.

¹⁸R. S. § 544, U. S. Comp. Stat. 1901, p. 401.

¹⁹Act, June, 8, 1878, c. 169, 20 Stat. 101, U. S. Comp. Stat. 1901, p. 401.

²⁰Act Feb. 4, 1880, c. 18, 21 Stat. 63, U. S. Comp. Stat. 1901, p. 403.

away, Ross, Pike, Gallia, Jackson, Meigs, Vinton, Athens, Hocking, Fairfield, Licking, Perry, Muskingum, Morgan, Washington, Noble, Monroe, Belmont and Guernsey as then constituted, and the county of Logan, as constituted March 2, 1891, when it was transferred to the eastern division of the southern district.¹ The western division of the southern district of Ohio comprises the remaining counties in said State.²

Author's section.

§ 281. — Oklahoma, two districts.

The State of Oklahoma is to constitute an eastern and a western judicial district, of which what was Indian Territory is the eastern with terms of court at Muscogee, Vinita, Tulsa, South McAlester, Chickasha, and Ardmore. The western district is the former Territory of Oklahoma, with terms of court at Guthrie, Oklahoma City, and Enid.⁴

Author's section.

§ 282. Oregon, one district.

The State of Oregon constitutes but one district, court being held at Portland.⁶

Author's section.

§ 283. — Pennsylvania, three districts.

Since March 2, 1901, the State of Pennsylvania has been divided into three districts, called the eastern, middle and western districts of Pennsylvania. Prior thereto the state was divided into an eastern and a western district. The middle district then created⁸ comprises the counties of Lackawanna, Wyoming, Bradford, Monroe, Wayne, Pike, Susquehanna, Carbon, Tioga, Potter, Cameron, Clinton, Lycoming, Center, Union, Snyder, Mifflin, Juniata, Northumberland, Montour, Columbia, Sullivan, Luzerne, Dauphin, Lebanon, Perry, Huntingdon, Fulton, Franklin, Adams, York and Cumberland as then constituted and defined. All that portion of the State east of the middle district constitutes the eastern district of Penn-

¹Act Mar. 2, 1891, c. 493, 26 Stat. 799, U. S. Comp. Stat. 1901, p. 405.

²Act Feb. 4, 1880, c. 18, 21 Stat. 63, U. S. Comp. Stat. 1901, p. 403.

⁴Act June, 16, 1906, c. 3335, 34 Stat. 275.

⁶R. S. § 531.

⁸Act Mar. 2, 1901, c. 801, 31 Stat. 880, U. S. Comp. Stat. 1901, p. 405.

sylvania, and all that portion westerly thereof constitutes the western district.⁹

Author's section.

§ 284. — Rhode Island, one district.

The State of Rhode Island constitutes but one judicial district, with terms of court at Providence and Newport.¹¹

Author's section.

§ 285. — South Carolina, one district of two divisions.

The State of South Carolina is divided into two districts, which shall be called the eastern and western districts of the district of South Carolina. The western district includes the counties of Lancaster, Chester, York, Union, Spartanburgh, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens and Fairfield as they existed February 21, 1823. The eastern district includes the residue of said State.

R. S. § 546, U. S. Comp. Stat. 1901, p. 407.

The ambiguity in speaking of two districts "of the district of South Carolina" has been resolved by a recent decision of the Supreme Court declaring that but one Federal judicial district is created and that it has two divisions as defined above.¹³ The statutes respecting terms of court in South Carolina seem to contemplate one circuit court for both divisions, but two district courts, one for each division.¹⁴

§ 286. — South Dakota, one district of four divisions.

South Dakota constitutes only one district. But for the purpose of holding terms of the district court said district was divided on Nov. 3, 1893,¹⁶ into four divisions, known as the southern, northern, central and western divisions. The counties of Clay, Union, Yankton, Turner, Lincoln, Bonhomme Charles, Mix, Douglas, Hutchinson, Brule, Aurora, Davison, Hanson, McCook, Minnehaha, Moody, Lake, Lyman, Miner, Sanborn, Beadle, Gregory, Kingsbury and Todd as then constituted, and the Yankton, Crow Creek, and

⁹R. S. § 545, enumerated the counties in the western district as they existed in 1818. U. S. Comp. Stat. 1901, p. 405.

¹¹R. S. §§ 531, 572.

¹³Barrett v. United States, 169 U. S. 228, 42 L. ed. 726, 18 Sup. Ct. Rep. 327. See Young v. Ins. Co. 29 Fed. 275; The Hungaria, 41 Fed. 109.

¹⁴See Act Dec. 21, 1898, c. 32, § 4, 30 Stat. 769; Act May 10, 1900, c. 390, 31 Stat. 174, U. S. Comp. Stat. 1901, p. 410. See also ante, § 103 note.

¹⁶Act Nov. 3, 1893, c. 10, 28 Stat. 5, U. S. Comp. Stat. 1901, p. 411.

Lower Brule Indian reservations, constitute the southern division, the court for which is held at the city of Sioux Falls. The counties of Brookings, Hamlin, Deuel, Grant, Roberts, Codington, Clark, Day, Marshall, Spink, Brown, McPherson, Edmunds, Campbell, Walworth, as then constituted, and the Sisseton and Wahpaton reservation constitute the northern division, the court for which is held at Aberdeen. The counties of Potter, Sully, Faulk, Hand, Hyde, Hughes, Buffalo, Jerauld, Stanley, Nowlin as then constituted and that portion of the counties of Pratt, Jackson, and Sterling not included in any Indian reservation, and the Standing Rock and Cheyenne Indian reservations, constitute the central division, the court for which is held at the city of Pierre. All that portion of the State of South Dakota lying west of the central and southern divisions, and in addition thereto the Rosebud and Red Cloud Indian reservations, constitute the western division, the court for which is held at the city of Deadwood.

Author's section.

§ 287. — Tennessee, three districts, one having three and others two divisions.

The State of Tennessee is divided into three districts, called the eastern, western, and middle districts of Tennessee. The eastern district includes the counties of Anderson, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Cumberland, Grainger, Greene, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, McMinn, Marion, Meigs, Monroe, Morgan, Polk, Rhea, Scott, Sevier, Sullivan, Union, Washington and Grundy, as they existed February 10, 1856,¹⁸ and the county of Fentress as constituted December 27, 1884,¹⁹ when it was transferred from the middle district. The western district includes the counties of Benton, Carroll, Henry, Obion, Dyer, Gibson, Lauderdale, Haywood, Tipton, Shelby, Fayette, Hardeman, McNairy, Hardin, Madison, Henderson, Perry and Weakley, as they existed June 18, 1838.²⁰ The middle district includes the residue of said State. The middle district is not divided into subdivisions, but each of the others is divided. The eastern district comprises the northeastern, the northern and the southern divisions. The northeastern was

¹⁸Act Fed. 19, 1856, c. § 1, 11 Stat. 280, U. S. Comp. Stat. 1901, p. 417.

1. ²⁰Act June 18, 1838, c. 18, 5 Stat.

¹⁹Act Dec. 27, 1884, c. 7, 23 Stat. 249

created Feb. 7, 1900, out of counties then embraced within the northern and southern divisions, and comprises the counties of Johnson, Carter, Unicoi, Sullivan, Washington, Greene, Hawkins, Hancock, Cocke and Hamblen, as then constituted. The southern division was created June 11, 1880,¹ and now comprises the counties of Hamilton, James, Polk, McMinn, Bradley, Meigs, Rhea, Marion, Sequatchie, Bledsoe, Grundy, Fentress¹ and Cumberland as then constituted. The northern division consist of the remaining counties in the eastern district. Since June 20, 1878,² the western district has been separated into the eastern and western divisions. The eastern division includes the counties of Benton, Hardeman,¹ Carroll, Decatur, Gibson, Henderson, Henry, Madison, McNairy, Hardin, Dyer, Lake, Crockett, Weakley and Obion as then constituted, and the county of Hardeman as constituted Jan. 15, 1883,³ when it was detached from the western division. The remaining counties embraced in the western district constitute the western division thereof, the county of Dyer having been detached from the eastern and added to the western division on May 24, 1900.⁴

Author's section.

§ 288. — Texas, as divided into four districts.

The State of Texas is divided into four judicial districts, called the northern, the eastern, the southern, and the western judicial districts of the State of Texas. The northern judicial district includes the following counties as they existed March 11, 1902, when the present distribution of counties was made, and the waters thereof: Navarro, Johnson, Ellis, Kaufman, Dallas, Rockwall, Hunt, Comanche, Hood, Erath, Tarrant, Parker, Palo Pinto, Wise, Clay, Jack, Young, Wichita, Wilbarger, Archer, Baylor, Cottle, Hardeman, Motley, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Deaf Smith, Randall, Oldham, Potter, Carson, Gray, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Hutchinson, Hansford, Sherman, Moore, Hartley, Dallam, Eastland, Stephens, Throckmorton, Shackelford, Callahan, Taylor, Jones, Haskell, Knox, Nolan, Fisher, Stonewall, Kent, Dickens, King, Crosby, Garza, Lubbock, Gaines, Andrews, Mitchell, Scurry, Borden, Howard, Martin,

¹Act June 11, 1880, c. 203, 21 Stat. 175. U. S. Comp. Stat. 1901, p. 415.

²Act June, 20, 1878, c. 359, 20 Stat. 235, U. S. Comp. Stat. 1901, p. 414.

³Act Jan. 15, 1883, c. 25, 22 Stat. 402, U. S. Comp. Stat. 1901, p. 417.

⁴Act May 24, 1900, c. 549, 31 Stat. 183, U. S. Comp. Stat. 1901, p. 420.

Midland, Glasscock, Sterling, Coke, Tom Green, Crockett, Schleicher, Sutton, Irion, Mills, Runnels, Coleman, Brown, Bailey, Castro, Cochran, Dawson, Floyd, Foard, Hale, Hockley, Lamb, Lynn, Parmer, Swisher, Terry, Upton, Yoakum, Concho, and Menard. The eastern judicial district includes the following counties as constituted at said date and the waters thereof: Cooke, Denton, Montague, Collin, Grayson, Liberty, Jefferson, Orange, Newton, Jasper, Hardin, Tyler, San Augustine, Sabine, Shelby, Nacogdoches, Angelina, Houston, Anderson, Cherokee, Panola, Rusk, Smith, Henderson, Van Zandt, Rains, Gregg, Wood, Upshur, Harrison, Marion, Cass, Bowie, Red River, Titus, Camp, Hopkins, Morris, Franklin, Lamar, Fannin and Delta. The southern judicial district includes the following counties as constituted at said date and the waters thereof: Polk, Trinity, Madison, Brazos, Grimes, Walker, San Jacinto, Montgomery, Harris, Chambers, Galveston, Brazoria, Fort Bend, Waller, Austin, Colorado, Lavaca, Wharton, Matagorda, Jackson, Victoria, Goliad, Calhoun, Refugio, Aransas, San Patricio, Nueces, Cameron, Hidalgo, Starr, Zapata, Webb, Lasalle, McMullen, Duval and Fayette.⁶ The western judicial district includes the following counties as constituted at said date and the waters thereof: Maverick, Bee, Live Oak, Karnes, Dewitt, Gonzales, Guadalupe, Wilson, Atascosa, Bexar, Comal, Kendall, Kerr, Edwards, Bandera, Medina, Frio, Zavalla, Uvalde, Kinney, Pecos, Presidio, El Paso, Washington, Burleson, Milam, Robertson, Leon, Freestone, Limestone, Hill, Bosque, Somervell, Hamilton, Coryell, McLennan, Falls, Bell, Williamson, Lee, Bastrop, Caldwell, Hays, Travis, Blanco, Burnet, Gillespie, Llano, Mason, McCulloch, Kimble, San Saba, Lampasas, Brewster, Winkler, Ward, Valverde, Crane, Ector, Jeff Davis, Loving, and Reeves.⁷ Also the county of Dimmit which was detached from the southern district February 9, 1903⁸

Author's section.

§ 289. — Texas districts as subdivided into divisions.

The counties comprising the four districts above described are further divided into groups which are essentially divisions of the

⁶Fayette was transferred from western district by act Jan. 21, 1905, Stat. 64, 65, c. 52, 33 Stat. 612, U. S. Comp. Stat. ⁷See act Mar. 11, 1902, c. 183, 32 Stat. 64, 65. ⁸Act Feb. 9, 1903, c. 532, 32 Stat. 1905, p. 121. Process is returnable to Houston. 820.

various districts similar to those constituted in the judicial districts of many other states, although Congress has not usually so termed them.¹⁰ Congress has merely enacted that process issued against defendants residing in specified counties shall be returnable to a designated place, where terms of circuit and district court are required to be held, and further, that actions affecting realty shall be brought in the division where it is situate. These places of holding circuit and district court for the northern district, are Dallas, Fort Worth, Abilene, and San Angelo. The Dallas division comprises the counties of Navarro, Johnson, Ellis, Kaufman, Dallas, Rockwall and Hunt as they existed March 11, 1902, when the present designation of divisions was made. The Fort Worth division comprises the counties of Comanche, Hood, Erath, Tarrant, Parker, Palo Pinto, Wise, Clay, Jack, Young, Archer, Wichita, Wilbarger, Baylor, Bailey, Hardeman, Cottle, Motley, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Carson, Gray, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Hutchinson, Hansford, Sherman, Moore, Hartley, Dallam, Foard, Parmer, Swisher, Castro, Lamb, Hale, Floyd, Cochran, Dawson, and Hockley as then constituted. The Abilene division comprises the counties of Eastland, Stephens, Throckmorton, Shackelford, Callahan, Taylor, Jones, Haskell, Knox, Nolan, Fisher, Stonewall, Kent, Dickens, King, Crosby, Garza, Lubbock, Gaines, Andrews, Mitchell, Scurry, Borden, Howard, Martin, Midland, Yoakum, Terry, and Lynn as then constituted. The San Angelo division comprises the counties of Glasscock, Sterling, Coke, Tom Green, Crockett, Schleicher, Sutton, Irion, Mills, Runnels, Coleman, Concho, Menard, Brown and Upton as then constituted. In the western district the places of holding circuit and district court are Austin, San Antonio, Waco, El Paso and Del Rio. The Austin division comprises the counties of Washington, Burleson, Williamson, Lee, Bastrop, Caldwell, Hays, Travis, Blanco, Gillespie, Burnet, Llano, Mason, Kimble, McCulloch, San Saba and Lampasas as then constituted. The San Antonio division comprises the counties of Karnes, Dewitt, Gonzales, Guadalupe, Wilson, Atascosa, Bexar, Comal, Kendall, Kerr, Edwards, Bandera, Medina and Frio, some

¹⁰The act of 1902 however refers to them as divisions although it does not so designate them. See act Mar. 11, 1902, c. 183, § 10, 32 Stat. 68, U. S. Comp. Stat. 1905. The act of 1906 creates a Victoria division of the southern district. See act Apr. 18, 1906, c. 1636, 34 Stat. 121.

counties being withdrawn June 9, 1906, to constitute the Del Rio division.¹¹ The Del Rio division, created June 9, 1906, comprises the counties of Uvalde, Zavalla, Maverick, Kinney, Valverde, Terrell and Pecos.¹² The Waco division comprises the counties of Milam, Robertson, Leon, Limestone, Freestone, McLennan, Falls, Bell, Coryell, Hamilton, Bosque, Somervell and Hill as then constituted. The El Paso division comprises the counties of El Paso, Presidio, Reeves, Loving, Winkler, Ward, Ector, Crane, Jeff Davis and Brewster as then constituted. In the southern district the places of holding circuit and district court are Brownsville, Galveston, Houston, Laredo and Victoria. The Victoria division was created April 18, 1906, and comprises the counties of Bee, Calhoun, Dewitt, Goliad, Jackson, Live Oak, Refugio, Aransos, San Patricio and Victoria.¹³ Subject to this later Victoria division, the Brownsville division comprises the counties of Cameron, Hidalgo and Starr as constituted March 11, 1902. The Galveston division comprises the counties of Austin, Fort Bend, Matagorda, Wharton, Brazoria, Galveston and Chambers as then constituted. The Houston division comprises the counties of Lavaca, Colorado, Waller, Grimes, Brazos, Madison, Trinity, Walker, Montgomery, San Jacinto, Polk and Harris as they then existed; and also Fayette county was added January 21, 1905.¹⁴ The Laredo division comprises the counties of Zapata, Webb, Duval, Dimmit, Lasalle, McMullen, Nueces as they then existed. In the eastern district the places of holding circuit and district court are Tyler, Beaumont, Sherman, Jefferson, Paris and Texarkana. The Tyler division comprises the counties of Shelby, Nacogdoches, Angelina, Houston, Anderson, Cherokee, Panola, Rusk, Smith, Henderson, Van Zandt, Rains, Gregg and Wood as they existed March 11, 1902. The Beaumont division comprises the counties of Jefferson, Liberty, Orange, Newton, Jasper, Hardin, Tyler, San Augustine and Sabine as they then existed. The Sherman division comprises the counties of Grayson, Cooke, Montague, Denton and Collin as they then existed. The Jefferson division comprises the counties of Upshur, Harrison, Marion, Cass, Camp, Hopkins and Morris as they then existed. The Paris division comprises the counties of Lamar, Fannin, Red River and Delta

¹¹Act June 9, 1906, c. 3063, 34 Stat. 226.

¹²Act June 9, 1906, c. 3063, 34 Stat. 226.

¹³Act Apr. 18, 1906, c. 1636, 34 Stat. 121.

¹⁴Act Jan. 21, 1905, c. 52, 33 Stat. 612, U. S. Comp. Stat. 1905, p. 121.

as they then existed.¹⁵ The Texarkana division comprises of the counties of Bowie, Franklin and Titus as they existed March 2, 1903, when the division was created.¹⁶

Author's section.

§ 290. — Utah, one district of two divisions.

The State of Utah constitutes but one district, but for the purpose of holding terms of the district court it is divided into two divisions, known as the northern and central divisions. The counties of Weber, Davis, Morgan, Rich, Cache and Box Elder as constituted March 2, 1897,¹⁸ when the division was made, comprise the northern division, the court for which is held at the city of Ogden. All remaining counties of the State constitute the central division, the court for which is held at the city of Salt Lake.

Author's section.

§ 291. — Vermont, one district.

The State of Vermont constitutes but one district without any organized divisions thereof, though court is held at Burlington, Windsor, Rutland, and may be held at Montpelier.²⁰

Author's section.

§ 292. — Virginia, two districts.

The State of Virginia is divided into two districts, which shall be called the eastern and western districts of Virginia. The western district includes the counties of Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetcourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Floyd, Franklin, Frederick, Fluvanna, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Patrick, Page, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Shenandoah, Tazewell, Washington, Wise, Wythe and Warren. The eastern district includes the residue of said State.

R. S. § 549, U. S. Comp. Stat. 1901, p. 437.

The above section of the Revised Statutes necessarily refers to the territory then embraced by the above named counties.

¹⁵See act Mar. 11, 1902, c. 183, 32 Stat. 65, et seq.

¹⁸Act Mar. 2, 1897, c. 366, 29 Stat. 620. U. S. Comp. Stat. 1901, p. 435.

²⁰Act Mar. 2, 1903, c. 974, 32 Stat. 926. R. S. §§ 531, 807.

§ 293. — Washington, two districts.

Washington was divided into two districts on March 2, 1905.¹ All that portion of the State which includes the counties of Stevens, Ferry, Okanogan, Chelan, Spokane, Lincoln, Douglas, Adams, Franklin, Wallawalla, Garfield, Columbia, Asotin, Whitman, Yakima, Klickitat, Kittitas, and any and all Indian reservations in one or more of said counties, and such other counties as may be created in that portion of the State of Washington lying east of the Cascade Mountains, with the waters thereof, constitute the eastern district of Washington, and the residue of the State, with the waters thereof, constitutes the western district. The places of holding court in the eastern district are Spokane, Wallawalla and North Yakima, and in the western, Seattle and Tacoma.

Author's section.

The act dividing Washington into two districts has been held sufficient to establish circuit and district courts in the western district.²¹

§ 294. — West Virginia, two districts.

Since January 22, 1901, West Virginia has been divided into two judicial districts, a northern and a southern. The northern district includes the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley and Jefferson as then constituted, with the waters thereof. The southern district includes the residue of the State, with the waters thereof.²

Author's section.

§ 295. — Wisconsin, two districts.

The State of Wisconsin is divided into two districts, called the eastern and western districts of Wisconsin. The western district includes the counties of Rock, Jefferson, Dane, Green, Grant, Columbia, Iowa, La Fayette, Sauk, Richland, Crawford, Vernon, La Crosse, Monroe, Adams, Juneau, Buffalo, Chippewa, Dunn, Clark, Jackson, Eau Claire, Pepin, Marathon, Wood, Pierce, Polk, Portage, Saint Croix, Trempealeau, Douglas, Barron, Burnett, Ashland and

¹Act Mar. 2, 1905, c. 65, 33 Stat.

²Act Jan. 22, 1901, c. 105, 31 Stat.

824, U. S. Comp. Stat. 1905, p. 126. 736, U. S. Comp. Stat. 1901, p. 440.

²¹See *Gieger v. Tacoma Ry.* 141

Fed. 169.

Bayfield as they existed June 29, 1870,⁴ when the two districts were created. The eastern district includes the residue of said State.

Author's section.

The above is the substance of R. S. § 550.⁵

§ 296. — Wyoming and Yellowstone National Park, one district.

The State of Wyoming constitutes but one judicial district and since May 7, 1894, the Yellowstone National Park, which is inside the territorial boundaries of the State, but within the exclusive jurisdiction of Congress, is part of the district for jurisdictional purposes.⁷

Author's section.

⁴Act June 29, 1870, c. 175, 16 Stat. 16-18, 26 Stat. 225, act May 7, 1894, 171. c. 72, § 2, 28 Stat. 73, U. S. Comp.

⁵U. S. Comp. Stat. 1901, p. 443.

Stat. 1901 p. 1562.

⁷See act July 10, 1890, c. 664, §§

CHAPTER 10.

TERMS OF FEDERAL COURTS.

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- § 370. Causes not discontinued by new term.

§ 304. Supreme Court, one term annually.

The Supreme Court shall hold, at the seat of government, one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business; and suits, proceedings, recognizances, and processes pending in or returnable to said court shall be tried, heard, and proceeded with as if the time of holding said sessions had not been hereby altered.

R. S. § 684, U. S. Comp. Stat. 1901, p. 563.

§ 305. Adjournments for want of a quorum.

If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

R. S. § 685, U. S. Comp. Stat. 1901, p. 563.

A minority of the court may constitute a majority of a quorum and render a binding decision. There is no provision, as in the case of the Court of Claims, requiring that a majority of the entire court concur in a decision.¹

§ 306. Adjournments of courts to other places by reason of epidemic.

Whenever, in the opinion of the Chief Justice, or, in case of his death, or inability, of the senior associate justice of the Supreme Court, a contagious or epidemic sickness shall render it hazardous to hold the next stated session of the court at the seat of government, the chief or such associate justice may issue his order to the marshal of the Supreme Court, directing him to adjourn the next session of the court to such other place as such justice deems convenient. The marshal shall thereupon adjourn the court, by making publication thereof in one or more public papers printed at the seat of government from the time he shall receive such order until the time by law prescribed for commencing the session. The several circuit and district judges shall, respectively, under the same circumstances, have the same power, by the same means, to direct adjournments of the several circuit and district courts to some convenient place within their districts respectively.

R. S. § 4799, U. S. Comp. Stat. 1901, p. 3319.

§ 307. Less than quorum may make preparatory orders.

The justices attending at any term when less than a quorum is present, may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or

¹Ante, § 228.

process, depending in or returned to the court, preparatory to the hearing, trial, or decision thereof.

R. S. § 686, U. S. Comp. Stat. 1901, p. 564.

§ 308. Court of Claims, one session annually.

The Court of Claims shall hold one annual session, at the city of Washington, beginning on the first Monday in December, and continuing as long as may be necessary for the prompt disposition of the business of the court.

Part of R. S. § 1052, U. S. Comp. Stat. 1901, p. 730.

The omitted portion of the section provides as to a quorum of the court.³

§ 309. Circuit courts of appeals, at least one term annually.

A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans;⁵ in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis;⁶ in the ninth circuit, in the city of San Francisco;⁷ and in such other places in each of the above circuits as said court may from time to time designate. . . . The . . . terms of said courts shall be held . . . at such times as may be fixed by said courts.

Part of § 3, act Mar. 3, 1891, c. 517, 26 Stat. 827, U. S. Comp. Stat. 1901, p. 548.

The rules adopted pursuant to the foregoing in the different circuits as to terms of court vary, and should be consulted. In some circuits there is but one term, continuing throughout the year, and in others two or more are provided. In some circuits an additional term is appointed for a city other than that above specified.

§ 310. Special provision for terms in eighth circuit.

The circuit court of appeals of the eighth judicial circuit of the United States is hereby authorized and required to hold one term

³Ante, § 228.

⁵See also post, § 311.

⁶See also post, § 310.

⁷See also post, § 311.

of said court annually in the city of Denver, in the State of Colorado, or in the city of Cheyenne, in the State of Wyoming, on the first Monday in September in each year, and is hereby authorized and required to hold one term of said court annually in the city of Saint Paul and State of Minnesota on the first Monday in May of each year. . . . All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the circuit or district courts of the United States in the States of Colorado, Utah and Wyoming, and the supreme court of the Territory of New Mexico, to the court of appeals of the eighth judicial circuit, shall be heard and disposed of by the said court of appeals at the term thereof hereinbefore provided for so to be held either at the city of Denver, in the State of Colorado, or at the city of Cheyenne, in the State of Wyoming, except that any case arising from said States and Territory may, by consent of all the parties thereto, be heard and decided at a term of said court other than the one to be held in the city of Denver, in the State of Colorado, or in the city of Cheyenne, in the State of Wyoming. . . . This act shall not operate to prevent the said court from holding other terms in the aforesaid places or in such other places in the said eighth judicial circuit as said court may from time to time designate.

§§ 1-3 of act June 9, 1902, c. 1071, 32 Stat. 329, U. S. Comp. Stat. 1905, p. 146.

The 3rd rule of the circuit court of appeals of the eighth circuit set forth in the appendix, makes provision as to terms.

§ 311. Special provisions for terms in fifth and ninth circuits.

Since May 28, 1896, terms of the circuit court of appeals for the ninth circuit must be held at two other places than San Francisco within that circuit.⁹ More recent enactments have required terms of court within the fifth circuit at Atlanta, Georgia, on the first Monday in October, at Fort Worth, Texas, on the first Monday in November, and at Montgomery, Alabama, on the first Monday in September, as well as at New Orleans. Appellate proceedings from the circuit and district courts of Georgia, Texas and Alabama must be heard at these terms respectively, but the court may hear "appeals or writs of error wherever the said court shall sit, in cases of injunctions and in all other cases which under the statutes and the rules,

⁹Act May 28, 1896. c. 252, 29 Stat. 177, U. S. Com. Stat. 1901, p. 556.

or in the opinion of the court, are entitled to be brought to a speedy hearing," and these enactments "shall not operate to prevent the said court from holding other terms" in Atlanta, Fort Worth or Montgomery, "or in such other places in the said fifth judicial circuit as said court may from time to time designate."¹⁰

Author's section.

Rule 3, of the fifth circuit set forth in the appendix, makes additional provisions as to terms therein, and should be consulted. See also rule 36, in the ninth circuit.

§ 312. — provision for court rooms.

The marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: Provided, however, that in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the Attorney General of the United States, may, from time to time, lease such rooms as may be necessary for such courts.

Part of § 9, act Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 552.

§ 313. Times and places of holding circuit and district court.

The revised statutes treat of the terms of circuit and district courts in separate chapters. So many of the provisions have been changed by later laws and these laws in turn have been so frequently changed, and doubtless will be hereafter, that it seems useless to try to reproduce the exact phraseology of the enactments here. It also seems more convenient to state the terms of both circuit and

¹⁰As to Atlanta see act June 30, Stat. 756. Montgomery: See act 1902, c. 1333, 32 Stat. 548. Fort Jan. 30, 1903, c. 335, § 5, 32 Stat. 784, Worth: See act Dec. 1890, c. 4, 32 U. S. Comp. Stat. 1905, p. 150.

district courts for a State in the same section, as they are so often directed to commence at the same time.

Author's section.

A term of the circuit court may extend from the beginning of one to the opening of the next succeeding term, unless sooner adjourned.¹²

§ 314. — Alabama, regular terms, adjournments.

In the northern district of Alabama, terms of the circuit and district courts are held at Anniston, for the eastern division thereof, on the first Mondays in May and November;¹⁴ at Tuscaloosa for the western division, on the first Tuesdays in January and June;¹⁵ at Huntsville for the northern division on the first Monday in April and second Monday in October;¹⁶ and for the southern division in Birmingham, twice in each year, on the first Mondays in March and September, being required to remain in open session for the transaction of business at least six months in each calendar year.¹⁷ In the middle district terms are held at Montgomery, first Monday in May and November.¹⁸ In the southern district, southern division, they are held at Mobile on the first Monday in May and the fourth Monday in November.¹⁹ In the northern division of the southern district they are held at Selma on the first Monday in May and November.²⁰ "If the judge of any district court in Alabama¹ . . . is not present at the time for opening the court, the clerk may open and adjourn the court from day to day for four days; and if the judge does not appear by two o'clock, afternoon of the fourth day, the clerk shall adjourn the court to the next regular term."² But this section is subject to the general provision as to adjournment for non-attendance of the judge stated elsewhere.³

Author's section.

¹²East Tennessee, etc. Co. v. Wiggins, 68 Fed. 446, 15 C. C. A. 510.

¹⁴Act Feb. 16, 1903, c. 554, 32 Stat. 832.

¹⁵Act Mar. 3, 1905, § 8, c. 1419, 33 Stat. 958, U. S. Comp. Stat. 1905, p. 79.

¹⁶Act June 22, 1874, cited *infra*.

¹⁷Act Apr. 14, 1906, c. 1625, 34 Stat. 114.

¹⁸Act June 22, 1874, c. 401, 18 Stat. 125, U. S. Comp. Stat. 1901, p. 317.

¹⁹Act June 26, 1890, c. 631, 26 Stat. 680, U. S. Comp. Stat. 1901, p. 319.

²⁰Act Mar. 3, 1905, § 2, c. 1419, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 77.

¹The section enumerates also California, Georgia, Indiana, Iowa, Kentucky, North Carolina, Tennessee and West Virginia.

²R. S. § 584, U. S. Comp. Stat. 1901, p. 478.

³See post, § 364.

§ 315. — Arkansas, at Harrison, Texarkana, Fort Smith, Helena, Batesville and Little Rock.

In the western district of Arkansas terms of circuit and district courts are held at Harrison, for the Harrison division, on the second Mondays in April and October;⁵ at Texarkana, for the Texarkana division thereof, on the second Mondays in May and November; and at Fort Smith, for the Fort Smith division, on the second Mondays in January and June.⁶ In the eastern district terms of circuit and district courts are held at Helena, for the eastern division thereof, on the second Monday in March and first Monday in October;⁷ at Batesville, for the northern division, on the fourth Monday in May and the second Monday in December; and at Little Rock, for the western division thereof, on the first Monday in April and the third Monday in October.⁸

Author's section.

§ 316. — California, intermediate and special terms and adjournments.

In the northern district terms of circuit and district courts are held at San Francisco, on the first Monday in March and the second Monday in July, and the first Monday in November;⁹ and at Eureka on the third Monday in July and continuing as long as the business may require.¹⁰ In the southern district terms of circuit and district courts are held at Fresno, for the northern division thereof, on the first Monday in May and the second Monday in November; and at Los Angeles, for the southern division thereof, on the second Monday in January and the second Monday in July.¹¹ The district courts in California are required to hold intermediate terms when necessary where the regular term has not been held.¹² The provision of R. S. § 584 for adjournments of district court by the clerk in Alabama, applies also to California.¹³ In the circuit court the "circuit justice or circuit judge may appoint special sessions of the circuit courts, to be held at the places where the regular sessions are held, by an order under his hand and seal directed to the

⁵Act Mar. 18, 1902, c. 222, 32 Stat. 72.

⁶Act Feb. 20, 1897, c. 269, 29 Stat. 591, U. S. Comp. Stat. 1901, p. 322.

⁷Act Feb. 3, 1903, c. 400, 32 Stat. 795.

⁸Act Jan. 16, 1901, c. 92, 31 Stat. 733, U. S. Comp. Stat. 1901, p. 323.

⁹Act May 25, 1896, c. 238, 29 Stat. 135, U. S. Comp. Stat. 1901, p. 326.

¹⁰Act June 29, 1906, c. 3626, 34 Stat. 631.

¹¹Act May 29, 1900, c. 594, 31 Stat. 219, U. S. Comp. Stat. 1901, p. 327.

¹²Ante, § 314.

¹³Ante, § 314.

marshal and clerk of such court, at least fifteen days before the time fixed for the commencement of such special sessions. Said order is required to be published by the marshal in one or more of the newspapers within the district where such sessions are to be held.”¹⁴

Author's section.

§ 317. — Colorado, at Denver, Pueblo and Montrose.

In the district of Colorado terms of the circuit and district courts are held at Denver on the first Tuesdays in May and in November in every year; at Pueblo on the first Tuesday in April annually, and at Montrose on the second Tuesday in September annually; “and such cases shall be heard in said courts as the law or the rules of said court may now or hereafter provide.”¹⁶

Author's section.

§ 318. — Connecticut and Delaware.

In the district of Connecticut terms of the district court are held at Hartford on the fourth Tuesday in May and the first Tuesday of December;¹⁸ at New Haven on the fourth Tuesday of February and of August.¹⁹ Terms of the circuit court are held at Hartford on the second Tuesday of October;²⁰ and at New Haven on the fourth Tuesday in April.²¹ In Delaware terms of the district court are held at Wilmington on the second Tuesday of January, April, June and September;² and of the circuit court at Wilmington on the third Tuesdays in June and October.³

Author's section.

§ 319. — Florida at Tallahassee, Pensacola, Jacksonville, Key West, Tampa, Ocala, and Miami.

In the northern district terms of the circuit and district courts are held at Tallahassee on the first Monday in February, and at Pensacola on the first Monday in March.⁵ In the southern district terms of the circuit and district courts are held at Miami on the fourth Monday in April;⁶ at Jacksonville, the first Monday in De-

¹⁴R. S. § 664, U. S. Comp. Stat. 1901, p. 543.

¹⁶Act Feb. 16, 1903, c. 555, 32 Stat. 833.

¹⁸R. S. § 572, act June 30, 1879, c. 49, 21 Stat. 41, U. S. Comp. Stat. 1901, p. 475.

¹⁹R. S. § 572.

²⁰Act June 10, 1896, c. 394, 29 Stat. 317, U. S. Comp. Stat. 1901, p. 541.

²¹R. S. § 658.

²R. S. § 572.

³R. S. § 658.

⁵R. S. §§ 572, 658.

⁶Act June 9, 1906, c. 3062, 34 Stat.

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ember;⁷ a Key West, the first Monday in May and November;⁸ at Tampa, the second Monday in February;⁹ at Ocala on the third Monday in January;¹⁰ and at Fernandina on the first Monday in April.¹¹ The district court for the southern district is required to be open at all times for the purpose of hearing and deciding admiralty cases.¹²

Author's section.

§ 320. — Georgia, regular terms and adjournments.

Terms of the circuit and district courts in the northern district are held at Atlanta, for the northern division thereof, on the second Monday in March and the first Monday in October;¹ at Columbus, for the western division, on the first Mondays in May and December, continuing as long as necessary;² at Athens, for the eastern division, on the fourth Monday in April and first Monday in November;³ at Rome, for the northwestern division, on the third Mondays in May and November.⁴ In the southern district of Georgia terms of the circuit and district courts are held at Macon, for the western division, on the first Mondays in May and October;⁵ at Albany, for the Albany division, on the third Mondays in June and December;⁶ at Augusta, for the northeastern division, on the first Monday in April and the third Monday in November;⁷ at Savannah, for the eastern division, the district court terms commencing on the second Tuesdays in February, May, August and November,⁸ and the circuit court terms on the second Monday in April and the Thursday after the first Monday in November;⁹ at Valdosta, for the southwestern division, both circuit and district court terms commencing on the second Mondays in June and De-

⁷Act July 23, 1894, c. 149, 28 Stat. 117, U. S. Comp. Stat. 1901, p. 332.

⁸R. S. §§ 572, 658.

⁹Act June 30, 1886, c. 581, 24 Stat. 106, U. S. Comp. Stat. 1901, p. 332.

¹⁰Act May 18, 1900, c. 482, 31 Stat. 180, U. S. Comp. Stat. 1901, p. 333.

¹¹Act Feb. 18, 1905, c. 584, 33 Stat. 719, U. S. Comp. Stat. 1905, p. 83.

¹²R. S. § 575, U. S. Comp. Stat. 1901, p. 476. See also post, § 368.

¹Act June 20, 1884, c. 106, 23 Stat. 50, act Feb. 23, 1889, c. 205, 25 Stat. 690, U. S. Comp. Stat. 1901, pp. 336, 338.

²Act Aug. 27, 1894, c. 341, 28 Stat. 504, U. S. Comp. Stat. 1901, p. 339.

³Act Apr. 7, 1904, c. 940, 33 Stat. 161, U. S. Comp. Stat. 1905, p. 86.

⁴Act Apr. 12, 1900, c. 185, 31 Stat. 73, U. S. Comp. Stat. 1901, p. 339.

⁵Act Jan. 29, 1880, c. 17, 21 Stat. 63, U. S. Comp. Stat. 1901, p. 334.

⁶Act Mar. 3, 1905, c. 1431, 33 Stat. 999, U. S. Comp. Stat. 1905, p. 87, as amended act June 28, 1906, c. 3577, 34 Stat. 547.

⁷Feb. 15, 1889, c. 168, 25 Stat. 671, U. S. Comp. Stat. 1901, p. 337.

⁸R. S. § 572.

⁹R. S. § 658.

ember.¹⁰ The provision of R. S. § 584, as to adjournment of district court terms by the clerk quoted in the section dealing with Alabama, apply also to Georgia.¹¹

Author's section.

§ 321. — Idaho, at Moscow, Boise City and Pocatello.

In the district of Idaho, terms of circuit and district courts are held at Moscow, for the northern division on the second Monday in May and the fourth Monday in October; at Boise City, for the central division, on the second Mondays in March and September; and at Pocatello, for the southern division, on the second Monday in April and the first Monday in October.¹³

Author's section.

§ 322. — Illinois, regular and special terms.

In the northern district terms of the circuit and district courts are held at Chicago, for the eastern division thereof, on the first Monday in July and the third Monday in December;¹⁵ and at Freeport, for the western division, on the third Mondays in April and October.¹⁶ In the southern district terms are held at Peoria, for the northern division, on the third Mondays in April and October;¹⁷ and at Springfield, for the southern division, on the first Mondays in January and June;¹⁸ at Quincy on the first Monday in September.¹⁹ In the eastern district terms are held at Danville on the first Mondays of March and September; at Cairo on the first Mondays of April and October; and at East St. Louis on the first Mondays of May and November.²⁰ The judges of the circuit and district courts in the Illinois districts are expressly authorized to appoint and hold additional special terms "whenever deemed necessary by the judges of said courts, respectively, and the time or times of holding such special sessions of said courts shall be fixed by the judges of said courts, respectively, either by rule of such

¹⁰Act June 30, 1902, c. 1338, 32 Stat. 550, U. S. Comp. Stat. 1903, p. 87.

¹¹Ante, § 314.

¹³Act July 5, 1892, c. 145, 27 Stat. 73, U. S. Comp. Stat. 1901, p. 344.

¹⁵R. S. §§ 572, 658, act Mar. 3, 1905, § 5, c. 1427, 33 Stat. 993, U. S. Comp. Stat. 1905, p. 90.

¹⁶Act Mar. 3, 1905, § 5, c. 1427, cited in preceding note.

¹⁷Act Mar. 3, 1905, § 10, c. 1427, 33 Stat. 994, U. S. Comp. Stat. 1905, p. 93.

¹⁸R. S. §§ 572, 658. See also act Mar. 3, 1905, § 10 supra.

¹⁹Act Aug. 8, 1888, c. 788, 25 Stat. 387, U. S. Comp. Stat. 1901, p. 346.

²⁰Act Mar. 3, 1905, § 16, c. 1427, 33 Stat. 995, U. S. Comp. Stat. 1905.

courts or by special or general order of such courts entered of record in said courts.”¹

Author's section.

§ 323. — Indiana, regular and special terms and adjournments.

In the district of Indiana terms of the circuit and district courts are held at Indianapolis on the first Tuesday in May and November; at New Albany on the first Mondays in January and July; at Evansville on the first Mondays in April and October; at Fort Wayne on the second Tuesdays in June and December, and at Hammond on the third Tuesdays in April and October, continuing as long as business requires.³ The circuit and district judges are also expressly authorized to hold special terms when necessary.⁴ District court terms are not limited to any particular number of days, nor is it necessary to adjourn because a term elsewhere intervenes, but the latter may be adjourned over until the business is concluded.⁵ Moreover, “the intervention of a term of the district court at another place, or of a circuit court, shall not preclude the power to adjourn over to a future day.”⁶ The provisions of R. S. § 584, as to adjournments by the clerk in the district judge's absence, quoted in the section dealing with Alabama terms,⁷ apply also to Indiana, subject to the general enactment regarding adjournments in the judge's absence,⁸ and subject to the further provision of R. S. § 585, that “in the districts of Indiana and Kentucky the district judge, in the case provided in the preceding section, [i. e., of adjournments by the clerk] may, by a written order to the clerk within the first three days of his term, adjourn the district court to a future day within thirty days of the first day. The clerk shall give notice of such adjournment by posting a copy of said order on the front door of the courthouse where the court is to be held.”⁹ In addition, R. S. §

¹Act Mar. 3, 1905, c. 1427, § 21, 33 Stat. 996, U. S. Comp. Stat. 1905, p. 96.

³As to Evansville, see act June 23, 1874, c. 463, 18 Stat. 251. As to Fort Wayne, see act Mar. 3, 1881, c. 154, 21 Stat. 511. As to Hammond, see act Feb. 14, 1899, c. 155, 30 Stat. 836. As to Indianapolis and New Albany, see R. S. §§ 572, 658. See U. S. Comp. Stat. 1901, p. 347.

⁴Consult R. S. § 665, U. S. Comp.

Stat. 1901, p. 544. Also act July 2, 1890, c. 651, 26 Stat. 212, U. S. Comp. Stat. 1901, p. 347.

⁵R. S. § 577, U. S. Comp. Stat. 1901, p. 476.

⁶R. S. § 580, U. S. Comp. Stat. 1901, p. 477.

⁷Ante, § 314.

⁸Post, § 364.

⁹R. S. § 585, U. S. Comp. Stat. 1901, p. 478.

579 gives district judges in Indiana power to adjourn court from time to time to meet the necessities and convenience of business.¹⁰

Author's section.

§ 324. — Iowa, regular and intermediate terms and adjournments.

In the northern district of Iowa terms of circuit and district courts are held at Dubuque, for the eastern division, on the fourth Tuesday in April and the first Tuesday in December; at Cedar Rapids, for the Cedar Rapids division, on the first Tuesday in April and the second Tuesday in September; at Fort Dodge, for the central division, on the second Tuesdays in June and November; and at Sioux City, for the western division, on the fourth Tuesday in May and the first Tuesday in October.¹² In the southern district terms of circuit and district courts are held at Keokuk, for the eastern division, on the second Tuesday in April and the third Tuesday in October; at Des Moines, for the central division, on the second Tuesday in May and third Tuesday in November; at Council Bluffs, for the western division, on the second Tuesday in March and third Tuesday in September;¹³ at Creston, for the southern division, on the fourth Tuesday in March and first Tuesday in November;¹⁴ and at Davenport, for the Davenport division, twice a year, the judges to fix the times and make publication and give due notice thereof.¹⁵ The district courts in Iowa are also required to hold intermediate terms when necessary where they have failed to hold the regular term.¹⁶ The district court clerk in Iowa is given power to adjourn a term of court for non-attendance of the judge, by R. S. § 584, quoted elsewhere.¹⁷

Author's section.

The creation of divisions in a particular district does not create new districts nor establish additional district courts. Hence the criminal jurisdiction remains unaffected unless there is some special provision to the contrary.¹⁸ There being no such provision in respect to the northern district of Iowa, the court for that district has power to name the time and place of trial, subject only to the defendant's right to a speedy trial within the district.¹⁹

¹⁰R. S. § 579, U. S. Comp. Stat. Stat. 547, U. S. Comp. Stat. 1905, p. 1901, p. 477.

¹²Act Jan. 4, 1896, c. 3, 29 Stat. 2, U. S. Comp. Stat. 1901, p. 353.

¹³Act Jan. 4, 1896, c. 3, 29 Stat. 2, U. S. Comp. Stat. 1901, p. 353.

¹⁴Act Apr. 21, 1906, c. 1648, 34 Stat. 127.

¹⁵Act Apr. 28, 1904, c. 1800, 33 433.

97.

¹⁶Post, § 361.

¹⁷Ante, § 314.

¹⁸See *Logan v. United States*, 144 U. S. 297, 36 L. ed. 441, 12 Sup. Ct. Rep. 617.

¹⁹*United States v. Kessel*, 63 Fed.

§ 325. — Kansas.

In the district of Kansas terms of circuit and district court for the first division of the district are held at Kansas City, Kansas, on the second Monday in January and first Monday in October;¹ at Topeka on the second Monday in April; and at Leavenworth on the second Monday in October;² for the third division at Fort Scott on the first Monday in May and second Monday of November;³ and for the second division at Salina on the second Monday in May and at Wichita on the second Monday in March and second Monday in September.⁴ But no cause, action, or proceeding is to be tried or considered at any term held at Salina unless by consent, or by order of the court for cause.⁵

Author's section.

§ 326. — Kentucky, regular and special terms and adjournments.

In the western district of Kentucky terms of the circuit and district courts are held as follows: At Louisville, beginning on the second Monday in March and the second Monday in October; at Owensboro, beginning on the fourth Monday in November and the first Monday in May; at Paducah, beginning on the third Monday in April and the third Monday in November; at Bowling Green, beginning on the third Monday in May and the second Monday in December. Regular terms of the circuit and district courts of the United States for the eastern district of Kentucky are held at the following times and places, namely: At Frankfort, beginning on the second Monday in March and the fourth Monday in September; at Covington, beginning on the first Monday in April and the third Monday in October; at Richmond, beginning on the fourth Monday in April and the second Monday in November; at London, beginning on the second Monday in May and the fourth Monday in November; at Catlettsburg, beginning on the fourth Monday in May and the second Monday in December, and at such other times and places as may hereafter be provided by law.⁷ District court terms are not limited to a particular number of days, nor is it neces-

¹Act Feb. 19, 1903 c. 709, 32 Stat. 849.

²R. S. §§ 572, 658.

³Act May 3, 1892, c. 59, 27 Stat. 24, U. S. Comp. Stat. 1901, p. 357.

Act Mar. 2, 1895, c. 1777, 28 Stat. 806, U. S. Comp. Stat. 1901, p. 358.

⁴Act June 9, 1890, c. 403, 26 Stat. 129, U. S. Comp. Stat. 1901, p. 356.

⁵Act Aug. 9, 1888, c. 817, 25 Stat. 392, U. S. Comp. Stat. 355.

⁷The above is the substance of an act of March 10, 1902, c. 144, 32 Stat.

58, U. S. Comp. Stat. 1905, p. 99.

sary to adjourn because a term elsewhere intervenes, but the latter may be adjourned over until pending business is concluded.⁸ Nor does the intervention of a district or circuit court term at another place preclude the power to adjourn over to a future day.⁹ There is also a provision of the Revised Statutes authorizing district judges in Kentucky to adjourn from time to time to meet the necessities and convenience of business.¹⁰ A special section of the Revised Statutes empowering the clerk to adjourn court, quoted in the statement as to terms in Alabama, is applicable to Kentucky as well as Alabama,¹¹ but subject to the general statute as to adjournments of the district court, and subject further to the provision of R. S. § 585, quoted elsewhere,¹² applicable to Indiana and Kentucky, empowering the judge to direct the clerk to adjourn to a particular day. Special terms of the circuit court are governed by R. S. § 665, which provides that "in the districts of Kentucky and Indiana the district judge, and in his absence the circuit justice or circuit judge, may, by a written order to the clerk of the circuit court, appoint a special term of such court; and by said order the judge may prescribe the duties of the officers of the court in summoning juries, and in the performance of other acts necessary for the holding of such special term; or the court may by its order, after it is opened, prescribe the duties of his officers, and the mode of proceeding, and any of the details thereof. Notice of such special term shall be given by the clerk by posting a copy of said order on the front door of the court house where the court is to be held, and by publishing the same in one or more newspapers in the same place."

Author's section.

While the provision of the Revised States above quoted was enacted before the division of the State into districts, it would seem to be still in force and unimpaired by later laws governing the holding of regular terms. The statute creating the Owensboro division provided that circuit and district judges should have "the same power to call special terms in said division as they may now do under the laws of the United States elsewhere in said district."¹³

⁸R. S. § 579, U. S. Comp. Stat. 1901, p. 477.

⁹R. S. § 580, U. S. Comp. Stat. 1901, p. 477.

¹⁰R. S. § 579, U. S. Comp. Stat. 1901, p. 477.

¹¹R. S. § 584, ante, § 314.

¹²See ante in § 323.

¹³Act Aug. 8, 1888, c. 792, 25 Stat. 389, U. S. Comp. Stat. 1901, p. 359.

§ 327. — Louisiana, regular terms and adjournments.

In the western district of Louisiana regular terms of circuit and district courts are held at Lake Charles, for the Lake Charles division, on the first Mondays in May and December;¹⁵ at Opelousas, for the Opelousas division, on the first Mondays in January and June; at Alexandria, for the Alexandria division, on the fourth Mondays in January and June; at Shreveport, for the division of that name, on the third Mondays in February and October; at Monroe, for the Monroe division, on the first Mondays of April and October.¹⁶ In the eastern district of Louisiana terms of district court are held at New Orleans, for the New Orleans division, on the third Mondays in February, May and November,¹⁷ and of circuit court on the fourth Monday in April and first Monday in November;¹⁸ at Baton Rouge, for the Baton Rouge division, terms of both circuit and district court are held on the second Mondays in April and November.¹⁹ By R. S. § 579 district judges in Louisiana are given power to adjourn court "from time to time to meet the necessities or convenience of business."²⁰

Author's section.

§ 328. — Maine, Maryland and Massachusetts.

In the circuit court for the Maine district terms are held at Portland on the third Tuesday of April and September;¹ and in the district court at Portland the first Tuesday in February and December; at Bangor the first Tuesday in June, and at Bath the first Tuesday in September.² In Maryland, circuit court terms are held at Baltimore first Monday in April and November,³ and at Cumberland, second Monday in May and last Monday in September;⁴ and district court terms at Baltimore on first Tuesdays in March, June, September and December,⁵ and at Cumberland on the second Monday in May and last Monday in September.⁶ In Massachusetts

¹⁵Act Mar. 2, 1905, c. 1308, 33 Stat. 1901, p. 534, as amended by act May 841, U. S. Comp. Stat. 1905, p. 100. 14, 1902, c. 790, 32 Stat. 199.

¹⁶Act May 18, 1900, c. 481, 31 Stat. 179, U. S. Comp. Stat. 1901, p. 368. ²R. S. § 572, U. S. Comp. Stat. 1901, p. 468.

¹⁷R. S. § 572.

³R. S. § 658, U. S. Comp. Stat. 1901, p. 534.

¹⁸R. S. § 658.

⁴Act Mar. 21, 1892, c. 20, 27 Stat. 11, U. S. Comp. Stat. 1901, p. 338.

¹⁹Act Aug. 13, 1888, c. 869, 25 Stat. 438, U. S. Comp. Stat. 1901, p. 367.

⁵R. S. § 572, U. S. Comp. Stat. 1901, p. 468.

²⁰R. S. § 579, U. S. Comp. Stat. 1901, p. 477.

⁶Act Mar. 21, 1892, c. 20, 27 Stat. 11, U. S. Comp. Stat. 1901, p. 368.

¹R. S. § 658, U. S. Comp. Stat. 1901, p. 368.

circuit court terms are held at Boston the last Tuesday of February and third Tuesday of October;⁷ and district court terms at Boston the third Tuesday in March, fourth Tuesday in June, second Tuesday in September, and first Tuesday in December.⁸

Author's section.

R. S. §§ 572 and 658 provide that when the named day falls on Sunday the term shall commence the following day.

§ 329. — Michigan, regular and admiralty terms and adjournments.

In the eastern district of Michigan terms of circuit and district court are held at Detroit, for the southern division thereof, on the first Tuesdays in March, June and November;¹⁰ and at Bay City, for the northern division, on the first Tuesdays in May and October.¹¹ In the western district terms of circuit and district court are held at Grand Rapids, for the southern division thereof, on the first Tuesdays in March and October; and at Marquette, for the northern division, on the first Tuesdays in May and September.¹² A special or adjourned term of the district court at Bay City in the northern division of the eastern district is required to be held beginning in February each year, for the trial of admiralty causes.¹³ One or more terms of the district court must be held at Port Huron annually in the discretion of the judge and at such times as he shall appoint.¹⁴ By R. S. § 579 district judges in Michigan are empowered to adjourn court "from time to time, to meet the necessities or convenience of business."¹⁵

Author's section.

§ 330. — Minnesota.

In the district of Minnesota terms of district and circuit courts are held at Winona, for the first division, on the third Tuesdays in May and November; at Mankato, for the second division, on the fourth Tuesdays in April and October; at St. Paul, for the third

⁷Act May 14, 1902, c. 790, 32 Stat. Stat. 175, U. S. Comp. Stat. 1901, p. 370.

⁸R. S. § 572, U. S. Comp. Stat. 1901, p. 469. ¹³Act Apr. 30, 1894, c. 66, 28 Stat. 67, U. S. Comp. Stat. 1901, p. 373.

¹⁰R. S. §§ 572, 658, U. S. Comp. Stat. 1901, pp. 469, 534. ¹⁴Act June 19, 1878, c. 326, § 9, 20 Stat. 177, U. S. Comp. Stat. 1901, p. 371.

¹¹Act Apr. 30, 1894, c. 66, 28 Stat. 67, U. S. Comp. Stat. 1901, p. 373. ¹⁵R. S. § 579, U. S. Comp. Stat. 1901, p. 477.

¹²Act June 19, 1878, c. 326, 20 Stat. 177, U. S. Comp. Stat. 1901, p. 477.

division, on the first Tuesdays in June and December; at Minneapolis, for the fourth division, on the first Tuesdays in April and October; at Duluth, for the fifth division, on the second Tuesdays in January and July; and at Fergus Falls, for the sixth division, on the first Tuesday in May and second Tuesday in November.¹⁷

Author's section.

§ 331. — Mississippi, regular and special terms.

In the northern district of Mississippi terms of circuit and district court are held at Aberdeen, for the eastern division, on the first Mondays in April and October, and continuing twenty-four judicial days, if the business requires; and at Oxford, for the western division, on the first Mondays in June and December, and continuing so long as business requires.¹⁹ In the southern district terms of circuit and district courts are held for the Jackson division on the fourth Mondays in January and June; at Meridian, for the eastern division, on the second Mondays of March and September, continuing three weeks or so long as business requires;²⁰ at Biloxi, for the southern division, on the third Mondays in February and August;¹ and at Vicksburg, for the western division, on the first Mondays in January and July, and continuing four weeks, or so long as business requires.² The district judge in the northern district is also authorized to hold "additional special terms of said courts, for the disposal of the unfinished business thereof, whenever the interests of the public and the condition of the docket shall so require; provided, that there shall not be more than two such special terms in any one year in each division, nor for a longer period than twelve judicial days for each special term."³

Author's section.

§ 332. — Missouri, regular and adjourned terms.

In the eastern district of Missouri terms of circuit and district

¹⁷See act Apr. 26, 1890, c. 167, § 4, 26 Stat. 73, U. S. Comp. Stat. 1901, p. 376, as amended Act Feb. 9, 1904, c. 153, 33 Stat. 11, U. S. Comp. Stat. 1905, p. 101. July 18, 1894, c. 144, 28 Stat. 114, U. S. Comp. Stat. 1901, p. 382.

¹⁹Act June 15, 1882, c. 218, 22 Stat. 101, act Feb. 6, 1889, c. 113, 25 Stat. 655, U. S. Comp. Stat. 1901, p. 378, 492. ¹Act Apr. 4, 1888, c. 58, 25 Stat. 78; act May 3, 1900, c. 344, 31 Stat. 165; U. S. Comp. Stat. 1901, pp. 381, 384.

²Act Feb. 28, 1887, c. 279, 24 Stat. 430, U. S. Comp. Stat. 1901, p. 380. ³Act June 15, 1882, c. 218, § 10, 22 Stat. 103, U. S. Comp. Stat. 1901, p. 380.

²⁰Term is to continue three weeks or so long as business requires. Act

courts are held at St. Louis, for the eastern division, terms of district court commencing on the first Mondays in May and November;⁵ and of circuit court on the third Mondays in March and September;⁶ at Hannibal, for the northern division, terms of both circuit and district court commence on the first Mondays in May and November;⁷ and in the southeastern division at Cape Girardeau on the second Mondays in April and October.⁸ In the western district terms of circuit and district court are held at Kansas City, for the western division, on the fourth Monday in April and first Monday in November;⁹ at Joplin, for the southwestern division, on the second Mondays of June and January;¹⁰ at St. Joseph, for the St. Joseph division, on the first Monday in March and third Monday in September; at Jefferson City, for the central division, on the third Mondays of March and October; and at Springfield, for the southern division, on the first Mondays in April and October.¹¹ "The circuit court for the several districts of Missouri may at any time order adjourned terms thereof. In the eastern district a copy of the order shall be posted on the door of the court room, and shall be advertised in some newspaper printed in St. Louis; and in the western district a copy of the order shall be posted on the door of the court room and advertised in some newspaper printed in the city of Jefferson, at least twenty days before the adjourned term is held. At such adjourned term any business may be transacted which might be transacted at a regular term."¹²

Author's section.

An adjourned term is an extension of the preceding session.¹³

§ 333. — Montana and Nebraska.

Terms of circuit and district courts in the Montana district are required to be held at Helena on the first Mondays in April and November;¹⁴ at Butte on the first Tuesday in February and on the

⁵R. S. § 572, U. S. Comp. Stat. 1901, p. 470.

⁶R. S. § 658, U. S. Comp. Stat. 1901, p. 535.

⁷Act May 14, 1890, c. 202, 26 Stat. 106, U. S. Comp. Stat. 1901, p. 386.

⁸Act Jan. 31, 1905, c. 287, 33 Stat. 626, U. S. Comp. Stat. 1905, p. 103.

⁹Act Apr. 19, 1892, c. 50, 27 Stat. 20, U. S. Comp. Stat. 1901, p. 388.

¹⁰Act Jan. 24, 1901, c. 164, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 390.

¹¹Act Apr. 19, 1892, c. 50, 27 Stat. 20, U. S. Comp. Stat. 1901, p. 388.

¹²R. S. § 633, U. S. Comp. Stat. 1901, p. 543.

¹³Memo. l Cranch C. C. 159, Fed. Cas. No. 9,409.

¹⁴Act Feb. 22, 1889, c. 180, § 21, 25 Stat. 682.

first Tuesday in September in each year;¹⁶ and at Great Falls on the first Monday in May and on the first Monday in October in each year, and causes civil and criminal may be transferred by the court or judge thereof from Helena or Butte to Great Falls or from Great Falls to Butte or Helena, in said district, when the convenience of parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in either place.¹⁷ In the district of Nebraska terms of circuit and district courts are held at Omaha on the first Monday in May and second Monday in November; at Lincoln on the third Monday in January and first Monday in October; at Hastings on the third Monday in April; and at Norfolk on the fourth Monday in April.¹⁸

Author's section.

§ 334. — Nevada and New Hampshire.

In the district of Nevada circuit court terms are held at Carson on the third Monday in March and first Monday in November;¹ and district court terms at Carson on the first Mondays in February, May and October.² The provision of R. S. § 664 respecting special circuit court terms in California applies also to Nevada.³ In the district of New Hampshire,⁴ circuit court terms are held at Portsmouth, on the first Tuesday of May; at Concord on the second Tuesday of December; and at Littleton last Tuesday in August; and district court terms are held at Portsmouth on the third Tuesdays in March and September; at Concord on the third Tuesdays in June and December; and at Littleton the last Tuesday in August.

Author's section.

§ 335. — New Jersey at Trenton and Newark.

Circuit court terms in the district of New Jersey are held at Trenton on the fourth Tuesdays in March and September, and district court terms at Trenton the third Tuesdays in January, April,

¹⁶Act July 7, 1898, c. 571, 30 Stat. 685, U. S. Comp. Stat. 1901, p. 392.

¹⁷Act Apr. 27, 1904, c. 1610, 33 Stat. 313, U. S. Comp. Stat. 1905, p. 104. The same provision as to transfers is in the act of July 7, 1898, *supra*.

¹⁸Act Aug. 3, 1894, c. 194, 28 Stat. 221, U. S. Comp. Stat. 1901, p. 392.

¹Act Feb. 18, 1876, c. 11, 19 Stat. 4, U. S. Comp. Stat. 1901, p. 541.

²R. S. § 572, U. S. Comp. Stat. 1901, p. 470.

³See *ante*, § 316.

⁴See R. S. §§ 658, 572, act Feb. 23, 1881, c. 71, 21 Stat. 330; act Mar. 10, 1892, c. 15, 27 Stat. 7, U. S. Comp. Stat. 1901, pp. 393, 470, 534; act May 14, 1902, c. 790, 32 Stat. 199.

June and September.⁶ But at any such term of either circuit or district court the judge or judges may by consent or upon application and good cause shown, order any civil cause set for hearing or trial at said term, to be tried at Newark upon a day set by said judge. Such application must be made to said judge either in vacation or term time, one week before the day set for trial, and on at least five days' notice to the opposite party, or his or her counsel.⁷

Author's section.

§ 336. — New York, circuit court terms.

Terms of the circuit court in the four districts of New York are held as follows: In the northern district of New York, at Utica on the first Tuesday of December; at Syracuse on the first Tuesday of April; at Albany on the second Tuesday of February. In the western district of New York, at Rochester, on the second Tuesday of May; at Canandaigua on the second Tuesday in September; at Buffalo on the second Tuesday of November. In the southern district of New York, at the city of New York, on the first Monday in April and the third Monday in October; and for the trial of criminal causes and suits in equity, on the last Monday in February; and exclusively for the trial and disposal of criminal cases, and matters arising and pending in said court, on the second Wednesdays in January, March and May, on the third Wednesday in June, and on the second Wednesdays in October and December: Provided, That the holding of any of the last-mentioned terms for criminal business shall not dispense with nor affect the holding of any other term of the court at the same time, and that the pending of any other term of the court shall not prevent the holding of any of the said terms for criminal business. In the eastern district of New York, at Brooklyn, on the first Wednesday in every month.⁹

Author's section.

§ 337. — New York, district court terms.

Terms of the district court in the four districts of New York

⁶See R. S. §§ 572, 658, U. S. Comp. Stat. 1901, pp. 470, 536. moning jurors and witnesses at Newark.

⁷See act Aug. 8, 1888, c. 790, 25 Stat. 388, U. S. Comp. Stat. 1901, p. 393, which further provides for sum-
⁹R. S. § 658, as amended act May 12, 1900, c. 391, § 3, 31 Stat. 175, U. S. Comp. Stat. 1901, p. 536.

are held as follows: In the northern district of New York, at Albany, on the second Tuesday of February; at Utica on the first Tuesday of December; at Binghamton on the second Tuesday of June; at Auburn on the first Tuesday of October; at Syracuse on the first Tuesday of April, and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego and Franklin as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. In the western district of New York, at the city of Elmira, on the second Tuesday of January; at the city of Buffalo on the second Tuesdays of March and November; at the city of Rochester on the second Tuesday of May; at the city of Jamestown on the second Tuesday of July; at the city Lockport on the second Tuesday of October. In the southern district of New York, in the city of New York, on the first Tuesday in every month. In the eastern district of New York, in Brooklyn, on the first Wednesday in every month. Regular sessions of the district court for the western district of New York, for the hearing of motions and for proceedings in bankruptcy and the trial of causes in admiralty are required to be held at the city of Buffalo at least two weeks in each month of the year except August, unless the business is sooner disposed of. The times for holding the same, and such other special sessions as the court shall deem necessary, are directed to be fixed by rules of the court.¹¹

Author's section.

§ 338. — North Carolina, regular and special terms.

In the eastern district of North Carolina terms of the district court are held at Washington on the second Mondays in April and October;¹³ at Elizabeth City on the third Mondays in April and October; at Newbern, on the fourth Mondays in April and October; at Raleigh on the fourth Monday of May and first Monday of December; at Wilmington on the first Monday after fourth Monday in April and October.¹⁴ Terms of the circuit court in the eastern district are held at Washington, Raleigh and Wilmington, at

¹¹R. S. § 572, act May 12, 1900, c. 391, 31 Stat. 175, 176, U. S. Comp. Stat. 1901, pp. 395, 471.

¹³Act Mar. 3, 1905 c. 1437, 33 Stat. 1004, U. S. Comp. Stat. 1905, p. 107.

¹⁴Act Aug. 9, 1894, c. 244, 28 Stat. 274, U. S. Comp. Stat. 1901, p. 398.

the same times as terms of the district court there.¹⁵ In the western district terms of circuit and district courts are held at Greensborough on the first Mondays in April and October; at Statesville on the third Mondays in April and October; at Asheville on the first Mondays in May and November;¹⁶ at Charlotte on the second Mondays in June and December, to continue until the business is disposed of; and at Wilkesboro on the second Mondays of July and November, and continuing until the business is disposed of.¹⁷ "In each of the districts of North Carolina the circuit court may order special terms thereof, to be held at such times and places in said district as the court may designate; provided, that no special term of the circuit court for either district shall be appointed, except by and with the concurrence and consent of the circuit judge."¹⁸ The district court clerks in North Carolina are given power to adjourn a term of court for non-attendance of the judge by R. S. § 584, quoted elsewhere.¹⁹

Author's section.

§ 339. — North Dakota.

In the four divisions of the district of North Dakota terms of circuit and district court are held as follows: At Bismarck for southwestern division, first Tuesday in March; at Fargo, for southeastern division, third Tuesday in May; at Grand Forks, for the northeastern division, second Tuesday in November; at Devil's Lake, for the northwestern division, on the first Tuesday in July; and at Minot on the second Tuesday in October.¹

Author's section.

§ 340. — Ohio, regular terms and adjournments.

In the northern district of Ohio terms of circuit and district court are held for the eastern division thereof, at Cleveland on the first Tuesdays in February, April and October; and for the western division at Toledo on the first Tuesdays in June and December.³ In the southern district terms of circuit and district court are held

¹⁵R. S. §§ 572, 658, U. S. Comp. Stat. 1901, pp. 471, 537.

¹⁹Ante, § 314.

¹⁶Act June 19, 1878, c. 322, 20 Stat. 173, U. S. Comp. Stat. 1901, p. 398.

¹Act June 29, 1906, c. 3595, 34 Stat. 610, amending act of Apr. 26,

1890, c. 161, 26 Stat. 67, U. S. Comp.

¹⁷Act Feb. 23, 1903, c. 749, 32 Stat. 852.

Stat. 1901, p. 389.

³Act July 27, 1882, c. 351, 22 Stat.

¹⁸R. S. § 667, U. S. Comp. Stat. 1901, p. 544.

176, U. S. Comp. Stat. 1901, p. 404.

for the western division at Cincinnati on the first Tuesdays in February, April and October; and for the eastern division at Columbus on the first Tuesdays in June and December.⁴ By R. S. § 579 the district judges in Ohio are empowered to adjourn court "from time to time, to meet the necessities or convenience of the business."⁵

Author's section.

§ 341. — Oklahoma and Oregon.

In the eastern district of Oklahoma regular terms of circuit and district courts are to be held at Muskogee on the first Monday in January; at Vinita on the first Monday in March; at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore on the first Monday in October. In the western district the regular terms are at Chickasha on the first Monday of November; at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June, and at Lawton on the first Monday in October in each year.⁷

Circuit court terms in the Oregon district are held at Portland on the second Monday of April and the first Monday of October;⁸ and district court terms on the first Mondays in March, July and November.⁹ The provision of R. S. § 664, for special circuit court terms in California, applies also to Oregon,¹⁰

Author's section.

§ 342. — Pennsylvania, regular and special terms and adjournments.

In the eastern district of Pennsylvania terms of district courts are held at Philadelphia on the second Mondays in March and June, the third Monday in September, and second Monday in December¹² and of circuit court at Philadelphia on the first Mondays in April and October.¹³ In the western district terms of district court are held at Pittsburg on the first Monday in May and third

⁴Act Feb. 4, 1880, c. 18, 21 Stat. 64, U. S. Comp. Stat. 1901, p. 403. ⁹R. S. § 572, U. S. Comp. Stat. 1901, p. 472.

⁵R. S. § 579, U. S. Comp. Stat. 1901, p. 477. ¹⁰See ante, § 316.

⁷Act June 16, 1906, c. 3335, 34 Stat. 549. ¹²Act June 30, 1902, c. 1336, 32 Stat. 275.

¹³R. S. § 658, U. S. Comp. Stat.

⁸Act Feb. 18, 1876, c. 11, 19 Stat. 4, 1901, p. 538. U. S. Comp. Stat. 1901, p. 541.

Monday in October, and of circuit court on the second Mondays of May and November; and at Erie terms of both circuit and district courts are held on the third Monday in July and the second Monday in January.¹⁴ In the middle district terms of circuit and district court are held at Scranton on the fourth Monday of February and third Monday of October; at Williamsport on the second Mondays of January and June; at Harrisburg on the first Mondays in May and December. The law provides that sessions in the middle district are to continue so long "as the judges thereof shall severally direct and determine; and adjourned sittings and sessions may be held from time to time according as the business of the said courts shall, in the opinion of the same, require it."¹⁵ Moreover, the circuit and district court for the middle district, or either of them, "may from time to time, in their discretion, appoint special terms of court, civil or criminal, and require grand, traverse, or petit juries, or all of them, to attend the same, by an order to be entered of record thirty days before the day at which such term shall convene, and at such special terms shall have all the powers which they respectively have at the regular terms appointed by law; Provided, however, That no special term of said circuit court shall be appointed except upon the order of the circuit judge or of the associate judge of the Supreme Court allotted to the third judicial circuit."¹⁶ An earlier provision of the Revised Statutes applicable to Pennsylvania and a few other States, authorizes the district judges to adjourn court "from time to time, to meet the necessities or convenience of the business."¹⁷

Author's section.

§ 343. — Rhode Island at Providence and Newport.

Circuit court terms in the district of Rhode Island are held at Providence on the fourth Tuesday of May and 15th day of November.¹ District court terms are held at Providence on the first Tues-

¹⁴R. S. §§ 572, 658, U. S. Comp. Stat. 1901, pp. 472, 538.

¹⁵Act June 30, 1902, c. 1335, 32 Stat. 549, U. S. Comp. Stat. 1905, p. 107.

¹⁶Act Mar. 2, 1901, c. 801, § 6, 31 Stat. 884, U. S. Comp. Stat. 1901, p. 407.

¹⁷R. S. § 579, U. S. Comp. Stat. 1901, p. 477.

¹Act May 14, 1902, c. 790, 32 Stat. 199, R. S. § 658, U. S. Comp. Stat. 1901, p. 538. When that date falls on Sunday, then the term commences the following day.

days in February and August, and at Newport on the second Tuesday in May and the third Tuesday in October.²

Author's section.

§ 344. — South Carolina.

Terms of district court in the western division of the South Carolina district are held at Greenville on the third Tuesdays in April and October; and in the eastern division at Charleston on the first Tuesdays in June and December, at Columbia on the fourth Tuesday in November, and at Florence on the first Tuesday in March.⁴ Terms of the circuit court are held at Greenville on the third Tuesdays in April and October; at Columbia on the fourth Tuesday of November; at Charleston on the first Tuesday in April; and at Florence on the first Tuesday in March.⁵

Author's section.

South Carolina constitutes only one district though the legislation of Congress is ambiguous and seems to speak of two. Congress also seems to assume the existence of one circuit court for the entire district, but of two district courts, one for each division.⁶

§ 345. — South Dakota.

The terms of the district and circuit courts of the United States in and for the State of South Dakota are held at Sioux Falls, the first Tuesday in April and the third Tuesday in October; at Aberdeen, the first Tuesday in May and the second Tuesday in November; at Pierre, the second Tuesday in June and the first Tuesday in October; at Deadwood, the third Tuesday in May and the first Tuesday in September.⁸

Author's section.

§ 346. — Tennessee, regular, intermediate and special terms and adjournments.

In the eastern district terms of circuit and district court are held at Chattanooga for the southern division on the first Mondays in April and December;¹⁰ at Knoxville for the northern division, on

²R. S. § 572, U. S. Comp. Stat. 1901, p. 472.

⁶Ante, § 284.

⁴See act Dec. 21, 1898, c. 32, § 197.

⁸Act May 9, 1902, c. 785, 32 Stat.

4, 30 Stat. 769, U. S. Comp. Stat. 1901, p. 409.

¹⁰Act June 18, 1906, c. 3341, 34 Stat. 298.

⁵Act May 10, 1900, c. 390, 31 Stat. 174, U. S. Comp. Stat. 1901, p. 410.

the first Monday in March and second Monday in September, continuing as long as the presiding judge may deem necessary;¹¹ and at Greeneville for the northeastern division, on the first Mondays in June and November, each term to continue as long as the presiding judge shall deem necessary.¹² In the middle district terms of circuit and district courts are held at Nashville on the first Mondays in May and October.¹³ In the western district terms of circuit and district court are held at Jackson for the eastern division thereof, at least twice each year, at such times as the judge shall fix;¹⁴ and at Memphis for the western division on the fourth Mondays in May and November.¹⁵ When a judge in any Tennessee district court fails to hold a regular term intermediate terms may be held.¹⁶ The district court clerks in Tennessee are given power to adjourn a term of court for nonattendance of the judge in certain cases, by R. S. § 584, quoted elsewhere.¹⁷ "In each of the districts of Tennessee the judges of the circuit court may appoint special terms thereof, to be held at the place where the regular terms are held; and notice of such special term shall be published for four consecutive weeks in at least one newspaper printed at the place where the court is to be held."¹⁸

Author's section.

§ 347. — Texas.

In the southern district of Texas terms of circuit and district court are held at Galveston on the second Monday of January and the first Monday of June; at Houston on the fourth Mondays of February and September; at Laredo on the third Monday of April and second Monday of November; at Brownsville on the second Monday of May and the first Monday of December;¹ and at Victoria twice in each year, the times to be fixed by the judges of said courts "of which they shall make publication and give due notice."² In the northern district terms of circuit and district courts are held

¹¹Act Feb. 2, 1899, c. 83, 30 Stat. 814, U. S. Comp. Stat. 1901, p. 418; act Apr. 28, 1904, c. 1797, 33 Stat. 545, U. S. Comp. Stat. 1905, p. 110.

¹²Act June 18, 1906, c. 3341, 34 Stat. 298.

¹³Act June 18, 1906, c. 3341, 34 Stat. 298.

¹⁴Act June 20, 1878, c. 359, 20 Stat. 235, U. S. Comp. Stat. 1901, p. 414.

¹⁵R. S. §§ 572, 658, U. S. Comp. Stat. 1901, p. 473, 538.

¹⁶See post, § 361.

¹⁷Ante, § 314.

¹⁸R. S. § 666, U. S. Comp. Stat. 1901, p. 544.

¹Act Mar. 11, 1902, c. 183, 32 Stat. 66, et seq. U. S. Comp. Stat. 1905, p. 117.

²Act, Apr. 18, 1906, c. 1636, 34 Stat. 121.

at Dallas, in the county of Dallas, on the second Monday of January and the first Monday of May; at Fort Worth, in the county of Tarrant, on the first Monday of November and the second Monday of March; at Abilene, in the county of Taylor, on the first Monday of October and the second Monday of April; and at San Angelo, in the county of Tom Green, on the third Monday of October and the fourth Monday of April. In the eastern district terms of circuit and district courts are held at Tyler, in the county of Smith, on the fourth Monday of January and the fourth Monday of April; at Jefferson, in the county of Marion, on the first Monday of October and the third Monday of February; at Beaumont, in the county of Jefferson, on the third Monday of November and the first Monday of April; at Sherman, in the county of Grayson, on the first Monday of January and the third Monday of May; and at Paris, in the county of Lamar, on the fourth Monday of October and the second Monday of March. In the western district terms of circuit and district courts are held at Del Rio twice each year, at times to be fixed by the judges, by due notice given and by publication;³ at Austin, in the county of Travis, on the fourth Monday of January and the second Monday of June; at Waco, in the county of McLennan, on the second Monday of November and the fourth Monday of February; at San Antonio, in the county of Bexar, on the third Monday of December and the first Monday of May; and at El Paso, in the county of El Paso, on the first Monday of October and the first Monday of April.⁴ By R. S. § 579 the district judges in Texas and a few other States, are authorized to adjourn court "from time to time to meet the necessities or convenience of the business."⁵

Author's section.

§ 348. — Utah, at Ogden and Salt Lake.

Circuit court terms for the Utah district are held at Ogden, for the northern division, on the first Mondays in March and September; and at Salt Lake, for the central division, on the first Mondays in May and December.⁷ District court terms are held at Salt Lake City on the second Monday in April and November and at

³Act June 3, 1906, c. 3063, 34 Stat. 226.

⁴Act Mar. 11, 1902, c. 183, §§ 11-14, 32 Stat. 66 et seq.

⁵R. S. § 579, U. S. Comp. Stat. 1901, p. 477.

⁷Act Mar. 2, 1897, c. 366, 29 Stat. 621.

Ogden City on the second Monday in March and September of each year: Provided, That other terms of said court may be held at said Salt Lake City and Ogden City and at other places in said district when deemed necessary by the judge.⁸

Author's section.

§ 349. — Vermont.

Circuit court terms for the Vermont district are held at Burlington on the fourth Tuesday in February; at Windsor on the fourth Tuesday in July; and at Rutland, on the third day of October.¹⁰ District court terms are held at Burlington on the fourth Tuesday in February; at Windsor on the Monday following the fourth Tuesday in July; and at Rutland on the sixth day of October.¹¹ One of the stated terms above specified may in each year when adjourned be adjourned to meet at Montpelier;¹² and there is a similar provision for adjournment to Newport.¹³

Author's section.

R. S. §§ 572 and 658 provide that if a term day specified fall on Sunday the term shall commence the next day.

§ 350. — Virginia, regular and special terms.

In the eastern district of Virginia terms of circuit and district court are held at Richmond on the first Mondays of April and October; at Norfolk on first Mondays of May and November; and at Alexandria, on first Mondays of January and July.¹⁵ In the western district the times and places for holding district and circuit courts are as follows, to wit: At Charlottesville, the second Monday in January and the first Monday in July; at Roanoke, the third Monday in February and the third Monday in June; at Lynchburg, on the Tuesday after the second Monday in March and September; at Danville, on the Tuesday after the second Monday in April and November; at Abingdon, on the Tuesday after the first Monday in May and October; at Harrisonburg, on the Tuesday after the first Monday in June and December; at Big Stone Gap, on the

⁸Act Feb. 19, 1903, c. 706, 32 Stat. 841.

¹⁰R. S. § 658, U. S. Comp. Stat. 1901, p. 539.

¹¹R. S. § 572, U. S. Comp. Stat. 1901, p. 474.

¹²Act July 3, 1894, c. 123, 28 Stat. 99, U. S. Comp. Stat. 1901, p. 436.

¹³Act Apr. 22, 1904, c. 1419, 33 Stat. 249, U. S. Comp. Stat. 1905, p. 122.

¹⁵R. S. §§ 658, 572, U. S. Comp. Stat. 1901, p. 474, 540.

fourth Monday in January and the second Monday in August.¹⁶ "In each of the districts of Virginia . . . the circuit court may order special terms, and direct the grand or petit jury, or both, to attend the same, by an order to be entered of record twenty days before the day on which such special term is to convene; provided, that no special term of such circuit courts shall be appointed in any of the said districts, except by and with the concurrence and consent of the circuit judge."¹⁷

Author's section.

The act of 1890 fixing terms in the western district provided that "hereafter" the circuit and district courts shall be held at the places named, "instead of at the times now provided by law." This would seem to apply to regular terms and hence not to repeal the provision of R. S. § 668, quoted above, as to special circuit court terms in Virginia districts.

§ 351. — Washington.

In the eastern district, regular terms of both circuit and district courts are held at Spokane on the first Tuesday in September and April; at Walla Walla on the first Tuesdays in December and June; at North Yakima on the first Tuesdays in May and October. In the western district regular terms are held at Seattle on the first Tuesdays in November and May; and at Tacoma on the first Tuesdays in February and July. It is specially provided that the "terms of said courts shall not be limited to any particular number of days, nor shall it be necessary to adjourn by reason of the intervention of a term elsewhere; but the court intervening may be adjourned until the business of the court in session is concluded."¹⁸

Author's section.

§ 352 — West Virginia.

In the northern district of West Virginia terms of circuit and district courts are held at Martinsburg, on the second Tuesday in May;¹ at Wheeling, on the first Tuesday of April and third Tuesday of September; at Clarksburg on the third Tuesday of April and first Tuesday of October; and at Martinsburg on the third Tuesday of October. A term of the circuit court is held at Parkers-

¹⁶Act Feb. 28, 1906, c. 3576, 34 Stat. 546, amending act of Feb. 3, 1903, c. 398, 32 Stat. 794.

¹⁷R. S. § 668, U. S. Comp. Stat. 1901, p. 544.

¹⁸Act Mar. 2, 1905, c. 1305, 33 Stat. 825, U. S. Comp. Stat. 1905, pp. 128, 129.

¹Act Feb. 24, 1904, c. 163, 33 Stat. 50, U. S. Comp. Stat. 1905, p. 130.

burg on the second Tuesdays of January and June. In the southern district terms of circuit and district court are held at Lewisburg on the second Tuesday in February;² at Huntington, the first Tuesday in April and the first Tuesday after the third Monday in September; at Bluefield, the first Tuesday in May and the third Tuesday in October; at Charleston, the first Tuesday in June and the third Tuesday in November.³ An act of 1903⁴ provides that "the regular term" of the district court in the southern district shall be held at Addison on the first Monday in September. Terms are not limited to any particular number of days nor is it necessary to adjourn because a term elsewhere intervenes; but the latter shall be adjourned until the business of the court in session is concluded.⁵ By R. S. § 584 quoted elsewhere⁶ the district court clerks in Tennessee are given power to adjourn a term of court for nonattendance of the judge.

Author's section.

The title of the act of 1903 as to the Addison term is "An act to establish a regular term of United States district court in Addison, West Virginia," and hence the act should not be construed as repealing prior statutes as to terms elsewhere in the southern district because providing that "the regular term" be at Addison.

§ 353. — Wisconsin, regular and special terms.

In the eastern district of Wisconsin terms of circuit and district court are held at Milwaukee, on the first Mondays of January and October; at Oshkosh on the second Tuesday of June; and at Green Bay the first Tuesday in April.⁸ In the western district terms of circuit and district courts are held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September;⁹ and at Superior, the third Tuesday in June.¹⁰ The district courts in both districts are required to be open at all times for the purpose of hearing and deciding admiralty causes so far as that can be done without a jury.¹¹ The provisions of R. S. § 668 quoted above as governing

²Act Apr. 28, 1904, c. 1802, 33 Stat. 548, U. S. Comp. Stat. 1905, p. 131.

³Act June 4, 1902, c. 989, 32 Stat. 304.

⁴Act Jan. 31, 1903, c. 346, 32 Stat. 791.

⁵Act Jan. 22, 1901, c. 105, 31 Stat. 737, U. S. Comp. Stat. 1901, p. 442.

⁶Ante, § 314.

⁸Act Mar. 28, 1904, c. 849, 33 Stat. 152, U. S. Comp. Stat. 1905, p. 131.

⁹Act Aug. 5, 1886, c. 932, 24 Stat. 337, U. S. Comp. Stat. 1901, p. 443.

¹⁰Act May 26, 1900, c. 591, 31 Stat. 219, U. S. Comp. Stat. 1901, p. 444.

¹¹R. S. § 576, U. S. Comp. Stat. 1901, p. 476.

the holding of special circuit court terms in Virginia,¹² governs also the holding of such terms in Wisconsin.

Author's section.

§ 354. — Wyoming, regular and additional terms.

In the district of Wyoming, terms of circuit and district court are held at Cheyenne, on the second Monday of May and November;¹⁴ at Evanston, on the second Tuesday in July,¹⁵ and at Sheridan one session annually. Additional terms of circuit and district court may be held at any other place within the State of Wyoming or the Yellowstone National Park at such dates as the said courts may order.¹⁶

Author's section.

§ 355. General provision as to special circuit court sessions.

In the districts not mentioned in the five preceding sections, [i. e., R. S. §§ 664–668, dealing with special circuit court terms in California, Indiana, Kentucky, Mississippi, North Carolina, Nevada, Oregon, Tennessee, Virginia and Wisconsin] the presiding judge of any circuit court may appoint special sessions thereof, to be held at the places where the regular sessions are held.

R. S. § 669, U. S. Comp. Stat. 1901, p. 545.

As the above provision refers to districts existing when the Revised Statutes were adopted, it does not seem broad enough to authorize special circuit court sessions to-day in any district created since their adoption. Special sessions are not required to be of any particular length.¹⁷

§ 356. Business that may be transacted at special circuit court sessions.

At any special term of a circuit court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia, and Wisconsin, any business may be transacted which might be transacted at any regular term of such court. At any special term of a circuit court in any other district, it shall be competent for the court to entertain jurisdiction of and to hear and decide all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment,

¹²Ante, § 350.

¹⁶Act May 7, 1894, c. 72, § 6. 28

¹⁴Act July 5, 1892, c. 145, § 8, 27 Stat. 75, U. S. Comp. Stat. 1901, Stat. 73, U. S. Comp. Stat. 1901, p. 1564.

p. 1446.

¹⁸Pitman v. United States, 45 Fed.

¹⁵Act April 13, 1906, c. 1619, 34 Stat. 159.

Stat. 111.

motion for a new trial, and all other motions, and to award executions and other final process, and to do and transact all other business, and direct all other proceedings, in all causes pending in the circuit court, except trying any cause by a jury, in the same way and with the same effect as the same might be done at any regular session of said court.

R. S. § 670, U. S. Comp. Stat. 1901, p. 545.

Under this and the preceding section a motion to remand may be properly entertained.²⁰

§ 357. Special circuit court sessions for criminal cases.

Any circuit court may, at its own discretion, or at the discretion of the Supreme Court, hold special sessions for the trial of criminal causes.

R. S. § 661, U. S. Comp. Stat. 1901, p. 542.

This provision was originally enacted in 1789.¹ Early cases hold that the court may hear not only cases existing at the time of the ordering of the special session, but also those arising subsequently,² but that no cause can be heard which was pending at the last session.³

§ 358. Special circuit criminal sessions near place of alleged offense.

The Supreme Court, or, when that court is not sitting, any circuit justice or circuit judge, together with the judge of the proper district, may direct special sessions of a circuit court to be held, for the trial of criminal causes, at any convenient place within the district nearer to the place where the offenses are said to be committed than the place appointed by law for the stated sessions. The clerk of such court shall, at least thirty days before the commencement of such special session, cause the time and place for holding it to be notified, for at least three weeks, consecutively, in one or more of the newspapers published nearest to the place where it is to be held. All process, writs, and recognizances respecting juries, witnesses, bail, or otherwise, which relate to the cases to be tried at such special session, shall be considered as belonging to such ses-

²⁰Kansas City, etc. R. Co. v. Lumber Co. 37 Fed. 3.

¹Act Sept. 24, 1789, c. 20, § 5, 1 Stat. 75.

²United States v. Williams, 4 Cr. C. C. 379, Fed. Cas. No. 16,712.

³Memorandum, 4 Cr. C. C. 337, Fed. Cas. No. 9,411. See also, United States v. Cornell, 2 Mason, 91, Fed. Cas. No. 14,868.

sions, in the same manner as if they had been issued or taken in reference thereto. Any such session may be adjourned from time to time to any time previous to the next stated term of the court; and all business depending for trial at any special session shall, at the close thereof, be considered as removed to the next stated term.

R. S. § 662, U. S. Comp. Stat. 1901, p. 542.

This provision, which includes capital cases,⁴ regards the place of trial while the preceding section regards the time.⁵ It vests the court with discretion and a change in the place of trial will not be made when it works an inconvenience.⁶ The order of a special session may be made by the judge out of court.⁷

§ 359. General provision as to special district court terms.

A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. And any business may be transacted at such special term which might be transacted at a regular term.

R. S. § 581, U. S. Comp. Stat. 1901, p. 477.

§ 360. Monthly adjournments of district court for criminal causes.

District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

R. S. § 578, U. S. Comp. Stat. 1901, p. 476.

The above provision was enacted in 1842.⁹

§ 361. Intermediate district court terms in California, Iowa and Tennessee.

Whenever the judge of any district court in the districts of California, Iowa, and Tennessee fails to hold any regular term thereof, it shall be his duty, if it appears that the business of the

⁴United States v. Cornell, 2 Mason, 91, Fed. Cas. No. 14,868.

⁷United States v. Williams, 4 Cr. C. C. 372, Fed. Cas. No. 16,712.

⁵United States v. Williams, 4 Cr. C. C. 372, Fed. Cas. No. 16,712.

⁹Act Aug. 23, 1842, c. 188, § 3, 5 Stat. 517.

⁶United States v. Insurgents, 3 Dall. 513, Fed. Cas. No. 15,442.

court requires it, to hold an intermediate term. Such intermediate term shall be appointed by an order under his hand and seal, addressed to the clerk and marshal at least thirty days previous to the time fixed therein for holding it, and the order shall be published the same length of time in the several newspapers published within such districts respectively. And at such intermediate term the business of the court shall have reference to and be proceeded with in the same manner as if it were a regular term.

R. S. § 586, U. S. Comp. Stat. 1901, p. 479.

§ 362. Adjournment of circuit court sessions in absence of judges.

If neither of the judges of a circuit court is present to open any session, the marshal may adjourn the court from day to day until a judge is present: Provided, that if neither of them attends before the close of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court to the next regular term.

R. S. § 671, U. S. Comp. Stat. 1901, p. 545.

The opening of the court by the marshal under the above provision is a ministerial act only, and the fact that it occurs on Sunday does not render it necessarily void.¹¹

§ 363. Adjournment of circuit court by judge's written order.

If neither of the judges of a circuit court be present to open and adjourn any regular or adjourned or special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term.

R. S. § 672, U. S. Comp. Stat. 1901, p. 546.

The words "any regular adjourned or special session" refer to any day at which a court is appointed to sit.¹³ A "written order" has been held to include a telegraph but not a telephone order.¹⁴ Omission to make such an order does not cause the term to lapse, but if properly commenced it will continue until final adjournment, unless previously terminated by the court or by law.¹⁵

¹¹Puleston v. United States, 85 Fed. 575.

¹³Pitman v. United States, 45 Fed. 159.

¹⁴Schofield v. Cattle Co. 65 Fed. 433.

¹⁵Idem; and see United States v. Pitman, 147 U. S. 669, 37 L. ed. 324, 13 Sup. Ct. Rep. 425.

§ 364. Adjournment of district court for non-attendance of judge.

If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

R. S. § 583, U. S. Comp. Stat. 1901, p. 478.

§ 365. Circuit court always open in equity for certain purposes.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a circuit court may, upon reasonable notice to the parties, make and direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court.

R. S. § 638, U. S. Comp. Stat. 1901, p. 519.

An act of 1890 provides that the circuit court shall always be open for the purpose of hearing appeals from the board of general appraisers.¹⁷ The district courts also are always open in admiralty and equity for certain purposes.¹⁸ Under this section a motion for an attachment for contempt in equity may be made at any time.¹⁹ The first equity rule, promulgated by the Supreme Court in 1842,²⁰ provides as follows: "The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits."

§ 366. — always open for certain commerce proceedings.

For the purposes of this act, [i. e., the Commerce act of 1887 as amended 1889] excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

Part of § 16, act Feb. 4, 1887, c. 104, 24 Stat. 384, as amended June 29, 1906, c. 3591, 34 Stat. 592.

¹⁷Post, § 367.

¹⁸Post, § 368.

¹⁹Vose v. Reed, 1 Woods, 647, Fed. Cas. No. 17,011.

²⁰See post, § 802.

The above is the concluding provision of § 16 of the act of 1887 as amended in 1906. The other portions are given in a subsequent chapter of this code.¹

§ 367. — always open for appeals from general appraisers.

For the purposes of this section [i. e., providing appeals from the Board of General Appraisers]³ the circuit courts of the United States shall be deemed always open.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

§ 368. District court always open in admiralty or equity for certain purposes.

The district courts, as courts of admiralty, and as courts of equity, so far as equity jurisdiction has been conferred upon them, shall be deemed always open, for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court.

R. S. § 574, U. S. Comp. Stat. 1901, p. 475.

This section was enacted in 1842.⁵ Its provisions are substantially the same as those provided for the circuit court under the first equity rule⁶ and under R. S. § 638.⁷ A session of the court is held whenever business, as described by this provision or by R. S. § 638, is transacted by a judge between regular terms.⁸

§ 369. Alteration of terms not to affect suit or process.

No action, suit, proceeding, or process in any district[or circuit]¹⁰ court shall abate or be rendered invalid by reason of any act changing the time of holding such court; but the same shall be deemed

¹Post, §§ 1345, et seq.

³See ante, § 140.

⁵Act Aug. 23, 1842, c. 188, § 5, 5 Stat. 517.

⁶Central Trust Co. v. Coal etc. Co. 1901, p. 542.

60 Fed. 15.

⁷Ante, § 365.

⁸Butler v. United States, 87 Fed.

¹⁰R. S. § 660, U. S. Comp. Stat.

to be returnable to, pending, and triable in the terms established next after the return day thereof.

R. S. § 573, U. S. Comp. Stat. 1901, p. 475.

§ 370. Causes not discontinued by new term.

When the trial or hearing of any cause, civil or criminal, in a circuit or district court, has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; and the court may proceed therein and bring it to a conclusion, in the same manner and with the same effect as if another stated term of the court had not intervened.

R. S. § 746, U. S. Comp. Stat. 1901, p. 590.

This section was carried into the Revised Statutes from an act of 1855.¹¹ A trial is commenced and is in progress within the meaning of its terms although a full jury is not empaneled before the term ends.¹²

¹¹Act Mar. 2, 1855, c. 140, 10 Stat. 630.

¹²United States v. Lougherty, 13 Blatchf. 267, Fed. Cas. No. 15,631.

CHAPTER 11.

COURT RECORDS AND PLACES WHERE KEPT.

- § 378. Records of Supreme Court and Court of Claims.
- § 379. Records of circuit court of appeals.
- § 380. Records of the old court of appeals.
- § 381. Particular provisions as to circuit and district court records in various districts.
- § 382. General provision as to district court records.
- § 383. Transfer of records of territorial courts on State's admission.
- § 384. Duty of district judge to demand territorial court records.
- § 385. Duty of clerk to keep indexes to records.
- § 386. Duty to keep bankruptcy indexes.
- § 387. Certified copy of original records lost or destroyed.
- § 388. Proof of substance of record where no copy obtainable.
- § 389. Record in appellate court may replace lost record below.
- § 390. Mode of giving notice, and proof thereof in proceedings to restore records.
- § 391. Copies to supply originals in cases where United States are parties, —force and effect of copies substituted for lost originals.
- § 392. Restoration of records in cases where United States are parties, —compensation, etc.
- § 393. All official records and dockets open for investigation.
- § 394. Records of abolished circuit court commissioners.
- § 395. Records kept by United States commissioners.
- § 396. Affidavit to supply State court record when certified copy refused.

§ 378. Records of Supreme Court and Court of Claims.

The Supreme Court rules require the clerk to "reside and keep the office at the seat of the national government" and inferentially make him the custodian of its records by forbidding "any original record or paper to be taken from the court room, or from the office, without an order from the court."¹ The law requires the Court of Claims to hold sessions at Washington,² and its rules make its clerk there resident, custodian of its records.

Author's section.

§ 379. Records of circuit court of appeals.

Rules of the circuit courts of appeals in the several circuits

¹See Supreme Court Rule 1 in appendix.

²Ante, § 308.

³See rules in appendix.

require the clerk of the court to keep an office at the place in the circuit where the circuit court of appeals act requires an annual term to be held;⁴ and to "carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein."⁵ The acts requiring terms at other places in certain districts have not required a deputy clerk's office at such places or the keeping of records there.⁶

Author's section.

§ 380. Records of the old court of appeals.

The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them in the manner provided by law for giving copies of the records and proceedings of the Supreme Court; and such copies shall have like faith and credit with all other proceedings of said court.

R. S. § 679, U. S. Comp. Stat. 1901, p. 559.

This provision was enacted in 1792.⁸

§ 381. Particular provisions as to circuit and district court records in various districts.

There are a number of special statutory provisions as to the place where circuit and district court records shall be kept where the courts meet at more than one place within a district and especially where districts have been divided into divisions. In other cases the failure to make such provision has resulted in the establishment of depositaries of the records of circuit and district courts without specific statutory authority which could be produced here. Thus, the district judges are authorized, where court is held at more than one place in the district, to designate places of keeping their records where Congress has failed to do so.⁹ Directions for the appointment of deputy clerks to reside at places within a district where terms of court are held are found in the statutes regulating the organization of the Federal courts in many States, and these very strongly imply an intent on the part of Congress to have the

⁴Ante § 309.

⁵See Rules 5 and 27 of those courts in Appendix.

⁶See ante, §§ 310, 311.

⁸Act May. 8, 1792, § 12, c. 36, 1 Stat. 279.

⁹Post, § 382.

records of causes there cognizable, kept at such place.¹⁰ A provision that process in suits against residents of certain counties shall be returnable to the terms of court held at a place therein, with directions for terms of court at that place, would not necessarily imply that records should be kept there, at least, in the absence of a provision requiring a deputy clerk there resident.¹¹ In the case of California,^[a] Colorado,^[b] Georgia,^[c] Illinois,^[d] Indiana,^[e] Kentucky,^[f] Michigan,^[g] Minnesota,^[h] Mississippi,^[i] Missouri,^[j] North Carolina,^[k] Pennsylvania,^[l] Tennessee,^[m] and Virginia,^[n] there are more or less complete provisions as to the places of keeping court records. The practitioner must often ascertain the status in his own State, district, and division from a local rule of court or perhaps even from local custom. Aside from the statutory provisions on the subject of court records below referred to, there have frequently been special provisions temporary in character and operation, requiring that the records in causes transferred to a newly created judicial division or district be transmitted to the clerk in such new district or division to be there proceeded with.¹² Provisions respecting records as evidence are contained in the chapter of evidence.¹³

Author's section.

[a] California.

The clerks of the circuit and district courts of the northern district of California retained the records and files of said courts when they had jurisdiction over all of California prior to its division into two districts, at the city of San Francisco. They are authorized at the request of the district judge of the southern district, and at the cost of the parties requiring the same, to make transcripts of any of the records, files or papers of the district and circuit courts of the United States remaining in their offices and of all matters or proceedings which relate to or concern liens upon or titles to real estate situated in the southern district, "and such transcripts, when so made by either of said clerks, shall be certified to be true and correct by the clerk making the same, and the same, when so made and certified and filed in the proper court, shall constitute the record in such court, and shall be evidence in all courts and places equally with said originals."¹⁴ The act creating two divisions in the southern district required the clerk's office to be in Los Angeles, "where all records for said courts may be kept

¹⁰See post, § 569.

183, § 7, 32 Stat. 66, U. S. Comp. Stat. 1903, p. 69.

¹¹See act as to the two divisions in the southern district of California.

¹³See post, § 1777 et seq.

Act May 29, 1900, c. 594, 31 Stat. 219, U. S. Comp. Stat. 1901, p. 326.

¹⁴Act Aug. 5, 1886, c. 928, 24 Stat. 308, U. S. Comp. Stat. 1901, p. 324.

¹²E. g. see act March 11, 1902, c.

and all duties performed, but should, in the judgment of the district judge and the clerk, the business of said courts hereafter warrant the employment of a deputy clerk at Fresno" then a deputy may be appointed to reside and keep his office at Fresno.¹⁵

[b] Colorado.

The act of 1879 dividing Colorado into three districts for district court purposes provided for keeping district court records at Denver, Pueblo and Del Norte.¹⁶ The act of 1880, abolishing the divisions, provided that the records of the district court in the several divisions "shall be kept and retained in the clerk's office of the district court of Colorado," i. e., at Denver.¹⁷ The act changing the place of holding court from Del Norte to Montrose provided for a transfer of all records, files and books of the circuit and district courts to Montrose.¹⁸

[c] Georgia.

The only reference to the place of keeping records, in the statutes affecting the courts in Georgia, is in the provision for the eastern division of the northern district that "all pleadings and other papers may be filed in the clerk's office of Atlanta."²⁰ The appointment of deputy clerks for divisions is made optional.¹

[d] Illinois.

There are provisions for deputy clerks with offices at different places in the northern and southern districts, where terms of court are held;² and a provision that in the southern district the clerks of circuit and district court shall keep an office at each place of holding court and "shall there keep the records, files and documents pertaining to the court of that division."³

[e] Indiana.

The deputy clerks appointed for the circuit and district court offices at Hammond and Fort Wayne are required to "keep in their offices such records as appertain to their offices, and . . . full records of all actions, proceedings and judgments in said courts."⁴ Each of the deputies for the district court in New Albany and Evansville must "keep in his office full records of all actions and proceedings in the district court" held there.⁵

¹⁵Act May 29, 1901, c. 594, § 9, 31 Stat. 220, U. S. Comp. Stat. 1901, p. 328.

¹⁶Act Feb. 15, 1879, c. 82, § 5, 20 Stat. 293.

¹⁷Act Apr. 20, 1880, c. 58, 21 Stat. 76.

¹⁸Act Feb. 16, 1903, c. 555, 32 Stat. 833.

²⁰Act Feb. 28, 1901, c. 621, 31 Stat. 818, U. S. Comp. Stat. 1901, p. 341.

¹See post, § 569.

²Post, § 569.

³Act Mar. 3, 1905, c. 1427, § 10, 33 Stat. 994, U. S. Comp. Stat. 1905, p. 92.

⁴Act Mar. 3, 1881, c. 154, § 2, 21 Stat. 511, Act Feb. 14, 1899, c. 155, § 2, 30 Stat. 836, U. S. Comp. Stat. 1901, p. 348, 349.

⁵R. S. § 559, U. S. Comp. Stat. 1901, p. 453.

[f] **Kentucky.**

The deputy district court clerk for the Owensboro division in Kentucky must "keep and preserve the records of the court at Owensborough."⁶

[g] **Michigan.**

In the western district the deputy clerk appointed for the circuit and district courts held at Marquette must "keep in his office full records of all actions and proceedings in the said circuit and district courts for the northern division of said district held at that place."⁷ In the eastern district the deputy clerks of the circuit and district courts at Bay City are required to keep "dockets and full records of all actions and proceedings" of those courts in the northern division of the district.⁸

[h] **Minnesota.**

The clerks of the circuit and district courts in Minnesota and their deputies are required to keep the records¹⁰ of those courts in each division at the place appointed for the terms of court.¹¹

[i] **Mississippi.**

In the northern district the circuit and district court clerk must keep an office in each division of the district and, with his deputy, "keep the records, files and documents pertaining to the court of that division" at the place where court is held therein.¹² In the southern district deputies are required to keep an office at various places therein, but nothing is said about records.¹³

[j] **Missouri.**

In Missouri there is a separate circuit and district court in each division of the two districts except the southwestern division of the western district,¹⁵ hence for each court there is a clerk at St. Louis, Hannibal, St. Joseph, Kansas City, Jefferson City and Springfield, who is required to keep "the records, files and documents pertaining to the court of his division."¹⁶ The law creating the southwestern division of the western district provided that all records of that court may be kept at Springfield except when the court is in session at Joplin within the division, but permits the appointment of a deputy clerk for Joplin and new books and records for the courts there, when in the district judge's opinion the business so war-

⁶Act Aug. 8, 1888, c. 792, § 3, 25 Stat. 390, U. S. Comp. Stat. 1901, p. 360.

⁷Act June 19, 1878, c. 326, § 4, 20 Stat. 176, U. S. Comp. Stat. 1901, p. 371.

⁸Act Apr. 30, 1894, c. 66, § 4, 28 Stat. 67, U. S. Comp. Stat. 1901, p. 374.

¹⁰Act Apr. 26, 1890, c. 167, § 5, 26 Stat. 73, U. S. Comp. Stat. 1901, p. 376.

¹¹See ante, § 330.

¹²Act June 15, 1882, c. 218, § 4, 22 Stat. 102, U. S. Comp. Stat. 1901, p. 379.

¹³Post, § 569.

¹⁵Ante, § 103, note.

¹⁶Act Feb. 28, 1887, c. 271, § 5, 24 Stat. 426, U. S. Comp. Stat. 1901, p. 387. The clerks at St. Louis and Jefferson City were established prior to this act under the earlier law dividing Missouri into two districts.

rants.¹⁷ A similar provision was made when the southeastern division of the eastern district was created with headquarters at Cape Girardeau.¹⁸ There is a provision of an act of 1887 reorganizing and dividing the Missouri districts, requiring the clerk to certify the record in any case transferred to another division and specifying his fees, but it is not clear that it applies to any except pending causes.¹⁹

[k] North Carolina.

In the eastern district a circuit and district court clerk was recently authorized for Wilmington, in addition to the one at Raleigh, who has "the custody and control of the records of said courts" at Wilmington.²¹ Clerks at Wilkesboro and Washington, N. C., were provided for by an act establishing terms at those places.¹

[l] Pennsylvania.

The act creating a third district in Pennsylvania, known as the middle district, provided for the enforcement of judgment and other liens in the new district based upon proceedings in one of the old districts by the obtaining of certified copies thereof and entering them in the court of the middle district.² The act of 1902 provided that in the middle district, the records of circuit and district courts should be kept at Scranton, "but the said courts may provide by rule for the keeping of provisional or temporary records at Harrisburg and Williamsport of such actions, suits or proceedings as may be there entered or brought. Nothing herein contained, however, shall be construed as requiring the removal to Scranton of the records of the late courts of the western district at Williamsport, but the same shall there remain as heretofore, under the control and direction of the courts of the middle district, as provided in the ninth section of the act, to which this is an amendment, and in the charge and custody of the respective clerks thereof."³

[m] Tennessee.

The act creating the northeastern division of the eastern district specifically provides that the clerk's office and records for said division may be kept at Knoxville, but that new books and records may be opened in Greeneville and a deputy there appointed if the district judge deem that business so warrants.⁴ There is no other statutory provision as to records in Ten-

¹⁷Act Jan. 24, 1901, c. 164, § 3, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 390. ¹⁸Act Mar. 3, 1905, c. 1437, 33 Stat. 1004, U. S. Comp. Stat. 1905, p. 106, 107.

¹⁹Act Jan. 31, 1905, c. 287, § 4, 33 Stat. 627, U. S. Comp. Stat. 1905, p. 103. ²¹Act Mar. 2, 1901, c. 801, § 7, 31 Stat. 881, U. S. Comp. Stat. 1901, p. 407.

¹Act Feb. 28, 1887, § 4, 24 Stat. 425. ²Act June 30, 1902, c. 1335, 32 Stat. 549, U. S. Comp. Stat. 1905, p. 108.

³Act Apr. 15, 1902, c. 508, 32 Stat. 106. ⁴Act Feb. 7, 1900, c. 10, § 3, 31 Stat. 5, U. S. Comp. Stat. 1901, p. 419.

¹Act Feb. 23, 1903, c. 749, 33 Stat. 490.

nessee, though there are several provisions as to deputy clerks for different divisions.⁵

[n] Virginia.

In the eastern district of Virginia the records of the district court are required by act of 1899,⁶ to be kept at the respective places where the said court meets therein.⁷ In establishing terms at Roanoke City and Bigstone Gap deputy clerks to reside at those places were provided and required to take "charge and custody of the court records and papers."⁸

§ 382. General provision as to district court records.

The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district, and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge.

R. S. § 562, U. S. Comp. Stat. 1901, p. 454.

This section was carried into the Revised Statutes from the judiciary act of 1789.⁹

§ 383. Transfer of records of Territorial courts on State's admission.

When any Territory is admitted as a State, and a district court is established therein, all the records of the proceedings in the several cases pending in the court of appeals of said Territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court, shall be transferred to and deposited in the district court for the said State.

R. S. § 567, U. S. Comp. Stat. 1901, p. 462.

Writs of error and appeals to the Supreme Court to review district court judgments in cases transferred to the district court are authorized by another section.¹⁰ This section was carried into the Revised Statutes from

⁵Post, § 569.

⁶Act Mar. 3, 1899, c. 452, § 3, 30 Stat. 1368. U. S. Comp. Stat. 1901, p. 454.

⁷See ante, § 350.

⁸Act June 30, 1902, c. 1339, 32 Stat. 551, Act Apr. 22, 1904, c. 1421, 33

Stat. 249, as amended June 28, 1906, c. 3576, 34 Stat. 546, U. S. Comp. Stat. 1905 p. 123, 125.

⁹Act Sept 24, 1789, c. 20 § 3, 1 Stat. 73.

¹⁰Ante, § 49.

acts of 1847¹¹ and 1848.¹² It was held that those acts applied to cases pending in the superior or appellate courts of a Territory, admitted as a State, if at the time of its admission it did not form part of a judicial circuit, but if attached to a circuit the transfer should be to the circuit court.¹³ The transfer of pending suits and of the files, records, etc., to the circuit, district or State courts, as the case may be, is usually provided for on the admission of a new State into the union.¹⁴

§ 384. Duty of district judge to demand Territorial court records.

It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein mentioned, the delivery thereof, to be deposited in said district court; and, in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of said records by attachments or otherwise, according to law.

R. S. § 568, U. S. Comp. Stat. 1901, p. 462.

§ 385. Duty of clerk to keep indexes to records.

The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

§ 2, of act Aug. 1, 1888, c. 729, 25 Stat. 357, U. S. Comp. Stat. 1901, p. 701.

§ 386. Duty to keep bankruptcy indexes.

The clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in

¹¹Act Feb. 22, 1847, c. 17, § 1, 9 Stat. 128.

¹²Act Feb. 22, 1848, c. 12, § 2, 9 Stat. 212.

¹³Express Co. v. Kountze, 8 Wall. 343, 19 L. ed. 457.

¹⁴Idaho: act July 3, 1890, c. 656, 34 Stat. 276, 277.

§ 18, 26 Stat. 218; North and South Dakota, Montana and Washington: act Feb. 22, 1889, c. 180, § 22, 25 Stat. 683; Wyoming: act July 10, 1890, c. 664, § 17, 26 Stat. 225, 226; Oklahoma: act 1906, c. 33, 35, §§ 16, 18, 34 Stat. 276, 277.

said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

§ 71 of Bankrupt act, added by act Feb. 5, 1903, c. 487, § 17, 32 Stat. 800, U. S. Comp. Stat. 1905, p. 691.

§ 387. Certified copy of original records lost or destroyed.

When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had.

R. S. § 899, U. S. Comp. Stat. 1901, p. 675.

This provision was enacted in 1871.¹ It does not change the established rule as to secondary evidence.² Under it and the following section lost records in bankruptcy have been supplied.³

§ 388. Proof of substance of record where no copy obtainable.

When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to

¹Act Mar. 3, 1871, c. 111, § 1, 16 Stat. 474.

²*Cornett v. Williams*, 20 Wall. 226, 22 L. ed. 254.

³*In re Friedlob*, 19 N. B. R. 122, Fed. Cas. No. 5,118.

be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed.

R. S. § 900, U. S. Comp. Stat. 1901, p. 675.

§ 389. Record in appellate court may replace lost record below.

When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

R. S. § 901, U. S. Comp. Stat. 1901, p. 675.

§ 390. Mode of giving notice, and proof thereof, in proceedings to restore records.

In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal.

R. S. § 902, as amended by § 1 of act Jan. 31, 1879, c. 39, 20 Stat. 277, U. S. Comp. Stat. 1901, p. 676.

As originally enacted, this and the two following sections applied only to the records of the district and circuit court for the northern district of Illinois, which had been destroyed. The amending act above cited extended their application to all Federal courts, and added further provisions.

§ 391. Copies to supply originals in cases where United States are parties,—force and effect of copies substituted for lost originals.

A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk or other certifying or recording officer of any court of the United States, made in

pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers or records of any court of the United States have been or shall be lost or destroyed, the files, records and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to.

R. S. § 903, as amended by § 2, act Jan. 31, 1879, c. 39, 20 Stat. 277, U. S. Comp. Stat. 1901, p. 676.

See note to preceding section.

§ 392. Restoration of records in cases where United States are parties,—compensation, etc.

Whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files to be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney General of the United States,

upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.

R. S. § 904, as amended by § 3, act Jan. 31, 1879, c. 39, 20 Stat. 278, U. S. Comp. Stat. 1901, pp. 676, 677.

§ 393. All official records and dockets open for investigation.

The sundry civil appropriation acts since 1884 have contained an appropriation for the detection and prosecution of crimes against the United States preliminary to indictment; the investigation of official acts, records, and accounts of marshals, attorneys, clerks of the United States courts, and United States commissioners, "for which purpose all the records and dockets of said officers, without exception, shall be examined by the agents of the Attorney General at any time."⁶

Author's section.

§ 394. Records of abolished circuit court commissioners.

The act abolishing the office of circuit court commissioner provided that the commissioners should deposit "all the records and other official papers appertaining to their offices in the office of the clerk of the circuit court by which they were appointed."⁷

Author's section.

§ 395. Records kept by United States commissioners.

[United States] commissioners shall keep a complete record of all proceedings before them in criminal cases, in a well-bound book, which record book shall be delivered to and preserved by the clerk of the district court for such district on the death, resignation, removal, or expiration of term of the commissioner, for which record the commissioner shall receive no compensation.

Part of § 21, act May 28, 1896, c. 252, 29 Stat. 185, U. S. Comp. Stat. 1901, p. 653.

§ 396. Affidavit to supply State court record when certified copy refused.

In any case where a party is entitled to copies of the record and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court,

⁶See provision for 1906, in act June 30, 1906, c. 3914, 34 Stat. 752. ⁷Act May 28, 1896, c. 252, § 19, 29 Stat. 184.

upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such record and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit, or otherwise, as the circumstances of the case may require and allow; and, thereupon, such proceeding, trial and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

R. S. § 645, U. S. Comp. Stat. 1901, p. 523.

CHAPTER 12.

VENUE IN CIVIL AND CRIMINAL CAUSES.

- § 401. In what district suit may be brought.
- § 402. Place of suit in States containing several districts.
- § 403. Local suits where property lies in different districts of same State.
- § 404. —suits to enforce liens, etc., where property in different districts.
- § 405. Venue of civil causes and courts to which process is returnable in districts containing judicial divisions.
- § 406. Place of trial of offenses where district contains judicial divisions.
- § 407. Effect of change in territorial area of judicial district or of creation of divisions therein, upon pending causes.
- § 408. Provisions for trial of issues of fact where district contains judicial divisions.
- § 409. Transfer of causes for trial to another place within district.
- § 410. Provisions for transfer of cause by consent to another division.
- § 411. Change of venue to proper division in Mississippi where improperly brought.
- § 412. Venue on removal from State court in districts containing judicial divisions.
- § 413. Concurrent jurisdiction of southern and eastern districts over New York harbor.
- § 414. Place of return of process in western New York district.
- § 415. Venue of proceedings by National Bank to enjoin comptroller.
- § 416. Venue of patent infringement suits.
- § 417. Venue of suits against surety companies on bonds and recognizances.
- § 418. Venue of suits for combinations in restraint of import trade.
- § 419. Venue of partition suit where United States are parties.
- § 420. Venue of suits for internal revenue taxes.
- § 421. Venue of suits for penalties and forfeitures.
- § 422. Venue of proceedings for forfeitures.
- § 423. —for trade with insurrectionary districts.
- § 424. —for forfeiture of captured insurrectionary property.
- § 425. Venue of suits, civil and criminal, under submarine cable law.
- § 426. Place of trial in criminal causes.
- § 427. Place of trial of offenses punishable with death.
- § 428. Offenses on high seas and out of any district, where tried.
- § 429. Crimes on Pacific Islands deemed on American vessel.

- § 430. Offenses begun in one district and completed in another.
- § 431. Venue of equity proceedings against carriers for discrimination.
- § 432. —of proceedings by carriers against Commerce Commission.
- § 433. —of forfeiture proceedings against carrier violating Commission's order.
- § 434. —of proceedings to enforce Commission's orders.
- § 435. Venue of offense of issuing false passports.

§ 401. In what district suit may be brought.

No persons shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,^[a]~~but~~^[ccc] where the jurisdiction is founded only on the fact that the action is between citizens of different States,^[d] suit shall be brought only in the district of the residence of either the plaintiff or the defendant.^[e]~~and~~^[f]

Part of §1, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended act Mar. 3, 1887, c. 373, § 1, 24 Stat. 552, and corrected act Aug. 13, 1888, c. 866, § 1, 25 Stat. 434, U. S. Comp. Stat. 1901, p. 508.

[a] In general.

The omitted portion of the above section that still remains in force, prescribes the jurisdiction of the circuit court and is set forth in an earlier chapter.¹ Part of it, relating to the appellate jurisdiction of the circuit courts, has been superseded by the act establishing the circuit court of appeals.² The section is somewhat similar in terms to a provision of the judiciary act of 1789.³ That provision was held not to distinguish between those that are inhabitants of a district and those domiciled abroad, so as to protect the former and not the latter, and to indicate the intention of Congress that the latter should not be subject to process of the circuit courts.⁴ As this provision stood in the act of 1875, it contained an alternative clause following the word "inhabitant," and reading as follows: "Or in which he shall be found at the time of serving such process or commencing such proceeding." The amending act of 1887 omitted this clause and inserted instead the clause beginning "but where the jurisdiction is founded," etc., which is added by way of proviso to the next preceding clause.

[b] To what suits applicable.

The above provision does not apply to all Federal suits. Thus where exclusive jurisdiction is conferred on the Federal courts by special acts

¹Ante, §§ 129, et seq.

²See ante, § 77.

³Act Sept. 24, 1789, c. 20 § 11, 1 Stat. 79.

⁴Toland v. Sprague, 12 Pet. 329, 9 L. ed. 1093.

passed prior to the above enactment the jurisdiction thus conferred is not affected by the enactment.⁶ Apparently it is confined to cases in which the jurisdiction is concurrent with that of the State courts, the act from which it is taken dealing only with that class of cases.⁷ Hence it does not apply to suits for infringement of patent, jurisdiction in such cases being derived from earlier and special acts.⁸ Prior to an act of 1897 such suits could be prosecuted in any place where the defendant could be served.⁹ By the act just mentioned, however, such suits can now be prosecuted only in the district in which the defendant is an inhabitant, or in the district where the act is committed and where the defendant has established a place of business.¹⁰ So also, the section does not apply to suits for damages for overcharging under the interstate commerce act,¹¹ nor does it apply to admiralty suits;¹² and a libel in personam may be maintained against a corporation by attachment of its goods in a district not within the State of its incorporation.¹³ A suit brought by the United States against an individual is not a suit "between citizens of different States" within the meaning of the second clause of the above provision.¹⁴

[c] Suits by and against aliens.

While the above provision in terms forbids the bringing of civil suit except one founded solely on diverse citizenship "against any person" in any other district than that whereof he is an inhabitant, the words apply only to those persons who are inhabitants of the United States.¹⁵ Hence an alien defendant whether a natural person or a corporation being assumed not to reside in the United States may be sued in any district where valid service may be had.¹⁶ But such alien can sue a citizen in the Federal courts only in the district in which the defendant is an inhabi-

⁶Van Patten v. Chicago, etc. R. Co. 74 Fed. 988.

⁷See In re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; Van Patten v. Chicago, etc. R. Co. 74 Fed. 987; Westinghouse, etc. Co. v. Great Northern Ry. 88 Fed. 260, 31 C. C. A. 525.

⁸In re Keasbey, etc. Co. 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; Noonan v. Athletic Club Co. 75 Fed. 335; Southern Pac. Co. v. Earl, 82 Fed. 694, 27 C. C. A. 185; Westinghouse, etc. Co. v. Great Northern Ry. 88 Fed. 261, 31 C. C. A. 525; Lederer v Rankin, 90 Fed. 449. But see National, etc. Co. v. Pope, etc. Co. 56 Fed. 849; Gorham, etc. Co. v. Watson, 74 Fed. 418.

⁹Bowers v. Atlantic, etc. Co. 104 Fed. 890.

¹⁰Post, § 416; Bowers v. Atlantic, etc. Co. 104 Fed. 888.

¹¹Van Patten v. Chicago, etc. R. Co. 74 Fed. 986.

¹²In re Louisville Underwriters, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587. The same construction was given to a similar provision of the judiciary act of 1789, in Atkins v. Disintegrating Co. 18 Wall. 272, 21 L. ed. 841.

¹³Atkins v. Disintegrating Co. 18 Wall. 272, 21 L. ed. 841.

¹⁴United States v. Southern Pac. R. Co. 49 Fed. 301; United States v. Northern Pac. R. Co. 134 Fed. 718, 67 C. C. A. 269.

¹⁵In re Hohorst, 150 U. S. 660, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221.

¹⁶In re Hohorst, 150 U. S. 661, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; Barrow S. S. Co. v. Kane, 170 U. S. 112, 42 L. ed. 968, 18 Sup. Ct. Rep. 530; Galveston, etc. Ry. v. Gongales, 151 U. S. 507, 38 L. ed. 258, 14 Sup. Ct. Rep. 401 as to when valid service is made on corporation, see *infra* [ccc].

tant.¹⁷ Hence such suit brought against a nonresident defendant will be dismissed,¹⁸ even though such defendant is a corporation and carries on business in the State in which suit is brought.¹⁹ Where the State under the laws of which such defendant is incorporated is divided into districts it is held that suit must be brought in the district in which the principal place of business is located.²⁰

[cc] Suits against domestic corporations.

Under the original act of 1875, allowing suit against a defendant in that district in which he was an inhabitant or "in which he shall be found," a corporation could be sued in any district in which it carried on business and had a general agent.³ The amendment of 1887-1888 however struck out the above quoted clause and substituted the proviso as to diverse citizenship set forth in the above section. The result is that except in cases where jurisdiction is founded solely on diverse citizenship, and those cases in which the defendant corporation is an alien,⁴ the defendant can be sued only in the district of its residence.⁵ It being established that such corporation cannot be considered a citizen, inhabitant or resident of a State other than that of its incorporation⁶ it follows that such corporation can be sued only in that State although it carry on business elsewhere.⁷ In case the State of incorporation is divided into districts the suit must be brought in the district in which the general business of the corporation is done.⁸

[ccc] When corporation deemed found within district.

In all suits brought against corporations organized under the laws of a foreign country, whether jurisdiction is based upon alienage or the existence of a Federal question, and in suits where jurisdiction rests exclusively on diverse citizenship and plaintiff has elected to sue in the district of his

¹⁷Galveston, etc. Ry. v. Gonzales, 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 151 U. S. 506, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; Campbell v. Duluth, etc. Ry. 50 Fed. 242; Harold v. Iron, etc. Min. Co. 33 Fed. 529.

¹⁸Harold v. Iron, etc. Co. 33 Fed. 529.

¹⁹Campbell v. Duluth, etc. Ry. 50 Fed. 242.

²⁰Galveston, etc. Ry. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401. See, however, dissenting opinion holding such suit may be brought in any district of State.

³In re Keasbey, etc. Co. 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273.

⁴See supra note [c].

⁵In re Keasbey, etc. Co. 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273.

⁶In re Keasbey, etc. Co. 160 U. S.

228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273; Galveston, etc. Ry. v. Gonzales, 151 U. S. 501, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; Shaw v. Mining Co. 145 U. S. 453, 36 L. ed. 768, 12 Sup. Ct. Rep. 935.

⁷Shaw v. Mining Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; In re Keasbey, etc. Co. 160 U. S. 229, 40 L. ed. 404, 16 Sup. Ct. Rep. 273; Galveston, etc. Ry. v. Gonzales, 151 U. S. 502, 506, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; United States v. Shotter Co. 110 Fed. 1; Platt v. Massachusetts, etc. Co. 103 Fed. 705; Southern Pac. R. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44.

⁸Galveston, etc. Ry. v. Gonzales, 151 U. S. 496, 40 L. ed. 404, 14 Sup. Ct. Rep. 401. See, however, dissenting opinion.

own domicile, the question whether the corporation defendant is found within the district arises. Such corporation defendant is "found" within a State when it is engaged in business therein⁹ and service of process is made upon an agent therein so far representing it that he may be held in law its agent to receive such process.¹⁰ Many States have provided by statute that such corporations shall appoint an agent residing in the State upon whom process may be served.¹¹ But jurisdiction may be obtained by service on an agent not so appointed.¹² Service on a financial agent, unauthorized to accept service has been held sufficient.¹³ But service on the president of such corporation casually within the State in which the corporation does not transact business is not;¹⁴ nor is service on a passenger agent for a railroad whose sole duty is to solicit travel;¹⁵ nor is service on the directors of a corporation sufficient, although residents, where it had ceased to do business within the State at the time.¹⁶

[d] Suits between citizens of different States.

Where the suit is between citizens of different States it may be brought in the district of the residence of either party. If there is more than one plaintiff or defendant the suit must be brought either in the district where all the plaintiffs reside or in the district where all the defendants reside.²⁰ Thus where there are two or more plaintiffs, each a citizen of a different State, and suing a citizen of another State, such suit may be maintained in the district in which the defendant resides,¹ though it cannot be maintained in that of either of the plaintiffs.² So also where several defendants are sued by a nonresident plaintiff all such defendants must be residents of the district in which the suit is brought.³ By a special act of Congress, which, although passed before the above provision, was not

⁹Earle v. Chesapeake Ry. 127 Fed. 235; Central Grain, etc. Exchange v. Board of Trade, 125 Fed. 466.—C.C. A.

¹⁰See St. Clair v. Coe, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Connecticut Mutual L. Ins. Co. v. Spratley, 172 U. S. 616, 43 L. ed. 574, 9 Sup. Ct. Rep. 308; Central Grain, etc. Co. v. Board of Trade, 125 Fed. 467; Eldred v. Palace Car. Co. 105 Fed. 456, 45 C. C. A. 1; Revans v. Southern, etc. R. R. 114 Fed. 983; Van Dresser v. Navigation Co. 48 Fed. 202.

¹¹Barrow S. S. Co. v. Kane, 170 U. S. 107, 42 L. ed. 967, 18 Sup. Ct. Rep. 526.

¹²Idem: Connecticut Mutual L. Ins. Co. v. Spratley, 172 U. S. 618, 43 L. ed. 574, 19 Sup. Ct. Rep. 308; Mutual, etc. Assn. v. Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

¹³In re Hohorst, 150 U. S. 663, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221.

¹⁴Buffalo G. Co. v. Manufacturers' G. Co. 142 Fed. 273; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; for other cases in which service has been held insufficient, see Fairbanks Co. v. Cincinnati, etc. Ry. 54 Fed. 420, 4 C. C. A. 403, 38 L.R.A. 271; Evansville, etc. Co. v. United Press, 74 Fed. 918.

¹⁵Maxwell v. Railroad Co. 34 Fed. 286.

¹⁶Conley v. Alkali Works, 190 U. S. 411, 47 L. ed. 1115, 23 Sup. Ct. Rep. 728.

²⁰Lengel v. Refining Co. 110 Fed. 21.

¹Sweeney v. Carter Oil Co. 199 U. S. 252, 50 L. ed. 178, 26 Sup. Ct. Rep. 55.

²Smith v. Lyon, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303.

³Freeman v. Surety Co. 116 Fed.

548.

repealed thereby, two or more defendants residing in different districts in Illinois may be sued jointly in either district.⁴ An improper joinder of parties not indispensable, under this provision, will result in the dismissal of the suit only as to the one improperly joined.⁵ But if an indispensable party defendant is not a resident of the district where the suit is brought, the suit must be dismissed.⁶ It is held that when a nonresident defendant is sued solely on the ground that the suit is between citizens of different States, the declaration should allege not only that the plaintiff is a citizen of the State, but that he is a resident of the particular district.⁷ But facts as to residence in the district are not jurisdictional and may be waived,⁸ and failure to allege them is immaterial when the defendant has waived his right to be sued in a particular district.⁹

[e] "District of the residence."

The term "district of the residence" of a person is equivalent to "district whereof he is an inhabitant." It restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen.¹⁰ It is held, however, that if a person becomes a citizen of a State in which there is more than one district and does not acquire a fixed domicile his legal residence is in any district in which for the time being he may abide.¹¹ The term "inhabitant" as used in the first clause of the section is employed in the sense of "resident." A mere sojourner is not an inhabitant. Hence a resident of one State in charge of an exhibit in another is not an inhabitant within the meaning of the term.¹² Nor is a manufacturer having a residence and place of business in one district an inhabitant of another district in which he maintains a place of business through an agent.¹³

[f] Provision as to place of suit not jurisdictional.

The provision as to the district in which the suit shall be brought is not jurisdictional, being in the nature of a personal exemption in favor of a defendant, and may be waived by him.¹⁴ The entering of a general

⁴*Petri v. Creelman Lumber Co.* 199 U. S. 495, 50 L. ed. 286, 26 Sup. Ct. Rep. 133. See also note to following section.

⁵See *Bensinger, etc. Co. v. National, etc. Co.* 42 Fed. 81; *Smith v. Atchison, etc. Co.* 64 Fed. 1.

⁶See *United States v. Northern Pac. R. Co.* 134 Fed. 719, 67 C. C. A. 269.

⁷*Miller v. Pennsylvania R. Co.* 91 Fed. 298; *Laskey v. Mining Co.* 50 Fed. 634.

⁸See following note.

⁹See *Southern Express Co. v. Todd*, 56 Fed. 106, 5 C. C. A. 432.

¹⁰*Shaw v. Quincy Min. Co.* 145 U.

S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *United States, etc. Co. v. Board of Comrs.* 145 Fed. 144, — (C. C. A.) —.

¹¹*Marks v. Marks*, 75 Fed. 332.

¹²*Bicycle, etc. Co. v. Gordon*, 57 Fed. 529.

¹³*Anderson v. Germain*, 48 Fed. 295.

¹⁴*Wolff Co v. Choctaw, etc. R. Co.* 133 Fed. 601; *Mexican, etc. Railroad Co. v. Davidson*, 157 U. S. 208, 39 L. ed. 672, 15 Sup. Ct. Rep. 565; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Foulk v. Gray*, 120 Fed. 156; *Chesapeake, etc. Co. v. Fire*

appearance constitutes such waiver¹⁵ as does the filing of a demurrer on the ground that no cause of action is stated;¹⁶ or the giving of bond under act of Aug. 13, 1894, as sureties for contractors for government work,¹⁷ or the removal of a suit into a Federal, which was brought in a State, court.¹⁸ There is a waiver also where the defendant, although pleading his exemption on the grounds of nonresidence, unites therewith a plea to the merits.¹⁹ But the acceptance of service of process does not constitute a waiver,²⁰ nor does the entering of a special appearance for the purpose of objecting to the jurisdiction, nor the answering to the merits upon the overruling of such objection.¹ A State provision that the entry of such special appearance shall have the effect of a general appearance and confer jurisdiction is not binding on the Federal courts.² The filing of a general appearance in an action commenced by service of summons alone is no waiver when upon service of the complaint it appears that the ground of jurisdiction is diversity of citizenship and that suit is brought in the wrong district.³ Appearance as curing defective service is elsewhere discussed.⁴ A voluntary waiver on the part of a corporation defendant cannot be overruled by stockholders and creditors who were parties to the suit only by intervening petition.⁵

§ 402. Place of suit in states containing several districts.

When a State contains more than one district, every suit not of a local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which

Creek, etc. Co. 119 Fed. 944; *Mahr v. Union, etc. R. Co.* 140 Fed. 921; *Iowa, etc. Co. v. Bliss*, 144 Fed. 446.

¹⁵*Lowry v. Tile*, 98 Fed. 817; *Central, etc. Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286.

¹⁶*St. Louis, etc. Ry. v. McBride*, 141 U. S. 127, 35 L. ed. 660, 11 Sup. Ct. Rep. 982; *Fosha v. Telegraph Co.* 114 Fed. 701; *Scott v. Hoover*, 99 Fed. 247; *U. S. etc. Co. v. Board of Comrs.* 145 Fed. 144. See post, § 860.

¹⁷*United States v. Sheridan*, 119 Fed. 236.

¹⁸*Memphis, etc. Bank v. Houchens*, 115 Fed. 102, 52 C. C. A. 176; *U. S. etc. Co. v. Board of Comrs.* 145 Fed. 144. But where plaintiff objects to removal sought on grounds of di-

verse citizenship, and both parties are nonresidents, there is no waiver. *Ex parte Wisner*, 203 U. S. —, 51 L. ed. —, 27 Sup. Ct. Rep. 150.

¹⁹*Baltimore, etc. Co. R. R. v. Doty*, 133 Fed. 866.

²⁰*United States v. Loughrey*, 43 Fed. 449.

¹*Southern Pac. Ry. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

²*Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

³*Crown, etc. Mills v. Turner*, 82 Fed. 337.

⁴Post, § 860.

⁵*Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286.

any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree, rendered therein, execution may be issued, directed to the marshal of any district in the same State.

R. S. § 740, U. S. Comp. Stat. 1901, p. 587.

In several instances statutes dividing a State in districts have repeated part or all of this provision.⁶ It is a mooted question whether the provision is not impliedly repealed by the provisions of the previous code section.⁷ It applies to a suit brought in the district in which the plaintiff is an inhabitant against defendants, one of whom resides in the district and the others in another district of the same State.⁸ A suit by creditors for the appointment of a railroad receiver is a suit of a local nature within its terms.⁹ A foreign corporation is deemed a resident of that district in a State in which its designated place of business in such State is situate.¹⁰

§ 403. Local suits where property lies in different districts of same state.

Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

R. S. § 742, U. S. Comp. Stat. 1901, p. 588.

This section was carried into the Revised Statutes from an act of 1858.¹³ So far as it applies to suits in the circuit courts to enforce liens, etc., or to remove encumbrances, etc. from real or personal property, it is supplemented by an act of Mar. 3, 1875.¹⁴ A suit over land removed from a

⁶See act March 3, 1881, c. 144, 21 Stat. 507, U. S. Comp. Stat. 1901, p. 364, as to Louisiana.

⁷See *Petri v. Creelman Lumber Co.* 199 U. S. 493, 50 L. ed. 285, 26 Sup. Ct. Rep. 133; *East Tennessee, etc. R. Co. v. Atlanta, etc. R. Co.* 49 Fed. 608, 15 L.R.A. 109; *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24, holding that it is note repealed. See *park v. Bruen*, 133 Fed. 806; *Goddard v. Mailler*,

80 Fed. 422. See also *New Jersey, etc. Co. v. Chormann*, 105 Fed. 532.

⁸*St. Louis, etc. Bank v. Harrison*, 8 Fed. 721, 3 McCrary, 162.

⁹*East Tennessee, etc. R. Co. v. Atlanta, etc. R. Co.* 49 Fed. 608, 15 L.R.A. 109.

¹⁰*Weed v. Centre, etc. Ry.* 132 Fed. 151.

¹³Act May 4, 1858, c. 27, § 2, 11 Stat. 272.

¹⁴Post, § 404.

State court, the land lying in two divisions of a district, may be heard before a circuit court of either division.¹⁵

§ 404. — suits to enforce liens, etc., where property in different districts.

When a part of the said real or personal property against which such proceeding shall be taken [i. e., to enforce liens on or claims to, or to remove incumbrances or liens or clouds on title from, real or personal property] shall be within another district, but within the same State, said suit may be brought in either district in said State.

Part of § 8, act Mar. 3, 1875, c. 137, 18 Stat. 473, U. S. Comp. Stat. 1901, p. 513.

Other portions of this section, and a discussion of its scope and meaning will be found elsewhere.¹⁶

§ 405. Venue of civil causes and courts to which process is returnable in districts containing judicial divisions.

There is considerable similarity but no uniformity in the statutory provisions governing the place of bringing civil actions in districts having two or more judicial divisions. The practitioner must advise himself as to the provisions for any particular district and division and keep abreast of the changes that will doubtless be made from time to time. The existing provisions are collected in a note appended hereto. The statute creating divisions in the northern district of Mississippi provided that the district court therein for the western division should be styled "the district court of the United States for the western division of the northern judicial district of Mississippi,"¹⁷ and this would seem a proper form upon which to base the title of the court in any district having divisions.

Author's section.

[a] Alabama, Arkansas and California.

The act of 1903^{17½} further dividing the northern district of Alabama provided that "all civil process issued against residents in said counties of Etowah, Calhoun, Cleburne, Clay, Talladega and Cherokee, and cognizable

¹⁵Memp'li . etc. Bank v. Houchens, 22 Stat. 101, U. S. Comp. Stat. 1901. 115 Fed. 96. 52 C. C. A. 176. p. 378.

¹⁶See post, § 856.

^{17½}Act Feb. 16, 1903, c. 554, § 4, 32 Stat. 832, U. S. Comp. Stat. 1905, § 77.

¹⁷Act June 15, 1882, c. 218, § 2, p. 77.

before the United States courts, shall be made returnable to the courts, respectively, to be held at the city of Anniston."

A previous act involving the same district declared that "all civil suits, not of a local character, which shall be hereafter brought in the circuit or district court of United States for the northern district of Alabama, in either of said divisions, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants, residing in different divisions, such suit may be brought in either division."¹⁸ There was a similar provision in an act of 1905,¹⁹ involving the southern district. In Arkansas the statutes provide merely that "all process, civil and criminal, hereafter issued against persons residing" in specified counties constituting the several divisions of the districts, "shall hereafter be made returnable to the courts, respectively, to be held "at the designated places of holding court therein."²⁰ An act of 1902 made a similar provision respecting the Harrison division of the western Arkansas district.²¹ "All suits not of a local nature in said circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division.

In the southern district of California it is provided that "All civil process issued against persons resident in the northern division of said southern district of California, and cognizable before the United States courts, shall be made returnable to the courts respectively, to be held at the city of Fresno; all prosecutions for offenses committed in said northern division shall be tried in the appropriate court of jurisdiction at said city of Fresno; that all civil process issued against persons resident in the southern division of the said southern district of California, and cognizable before the United States courts, shall be made returnable to the courts, respectively, to be held at the city of Los Angeles; and all prosecutions for offenses committed in said southern division shall be tried in the appropriate court of jurisdiction at said city of Los Angeles."²²

[b] Georgia.

There is a general provision of a law of 1880 affecting Georgia districts, that "all suits not of a local nature in the circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be

¹⁸Act May 2, 1884, c. 38, § 4, 23 Stat. 18, U. S. Comp. Stat. 318.

¹⁹Act March 3, 1905, c. 1419, § 3, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 78.

²⁰See ante, § 258, and statutes there cited.

²¹Act March 18, 1902, c. 222, § 3, 32 Stat. 72, U. S. Comp. Stat. 1905, p. 81.

²²§ 4 and § 5, act May 29, 1900, c. 594, 31 Stat. 219, U. S. Comp. Stat. 1901, p. 327.

brought in either division.”²³ A later provision for the northern Georgia district declares that “all civil suits not of a local nature must be brought in said northeastern division where the defendant resides in said northeastern division of the southern Federal judicial district of Georgia. But if there are two or more defendants, some residing in the northeastern division and others residing in any other portion of said southern district of Georgia, the action may be brought in any one of the divisions in which any one of the defendants resides. When the defendant is a non-resident of either division, action may, if plaintiff is a citizen of the district, be brought in that division wherein the defendant may be found.”¹ A provision for the western division of the northern district, declares that “all process, civil and criminal, issued against citizens residing in said counties, shall be made returnable to the said courts, respectively (i. e. circuit and district), at the said city of Columbus, and not otherwise.”² A provision for the northwestern division of the northern district declares that “all civil suits which shall hereafter be brought against a defendant or defendants who reside in said northwestern division of said district shall be brought in said northwestern division; but if there are two or more defendants residing in different divisions of said district, such suit may be brought in either division of said district in which any defendant or defendants reside, and all mesne and final process subject to the provisions of this Act issued in either of the divisions of the northern district of Georgia may be served and executed in either or all of the divisions.”³ A provision affecting the eastern division of the northern district declares “all actions at law and all suits in equity against a defendant who shall be a resident of said eastern division shall be brought therein. Suits for the recovery of lands shall be brought in the division of the district where the land is situated; but in all cases at law or in equity against more than one defendant, in which some of the defendants shall reside in the western and some in the eastern division, such action at law may be brought in either division, and such suit in equity may be brought in either division in which a defendant may reside against whom substantial relief is prayed.”⁴ There is a further provision in “an act to provide for circuit and district courts of the United States at Valdosta, Georgia,” which seems broad enough to apply to all the divisions within the State, that “all suits not of a local nature in the circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the dis-

²³Act Jan. 29, 1880, c. 17, § 4, 21 26 Stat. 1110, U. S. Comp. Stat. Stat. 62, U. S. Comp. Stat. 1901, p. 1900, p. 338.
334.

¹Act Feb. 15, 1889, c. 168, § 3, 25 Stat. 671, U. S. Comp. Stat. 1901, p. 337.

²Act April 12, 1900, c. 185, § 2, 31 Stat. 74, U. S. Comp. Stat. 1901, p. 340.

⁴Act Feb. 28, 1901, c. 621, § 3, 31 Stat. 818, U. S. Comp. Stat. 1901, p. 341.

²Act March 3, 1891, c. 566, § 3, p. 341.

trict such suits may be brought in either division.”⁵ And finally there is a similar provision in the act providing for terms of court at Albany, Georgia.⁶

[c] Idaho, Illinois and Iowa.

In Idaho “all civil suits not of a local character, which shall be brought in the district or circuit courts of the United States for the district of Idaho, in either of the said divisions, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside, or if there are two or more defendants residing in different divisions, such suit may be brought in either division.”⁷ In the northern district of Illinois “all civil suits not of a local nature, and all criminal prosecutions, shall be commenced and tried in the division of the said northern district of Illinois where the defendant or defendants reside, or the offense is committed; but if there are two or more defendants in civil suits residing in the different divisions or districts, the action may be brought in either in which either of the defendants may reside. When the defendant is a nonresident of the district, action may be brought in either division of said district wherein the defendant may be found.”⁸ There is a similar provision with a minor change, respecting the southern district of Illinois.⁹ A general provision as to Iowa divisions in an act of 1880, declared that “all civil suits not of a local nature which shall hereafter be brought in the circuit or district court of the United States in said district of Iowa must be brought in the division of the district where the defendant or defendants reside; but if there are two or more defendants residing in different divisions, the plaintiff may sue in either one of the divisions in which a defendant resides. . . . Where the defendant is a nonresident of the district, suit may be brought in any division where property or the defendant is found.”¹⁰ A later act provided that “all civil suits not of a local nature must be brought in the division of the northern or southern district where the defendant or defendants reside; but, if there are two or more defendants residing in different divisions, the action may be brought in either of the divisions in which a defendant resides. When the defendant is a nonresident of either district, action may be brought in any division of either district wherein the defendant may be found.”¹¹ A statute creating the southern division of the southern district provided that “all civil suits which shall hereafter be brought against a defendant or defendants who reside in said southern division of said district shall be brought in said southern division; but

⁵Act June 30, 1902, c. 1338, § 3, 32 Stat. 551, U. S. Comp. Stat. 1903, p. 58.

⁶Act March 3, 1905, c. 1431, § 3, 33 Stat. 999, U. S. Comp. Stat. 1905, p. 88.

⁷Act July 5, 1892, c. 145, § 4, 27 Stat. 73, U. S. Comp. Stat. 1901, p. 343.

⁸Act March 3, 1905, c. 1427, § 6, 33 Stat. 993, U. S. Comp. Stat. 1905, p. 90.

⁹Act March 3, 1905, supra, § 10.

¹⁰Act June 4, 1880, c. 120, § 2, 21 Stat. 155.

¹¹Act July 20, 1882, c. 312, § 9, 22 Stat. 173, U. S. Comp. Stat. 1901, p. 352.

if there are two or more defendants residing in different divisions of said district, such suit may be brought in either division of said district in which any defendant or defendants reside.¹² An act of 1904 required process against persons resident in the counties constituting the Davenport division, to be returnable to the courts to be held there, and that offenses in those counties be there tried.¹³ An act of 1906 transferring Clinton county to the southern district, required all process against residents of the county to be returnable before the courts to be held at Davenport.^{13½}

[d] Kansas, Kentucky and Louisiana.

In the divisions of the Kansas district "all civil suits not of a local character, which shall be hereafter brought in either of said divisions against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants residing in different divisions, such suit may be brought in either division."¹⁴ The law creating the Owensboro division of what is now the western district of Kentucky provided that "where one or more defendants in any civil cause shall reside in said division, and one or more defendants to such cause shall reside out of said division, but in said district, then the plaintiff may institute his action either in the court having jurisdiction over the latter or in the said division."¹⁵ While Kentucky was a single district it was provided that "in the district of Kentucky the clerks of the circuit and district courts, respectively, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest a court. if he have information sufficient, and shall immediately, upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought."¹⁶ In Louisiana the provision for both districts is that "if there be more than one defendant, and they reside in different divisions of the district, the plaintiff may sue in either division, and send duplicate writ or writs to the other defendants; and the said writs, when executed and returned into the court from which they issued, shall constitute one suit and be proceeded in accordingly."¹⁷ In creating the Lake

¹²Act June 1, 1900, c. 601, § 2, 31 Stat. 249, U. S. Comp. Stat. 1901, p. 354. similar: Act May 3, 1892, c. 59, § 2, 27 Stat. 24, U. S. Comp. Stat. 1901, p. 357.

¹³Act April 28, 1904, c. 1800, § 3, 33 Stat. 547, U. S. Comp. Stat. 1905, p. 98. ¹⁵Act Aug. 8, 1888 c. 792, § 2, 25 Stat. 390.

^{13½}Act June 19, 1906, c. 3437, 34 Stat. 304. ¹⁶R. S. § 745, U. S. Comp. Stat. 1901, p. 589.

¹⁴Act June 9, 1890, c. 403, § 2, 26 Stat. 129, U. S. Comp. Stat. 1901, p. 357. The provision enacted on the creation of the third division is ¹⁷See act Aug. 8, 1888, c. 789, § 2, 25 Stat. 388; act Aug. 13, 1888, c. 869, § 3, 25 Stat. 438, U. S. Comp. Stat. 1901, pp. 366, 367.

Charles division of the western district it was provided that all civil process against persons resident in the parishes constituting the division be returnable to the courts there held.¹⁸

[e] **Michigan and Minnesota.**

In the western district of Michigan "all suits and proceedings hereafter to be brought in the said circuit or district courts not of a local nature shall be brought in a court of the division of the district where the defendant resides; but if there be more than one defendant, and they reside in different divisions of the district, the plaintiff may sue in either division and send duplicate writ or writs to the other defendants, on which the plaintiff or his attorney shall indorse that the writ thus sent is a copy of a writ sued out of a court of the proper division of the said district; and the said writs, when executed and returned into the office from which they issued, shall constitute one suit, and be proceeded in accordingly." The statute further provides that "all issues of fact shall be tried at the terms of said courts to be held in the division where such suits shall hereafter be commenced; but nothing herein contained shall prevent the said circuit and district courts from regulating by general rule the venue of transitory actions, either in law or in equity, and from changing the same for cause."²⁰ In the eastern Michigan district the statute provides that "all suits and proceedings hereafter to be tried in said circuit and district courts, not of a local nature, shall be brought in the court of the division of the district where the defendant, or one of the defendants if there be several, resides, and if there be several defendants, part of whom reside in one division and part in another of the district, the plaintiff may sue in either division and send a duplicate writ or writs to the other defendants on which the plaintiff or his attorney shall indorse that the writ thus sent is a copy of a writ sued out in the proper division of said district, and said writs when executed and returned into the office from which they issued shall constitute one suit and be proceeded in accordingly. Actions in rem in admiralty may be brought in whichever division of the district service can be had upon the res."²¹ In the Minnesota district, "all civil suits not of a local nature must be brought in the division where the defendant or defendants reside; but if there are two or more defendants residing in different divisions, the action may be brought in any division in which a defendant resides. . . . All civil process from the circuit and district courts of the United States for said district of Minnesota against defendants residing or found therein, shall be returned to the place appointed for the holding of said courts in the division where such defendant resides. . . . If there be more than one defendant and they reside in different divisions of the district, the plaintiff may sue in either division, and send duplicate writ or

¹⁸Act March 2, 1905, c. 1308, § 3, 3, 20 Stat. 175, 176, U. S. Comp. Stat. 33 Stat. 841, U. S. Comp. Stat. 1905, 1901, p. 370.

p. 100.

²¹Act April 30, 1894, c. 66, § 3, 28 Stat. 67, U. S. Comp. Stat. 1901, p. 373.

writs to the other defendants; and the said writs, when executed and returned into the court from which they issued, shall constitute one suit and be proceeded in accordingly.”²²

[f] Mississippi.

In the northern Mississippi district the statute provides that “hereafter all suits to be brought in either of said courts, not of a local nature, shall be brought in the division where the defendants, or either of them, reside; but if there be more than one defendant, and they reside in different divisions, or any of them reside in the southern judicial district of Mississippi, the plaintiff may sue in either division or district, and send duplicate writs to the other division or district, directed to the marshal of the district where he or they may reside, on which said writs shall be indorsed by the plaintiff, or his attorney, that the same is a duplicate of the original writ sued out of the district court of the proper division or district; but whenever a defendant is sued out of the division of his residence, and is not joined with a co-defendant, whose residence is in the division where the suit is brought, he may, before pleading therein, on motion and on affidavit of the division of his residence, change the venue to the court of the division of his residence, which suit shall stand for trial at the first term of the court to which the venue may be changed.”¹ The statutes creating the western and southern divisions of the southern district of Mississippi provide that “all laws regulating and defining how suits against persons or property located or found in judicial districts shall be brought shall be applicable to and govern the bringing of suits” in those divisions.² And an act of 1894 governing the venue in the southern Mississippi district provides that if “there be more than one defendant in a cause, and the defendants reside in different divisions of said southern district, or any of the defendants reside in the northern district, the plaintiff may sue in either division or district where any defendant resides and send duplicate writs for the other defendant or defendants to the other division or district, where such defendant or defendants reside, and said writs, when executed and returned into the court from which they issued, shall constitute one suit and be proceeded in accordingly.” And that “all processes issued out of” the circuit and district courts at the place of holding court in the southern division of the eastern district against defendants residing in the counties constituting it,³ shall be returned to the courts at such place.

[g] Missouri.

In Missouri “all suits to be brought in the courts of the United States in Missouri, not of a local nature, shall be brought in the division having juris-

²²Act April 26, 1890, c. 167, § 2, Stat. 630; act April 4, 1888, c. 58, 26 Stat. 72, U. S. Comp. Stat. 1901, § 2, 25 Stat. 78, U. S. Comp. Stat. 1901, p. 381.

¹Act June 15, 1882, c. 218, § 3, 22 Stat. 102, U. S. Comp. Stat. 1901, p. 378. ³See ante, § 274; act July 18, 1894, c. 144, § 5, 6, 28 Stat. 115, U. S. Comp. Stat. 1901, p. 363.

²Act Feb. 28, 1887, c. 279, § 2, 24

diction over the county where the defendants, or either of them, reside; but if there be more than one defendant, and a part of them reside in different divisions or districts of said State, the plaintiff may sue in either division of either district where one of such defendants resides, and send duplicate writs to the other division or district, directed to the marshal of said district, on which said writs shall be indorsed, by the plaintiff or his attorney, that the same is a duplicate of the original writ sued out of the court of the proper division and district."⁴ The act creating the southern division in the western district of Missouri and the act creating the southeastern division of the eastern district, provide that "all suits not of a local nature in said circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district such suits may be brought in either division."⁵ The act attaching Audrain county, Missouri, to the eastern district requires "all process, civil and criminal, hereafter issued against persons residing" therein, "shall be made returnable to the courts held at Saint Louis."⁶

[h] North Dakota, Ohio and South Dakota.

In North Dakota, "all civil suits not of a local character now pending, or which shall be brought in the district or circuit courts of the United States for the district of North Dakota, in either of the said divisions against a single defendant, or where all the defendants reside in the same divisions of said district, shall be brought in the division in which the defendant or defendants reside, or if there are two or more defendants residing in different divisions, such suit may be brought in either division."⁷ In the Ohio districts "all suits not of a local nature in the circuit or district courts, against a single defendant, inhabitant of such State, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be brought in either division."⁸ In the South Dakota district "all civil suits not of a local nature must be brought in the division of the district where the defendant or defendants reside; but if there are two or more defendants, residing in different divisions, the action may be brought in either of the divisions in which a defendant resides."⁹

⁴Act Feb. 28, 1887, c. 271, § 4, 24 Stat. 425, U. S. Comp. Stat. 1901, p. 387. ⁷Act June 29, 1906, c. 3595, § 4, 34 Stat. 609.

⁵Act Jan. 24, 1901, c. 164, § 4, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 390; act Jan. 31, 1905, c. 287, § 4, 33 Stat. 627, U. S. Comp. Stat. 1905, p. 103. ⁸Act June 8, 1878, c. 169, § 3, 20 Stat. 102; act Feb. 4, 1880, c. 18, § 4, 21 Stat. 64, U. S. Comp. Stat. 1901, pp. 402, 403.

⁹Act Nov. 3, 1893, c. 10, § 5, 28 Stat. 5, U. S. Comp. Stat. 1901, p. 412.

⁶Act Jan. 28, 1897, c. 106, § 2, 29 Stat. 502, U. S. Comp. Stat. 1901, p. 389.

[i] Tennessee.

The act creating divisions in the eastern district of Tennessee provided that "all suits not of a local nature in the circuit and district courts, against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be brought in either division."¹¹ The act dividing the western district provided that "all suits not of a local character which shall be hereafter brought in the district or circuit court of the United States for the western district of Tennessee, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants residing in different divisions, such suit may be brought in either division, and duplicate writs may be sent to the other defendants. The clerk issuing such duplicate writs shall indorse thereon that it is a true copy of a writ sued out in the proper division of the district, and the original and duplicate writs, when executed and returned into the office from which they shall have issued, shall be proceeded in as one suit."¹² The act creating the northeastern division of the eastern district provided that "all suits not of a local nature in said circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division."¹³ In addition there have been statutes transferring Grundy and Fentress counties to different divisions which provided that all process hereafter issuing against citizens thereof should be returnable to the middle district and to the courts at Chattanooga respectively;¹⁴ and an act transferring Dyer county and making "all process, civil and criminal, hereafter issued against persons residing" therein returnable to the courts held at Memphis.¹⁵

[j] Texas.

In Texas, "if there be more than one defendant, and they reside in different divisions of the district, or in different districts, the plaintiff may sue in either division, or in either district in which one or more defendants may reside, and send duplicate writ or writs to the other defendant or defendants, on which the clerk issuing the writ shall indorse that the writ thus sent is a copy of a writ sued out of the court of the proper division of said district, and said writs, when executed and returned into the office from which they were issued, shall constitute one suit, and be proceeded in ac-

¹¹Act June 11, 1880, c. 203, § 3, 21 Stat. 175, U. S. Comp. Stat. 1901, p. 415.

¹²Act June 20, 1878, c. 359, § 1, 20 Stat. 235, U. S. Comp. Stat. 1901, p. 414.

¹³Act Feb. 7, 1900, c. 10, § 4, 31 Stat. 6, U. S. Comp. Stat. 1901, p. 419.

¹⁴Act Dec. 27, 1884, c. 7, § 1, 2, 23 Stat. 280, U. S. Comp. Stat. 1901, p. 417.

¹⁵Act May 24, 1900, c. 549, § 1, 31 Stat. 183, U. S. Comp. Stat. 1901, p. 420.

cordingly. Provided, that suits and actions affecting the title to or to foreclose liens on real estate shall be brought in the district and in the division thereof in which said real estate is, in whole or in part, situate."¹⁶ The statute dividing Texas into judicial divisions also provides in creating each division that all process against defendants residing therein shall be returnable to a designated place therein.¹⁷

[k] **Utah and Washington.**

In the Utah district "all civil suits not of a local character, which shall be brought in the district or circuit courts of the United States for the district of Utah, in either of said divisions, against a single defendant, or, where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside, or if there are two or more defendants residing in different divisions, such suit may be brought in either division."¹⁸ In the district of Washington "all civil suits not of a local character, which shall be brought in the district of Washington, in either of the said divisions, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside, or, if there are two or more defendants residing in different divisions, such suit may be brought in either division."¹⁹

§ 406. **Place of trial of offenses where district contains judicial divisions.**

The statutory provisions respecting the place of trial of offenses in districts containing divisions are collated in a note to this section. They are all substantially to the same effect, and make criminal causes cognizable in the division wherein the offenses were committed. Such statutes usually contain other provisions to the effect that jurisdiction over offenses committed prior to a division or a change in its boundaries is not affected by the new law. Being temporary in their operation such provisions are not here included.

Author's section.

[a] **Alabama, Arkansas and California.**

In Alabama an act of 1905 provided that "prosecutions for crime or offenses hereafter committed in any of the counties of the northern division shall be cognizable within such division; and all prosecutions for crime or offenses heretofore committed within either of said counties, taken, as aforesaid, from the middle and southern districts, or committed in the mid-

¹⁶Act March 11, 1902, c. 183, § 10, 29 Stat. 620, U. S. Comp. Stat. 1901, 32 Stat. 68, U. S. Comp. Stat. 1903, p. 435.
p. 71.

¹⁷See ante, § 288. Also act April 5, 1890, c. 65, § 4, 26 Stat. 45, U. S. Comp. Stat. 1901, p. 439.

¹⁸Act March 2, 1897, c. 366, § 3,

dle or southern districts as hitherto constituted, shall be commenced and proceeded with as if this act had not been passed.”²¹ An earlier act provided that “all offenses hereafter committed in either of said divisions shall be cognizable and indictable within the division where committed.”¹ In Arkansas, “all crimes or offenses hereafter committed in any of the divisions of said districts shall be cognizable within such division.”² In California “all prosecutions for offenses committed” in a division “shall be tried in the appropriate court of jurisdiction therein.”³

[b] Georgia, Idaho, Illinois.

In the southern district of Georgia “all prosecutions for crimes or offenses committed after the date this act takes effect, in any of the counties of the northeastern division, shall be cognizable within this division;”⁴ there are similar provisions for other subdivisions.⁵ There is no provision for venue in criminal causes in the Idaho divisions. The provision in Illinois is contained in the section covering venue in civil causes.⁶

[c] Iowa and Kansas.

In the act dividing Iowa into districts and divisions it is provided that “all prosecutions for crimes or offenses hereafter committed in either of said districts shall be cognizable within such district; and all prosecutions for crimes or offenses heretofore committed in the district of Iowa shall be commenced and proceeded with as if this act had not been passed.”⁷ The act creating the southern division of the southern district provides that “all crimes and offenses against the laws of the United States com-

²¹Act March 3, 1905, c. 1419, § 4, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 78. There was also a provision in § 9 saving pending prosecutions and previous offenses from the provisions of the act.

¹Act May 2, 1884, c. 38, § 3, 23 Stat. 18, U. S. Comp. Stat. 1901, p. 318. An act of 1903 respecting the Anniston division required that offenses in that division be tried in Anniston: Act Feb. 16, 1903, c. 554, § 4, 32 Stat. 832, U. S. Comp. Stat. 1905, p. 77.

²Act Feb. 20, 1897, c. 269, § 7, 29 Stat. 592, U. S. Comp. Stat. 1901, p. 322.

³Act May 29, 1900, c. 594, § 5, 31 Stat. 220, U. S. Comp. Stat. 1901, p. 327.

⁴Act Feb. 15, 1889, c. 168, § 4, 25 Stat. 671.

⁵Act Jan. 29, 1880, c. 17, § 5, 21 Stat. 63 (eastern and western divisions); act April 12, 1900, c. 185, § 3, 31 Stat. 74 (northwestern division); act Feb. 28, 1901, c. 621, §

4, 31 Stat. 818 (eastern division); act June 30, 1902, c. 1338, § 4, 32 Stat. 551, U. S. Comp. Stat. 1901, p. 335, 337, 340, 341; U. S. Comp. Stat. 1903, p. 58; act June 30, 1902, c. 1238, § 4, 32 Stat. 551, U. S. Comp. Stat. 1905, p. 85 (southwestern division, northern district); act March 3, 1905, c. 1431, § 4, 33 Stat. 999, U. S. Comp. Stat. 1905, p. 88 (southwest division, southern district).

⁶Ante, § 405.[c]

⁷Act July 20, 1882, c. 312, § 10, 22 Stat. 173, U. S. Comp. Stat. 352. The act creating the Davenport division declared that prosecutions for offenses therein should be tried in the appropriate court in Davenport: Act April 28, 1904, c. 1800, § 3, 33 Stat. 547, U. S. Comp. Stat. 1905, p. 98. The acts transferring Appanoose and Clinton counties to different divisions provided, that offenses therein should be tried and determined at Keokuk and Davenport: Act April 21, 1906, c. 1648, 34 Stat. 127; act June 19, 1906, c. 3437, 34 Stat. 304.

mitted within the counties comprising the southern division," shall be "prosecuted, tried and determined at the terms of the circuit and district courts herein provided for."⁸ A provision for the third division of the Kansas district is similar to that just quoted.⁹

[d] Kentucky and Louisiana.

The criminal jurisdiction of the Owensboro division is stated in the section defining the civil jurisdiction.¹⁰ In Louisiana "all prosecutions for crimes or offenses hereafter committed in either of the divisions shall be cognizable within such division."¹¹

[e] Michigan, Minnesota and Mississippi.

In the western district "any person charged with violating any of the penal or criminal statutes of the United States, of which the said circuit or district courts have jurisdiction, shall be proceeded against by indictment or otherwise, within the division of said district where the alleged offense or offenses shall be committed, and shall have his or her trial at a term of the said court held in said division, unless for cause shown the judge shall otherwise direct."¹² There is a similar provision for the divisions in the eastern district.¹³ In Minnesota "all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had, and prosecuted in the division of said district in which such offenses were committed."¹⁴ There are no provisions as to venue in the Mississippi divisions except those respecting civil causes.¹⁵

[f] Missouri and North Dakota.

In the western district of Missouri "all prosecutions for crimes or offenses hereafter committed in either of the divisions of said district shall be cognizable within such division."¹⁶ The only provision as to venue in the North Dakota districts affects civil causes.¹⁷

⁸Act June 1, 1900, c. 601, § 3, 31 Stat. 176, U. S. Comp. Stat. 1901, Stat. 24, U. S. Comp. Stat. 1901, p. 371.

¹³Act April 30, 1894, c. 66, § 6, 28 Stat. 68, U. S. Comp. Stat. 1901, p. 374.

⁹Act May 3, 1892, c. 59, § 3, 27 Stat. 68, U. S. Comp. Stat. 1901, p. 374.

¹⁴Act July 12, 1894, c. 132, § 1, 28 Stat. 102, U. S. Comp. Stat. 1901, p. 376.

¹⁰Act Aug. 8, 1888, c. 792, § 2, 25 Stat. 389, U. S. Comp. Stat. 1901, p. 359.

¹¹Act Aug. 8, 1888, c. 789, § 4, 25 Stat. 388; Aug. 13, 1888, c. 869, § 4, 25 Stat. 438, U. S. Comp. Stat. 1901, pp. 366, 367. Similar provision for Lake Charles division in act March 2, 1905, c. 1308, § 3, 33 Stat. 841, U. S. Comp. Stat. 1905, p. 100.

¹²Act June 19, 1878, c. 326, § 6, 20

¹⁵Ante, § 405 [f].

¹⁶Act Jan. 24, 1901, c. 164, § 5, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 390. See act Jan. 31, 1905, c. 287, § 5, 33 Stat. 627, U. S. Comp. Stat. 1905, p. 104, for similar provision respecting eastern district.

¹⁷Ante, § 405 [h].

[g] Ohio, Oklahoma, South Carolina and South Dakota.

In the northern district of Ohio "all offenses committed in either of the subdivisions shall be cognizable and indictable within said division."¹⁸ In the southern district "all prosecutions for crimes or offenses hereafter committed in either of the subdivisions shall be cognizable within such division."¹⁹ In the Oklahoma districts, "all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted, shall be cognizable within the district in which committed."²⁰ The statutes affecting South Carolina do not contain provisions as to venue, either civil or criminal. The statutes governing South Dakota merely provide the venue in civil causes.²¹

[h] Tennessee, Texas, Utah and Washington.

In the eastern district of Tennessee "all prosecutions for crimes and offenses hereafter committed in either of the subdivisions shall be cognizable within such division."²² In Texas "all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed;"¹ but there is in general² no provision making them cognizable in the division of the district where committed. The statute merely makes "all process issued against defendants residing in" a given group of counties or division, returnable to a designated place therein.³ There is no provision for venue of causes in Utah or Washington divisions except civil causes.⁴

§ 407. Effect of change in Territorial area of judicial district or of creation of divisions therein, upon pending causes.

The numerous statutes passed from time to time creating new judicial districts and changing the old, or creating two or more divisions in existing districts, have usually provided that pending causes, both civil and criminal, should remain for final disposition in the place where triable at the time suit was brought.⁷ A failure to so specify would probably work the same result, in view of the familiar rule that a statute is to be construed prospectively and as

¹⁸Act June 8, 1878, c. 169, § 4, 32 Stat. 67, U. S. Comp. Stat. 1903, 20 Stat. 102, U. S. Comp. Stat. 1901, p. 70.
¹⁹Act Feb. 4, 1880, c. 18, § 5, 21 Stat. 64, U. S. Comp. Stat. 1901, p. 404.

²⁰Act June 16, 1906, c. 3335, § 14, 34 Stat. 275.

²¹Ante, § 405.[h]

²²Act Feb. 7, 1900, c. 10, § 5, 31 Stat. 6, U. S. Comp. Stat. 1901, p. 419.

¹Act March 11, 1902, c. 183, § 8, 1903, p. 54, as to Arkansas.

²But see recent acts: Feb. 9, 1903,

c. 532, § 3, 32 Stat. 820; act March 2, 1903, c. 974, § 3, 32 Stat. 927, U. S. Comp. Stat. 1905, p. 120, 121; act June 9, 1906, c. 3063, § 3, 34 Stat. 226 (Del Rio division).

³See ante, § 288.

⁴Ante, § 405.[k]

⁷E. g. see act March 18, 1902, c. 222, § 3, 32 Stat. 72, U. S. Comp.

applicable only to future causes unless a retrospective operation is specifically provided. In some cases, however, the statutes have permitted the transfer of such causes for trial in the new locus fori, by consent, or by order of the court for cause;⁸ and in others, pending causes have been ordered transferred.⁹ All such provisions are temporary in character and largely negative in their operation. The existing laws that could be set forth here have in the main fulfilled the purposes of their enactment. It seems useless to reproduce them in this work. The practitioner must keep advised of late enactments affecting the organization of any particular judicial district.

Author's section.

§ 408. Provisions for trial of issues of fact where district contains judicial divisions.

In the laws respecting divisions of judicial districts in Alabama,¹⁰ Georgia,¹¹ Ohio,¹² Tennessee,¹³ there is a provision that "all issues of fact in said suits [i. e., suits not of a local character in the circuit and district courts] shall be tried at a term of the court held in the division where the suit is so brought." In Michigan it is provided that "all issues of fact shall be tried at the terms of said courts [i. e., circuit and district] to be held in the division where such suits shall hereafter be commenced."¹⁴ But in the western district of Michigan the courts may by rule regulate and

⁸E. g. see as to Alabama act Feb. 16, 1903, c. 354, § 4, 32 Stat. 832, U. S. Comp. Stat. 1903, p. 53; as to Georgia; act June 30, 1902, c. 1338, § 5, 32 Stat. 581, U. S. Comp. Stat. 1903, p. 58; as to Victoria division in Texas: act April 18, 1906, § 3, c. 1636, 34 Stat. 122; Iowa (Appanoose county) act April 21, 1906, c. 1648, 34 Stat. 127.

⁹So in Texas by act March 11, 1902, c. 183, § 7, 32 Stat. 66, U. S. Comp. Stat. 1903, p. 69; Oklahoma: Act June 16, 1906, c. 3335, § 14, 34 Stat. 275; Illinois: Act March 3, 1905, c. 1427, § 17, 33 Stat. 995, U. S. Comp. Stat. 1905, p. 94. But cases in which evidence was taken were not transferred.

¹⁰Act March 3, 1905, c. 1419, § 3, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 78.

¹¹Act Jan. 29, 1880, c. 17, § 4, 21 Stat. 62, U. S. Comp. Stat. 1901, p. 334; act June 30, 1902, c. 1338, § 3, 32 Stat. 551, U. S. Comp. Stat. 1903, p. 58; act March 3, 1905, c. 1431, § 3, 33 Stat. 999, U. S. Comp. Stat. 1905, p. 88.

¹²Act June 8, 1878, c. 169, § 3, 20 Stat. 102; act Feb. 4, 1880, c. 18, § 4, 21 Stat. 164, U. S. Comp. Stat. 1901, p. 402, 403.

¹³Act June 11, 1880, c. 203, § 5, 21 Stat. 176, U. S. Comp. Stat. 1901, p. 416; act June 20, 1878, c. 359, § 1, 20 Stat. 235, U. S. Comp. Stat. 1901, p. 414.

¹⁴Act June 19, 1879, c. 326, § 2, 20 Stat. 175; act April 30, 1894, c. 66, § 2, 28 Stat. 67, U. S. Comp. Stat. 1901, p. 372, 373.

change the venue of transitory actions.¹⁵ The act authorizing an additional district judge in Minnesota provides that "the senior circuit judge of the eighth circuit or the resident circuit judge within the district shall make all necessary orders for the division of business and the assignment of cases for trial in said district,"¹⁶ but this probably refers to the duties of the judges and not the venue of causes. In several other districts there is a provision for trial of issues of fact in the division where the suit is brought, but with a right of trial elsewhere by consent.¹⁷

Author's section.

§ 409. Transfer of causes for trial to another place within district.

In districts undivided into divisions where court is or may be held at different places therein, there are occasional special statutory provisions for transfer of causes from one place of holding court therein to another. In the Montana district it is provided that "causes, civil or criminal, may be transferred by the court or the judge from Helena to Butte, or from Butte to Helena, in said district, when the convenience of parties or the ends of justice would be promoted by the transfer, and any interlocutory order may be made by the court or judge thereof in either place."¹ The statute as to terms in New Jersey makes provision for transfer of causes to Newark for trial.²

Author's section.

§ 410. Provisions for transfer of cause by consent to another division.

In the laws relating to divisions in the judicial districts of Idaho, North Dakota, Utah and Washington it is provided that "all issues of fact in civil causes triable in any of the said courts [i. e., district or circuit courts] shall be tried in the division where the defendant or one of the defendants resides, unless by consent of both parties the case shall be removed to some other division."⁴

¹⁵See ante, § 405.[e]

¹⁶Act Feb. 4, 1903, c. 402, § 2, 32 Stat. 795, U. S. Comp. Stat. 1903, p. 61.

¹⁷Post, § 410.

¹Act July 7, 1898, c. 571, § 1, 30 Stat. 685, U. S. Comp. Stat. 1901, p. 39.

²See ante, § 335.

⁴For Idaho see act July 5, 1892, c. 145, § 4, 27 Stat. 73. North Dakota: Act April 26, 1890, c. 161, § 4, 26 Stat. 68; Act June 29, 1906, c. 3595, § 4, 34 Stat. 609. Utah: Act March 2, 1897, c. 366, § 3, 29 Stat. 620. Washington: Act April

There is a similar provision for Iowa, except that "civil" causes are not specified.⁵ In the laws relating to Minnesota and Louisiana it is provided that all causes triable in either of the courts of the district "shall be tried in the division to which the process is returnable under the provisions of this act, unless by consent of all parties the cause be removed to some other division of said district."⁶ In the statute respecting the northern district of Mississippi it is provided that any cause may on "written consent of both parties or their attorneys of record be transferred to the court of either division, without regard to the division of the residence of the defendants."⁷ The act respecting the districts and divisions of Missouri provides that "any cause may, by the written consent of both parties or their attorneys of record, be transferred to the court of either division or district, without regard to the residence of the defendants, and whether such cause be now pending or be instituted hereafter."⁸ More elaborate provisions respecting transfer of both civil and criminal cases for trial have been enacted for the western Arkansas district and are given below^{[a]-[b]}

Author's section.

[a] Transfer of civil causes for trial in Arkansas by consent,—fees.

In 1906 it was enacted that "civil cases in law or equity, now or hereafter pending, in either the district or circuit court of the United States, for either of the divisions of the western district of Arkansas, may, on written stipulation of the parties or their attorneys of record, signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge, signed and filed in the case, in vacation, or on the order of the court, duly entered of record, in term, be transferred to another division of the district for final trial; and in the event of such transfer, it shall be the duty of the clerk of the court in which such suit is pending to make out and transfer a certified copy of all the record entries in the case together with all the original papers in the case to the clerk of the court to which such case is transferred, for which he shall have such fees as are now allowed for making transcripts, and the sum of two dollars ad-

⁵ 1890, c. 65, § 4, 26 Stat. 45 U. S. Comp. Stat. 1901, p. 343, 400, 435, 439.

⁶ Act June 4, 1880, c. 120, § 2, 21 Stat. 155.

⁷ Louisiana: Act Aug. 8, 1888, c. 789, § 3, 25 Stat. 388; act Aug. 13, 1888, c. 869, § 4, 25 Stat. 438. Minnesota: Act April 26, 1890, c. 167, § 3, 26 Stat. 73, U. S. Comp. Stat. 1901, p. 361, 367, 375.

⁷ Act June 15, 1882, c. 218, § 3, 22 Stat. 102, U. S. Comp. Stat. 1901, p. 379.

⁸ Act Feb. 28, 1887, c. 271, § 4, 24 Stat. 425, U. S. Comp. Stat. 1901, p. 387. There is a provision of the section specifying the duty and fees of the clerk in certifying the record for transfer.

ditional for transferring the same, to be taxed as costs and paid as other costs in the case, and the clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of like nature.”⁹

[b] — transfer of criminal cases and fees of clerk.

The same law further provided that “the defendants in criminal cases now or hereafter pending in the district courts of the Harrison or Texarkana divisions of the western district of Arkansas and who are incarcerated at Fort Smith to await trial because of their inability to furnish bail and who desire to plead ‘guilty’ may, on their written motion showing those facts and filed in the case, in vacation, and upon the order of the judge, duly signed and filed in the case, have their cases transferred to the Fort Smith division of the western district of Arkansas, to the end that trials may be had and sentences imposed as in other cases of like nature; and prisoners bound over to answer to indictments in the Harrison or Texarkana divisions of the western district of Arkansas for offenses committed in those divisions and who are incarcerated in the jail at Fort Smith, Arkansas, for inability to furnish bail, and who desire to plead ‘guilty’ to such offenses, may on their own motions have their cases submitted to a grand jury of the Fort Smith division for indictment and final disposition in the courts of that division, or in proper cases may plead to informations filed in the proper court in said division and have their cases disposed of as other cases of like nature when the offense was committed in the Fort Smith division. When a transfer is ordered, as provided in this section, the clerk shall make out and forthwith send a certified copy of the record entries, together with the indictment and all the original papers, to the clerk of the court to which such case is transferred, who shall file the same, and thereupon the case shall be proceeded with as other cases of like nature pending in such court. For making out said transcript and forwarding the same, together with the original papers in said case, the clerk of the court shall have the usual compensation for making out transcripts, as now provided by law, and two dollars additional, to be taxed and paid as other costs in like cases.”¹⁰

§ 411. Change of venue to proper division in Mississippi where improperly brought.

The statute affecting the northern Mississippi district provides that “whenever a defendant is sued out of the division of his residence and is not joined with a codefendant, whose residence is in the division where the suit is brought, he may, before pleading therein, on motion and on affidavit of the division of his residence, change the venue to the court of the division of his residence, which

⁹ Act June 2, 1906, c. 2569, 34 Stat. 206.

¹⁰ Act June 2, 1906, c. 2569, § 2, 34 Stat. 207.

suit shall stand for trial at the first term of the court to which the venue may be changed.”¹¹ There are no other similar statutory provisions for other States.

Author's section.

§ 412. Venue on removal from state court in districts containing judicial divisions.

Some of the statutes creating divisions in judicial districts contain specific provisions governing removal of causes from State courts therein. In the legislation as to divisions in the southern and middle districts of Alabama,^{*} southern district of California, the southern district of Georgia, eastern and western districts of Missouri, southern district of Ohio and eastern district of Tennessee it is provided that “in all cases of removal of suits from the courts of the State . . . to the courts of the United States . . . such removal shall be to the United States courts in the division in which the county is situated from which the removal is made, and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of the United States courts, shall be deemed to refer to the terms of the United States courts in such division.”¹² In all of these States except California and Georgia there are other divisions of judicial districts for which no such provision is specifically made. In the legislation as to divisions in Georgia (northern district),¹³ Iowa, Louisiana and Minnesota, there is provision requiring removal to be to the particular division where the State court in which suit is brought is situate, but no provision as to the term to which the cause is returnable.¹⁴ In the statutes affecting divisions in Mississippi “all laws touching the removal of causes from State

¹¹Act June 15, 1882, c. 218, § 3, p. 328, 391, 404, 419, U. S. Comp. Stat. 1905, p. 88, 104. Alabama: Act March 3, 1905, c. 1419, § 6, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 79.

¹²For California see act May 29, 1900, c. 594, § 7, 31 Stat. 220. Georgia: Act June 30, 1902, c. 1338, § 6, 32 Stat. 551; act March 3, 1905, c. 1341, § 6, 33 Stat. 1000. Missouri: Act Jan. 24, 1901, c. 164, § 7, 31 Stat. 739. Ohio: Act Feb. 4, 1880, c. 18, § 8, 21 Stat. 64; act Jan. 31, 1905, c. 287, § 7, 33 Stat. 627. Tennessee: Act Feb. 7, 1900, c. 10, § 7, 31 Stat. 6, U. S. Comp. Stat. 1901, 366, 367, 375.

¹³Georgia: Act Feb. 28, 1901, c. 621, § 3, 31 Stat. 818.

¹⁴For Iowa see act July 20, 1882, c. 312, § 9, 22 Stat. 173. Louisiana: Act Aug. 8, 1888, c. 789, § 7, 25 Stat. 388; act Aug. 13, 1888, c. 86, § 8, 25 Stat. 438. Minnesota: Act April 26, 1890, c. 167, § 2, 26 Stat. 72, U. S. Comp. Stat. 1901, pp. 341, 352, 366, 367, 375.

courts" are declared applicable.¹⁵ The laws creating divisions in Arkansas, Illinois, Kansas, Kentucky, Michigan, North Dakota, South Carolina, Texas, Utah and Washington contain no special provisions as to venue of removal causes. Sometimes the provision of such statutes as to the place of trial, or place to which process is returnable, or from which process shall issue, is broad enough to apply to and include removed causes. The practitioner should consult these, as elsewhere set forth,^{15½} and also keep advised as to later legislation affecting the organization of any particular district. Though the legislative provision as to removals in all districts where divisions exist is not complete or specific, there is no evidence of an intent to make any distinction as to venue in such cases; and it would seem that in all districts removed cases are intended to be cognizable in the division where the State court from which the removal is made is situate, and that the time for perfecting the removal is always referable to the term of the Federal court in such division.

Author's section.

§ 413. Concurrent jurisdiction of southern and eastern districts over New York harbor.

The district courts of the southern and eastern districts of New York shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, and Suffolk, and over all seizures made and all matters done in such waters; and all processes or orders issued out of either of said courts, or by any judge thereof, shall run and be executed in any part of the said waters.

R. S. § 542, U. S. Comp. Stat. 1901, p. 397.

This provision was enacted in 1865.¹⁶

§ 414. Place of return of process in western New York district.

All process in admiralty causes and proceedings in the western district of New York shall be made returnable at Buffalo.¹⁷

Author's section.

¹⁵Act April 4, 1888, c. 58, § 2, 25 Stat. 78; Act July 18, 1894, c. 144, § 2, 28 Stat. 115, U. S. Comp. Stat. 1901, pp. 382, 383.

^{15½}§ 504, et seq.

¹⁶Act Feb. 25, 1865, c. 54, § 2, 13 Stat. 438.

¹⁷Act May. 12, 1900, c. 381, § 5, 31 Stat. 176, U. S. Comp. Stat. 1901, p. 395.

§ 415. Venue of proceedings by National Bank to enjoin comptroller.

All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

R. S. § 736, U. S. Comp. Stat. 1901, p. 586.

This provision was enacted in 1864.¹⁸

§ 416. Venue of patent infringement suits.

In suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

Act Mar. 3, 1897, c. 395, 29 Stat. 695, U. S. Comp. Stat. 1901, p. 589.

The provision of the act of 1887-1888, that no civil suit shall be brought in any other district than that whereof the defendant is an inhabitant, does not apply to patent infringement suits.¹ Hence, until the above provision was passed, suits could be prosecuted in any district where valid service could be had upon the defendant.² This provision, however, limits the place of suit to the district in which the act is committed if the defendant has there established a place of business, or to the district in which such defendant resides.³ It applies only to infringers who are inhabitants, and not to suits against aliens, which may be brought wherever the defendant is found.⁴

§ 417. Venue of suits against surety companies on bonds and recognizances.

Any surety company doing business under the provisions of this act [i. e., act relative to bonds, recognizances, etc., and to allow

¹⁸Act June 3, 1864, c. 106, §§ 50, 57, 13 Stat. 115, 116.

¹See ante, § 401.

²Bowers v. Atlantic, etc. Co. 104 Fed. 890.

³Idem.

⁴United States v. Duplessis, 134 Fed. 930.

certain corporations to act as sureties] may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond or undertaking, in the district in which such recognizance, stipulation, bond or undertaking was made or guaranteed, or in the district in which the principal office of such company is located. And for the purposes of this act such recognizance, stipulation, bond or undertaking shall be treated as made or guaranteed in the district in which the office is located, to which it is returnable or in which it is filed, or in the district in which the principal in such recognizance, stipulation, bond or undertaking resided when it was made or guaranteed.

§ 5, act Aug. 13, 1894, c. 282, 28 Stat. 280, U. S. Comp. Stat. 1901, p. 2316.

There is a special provision regarding suits on bonds to the United States given by contractors on public buildings and the venue of the same.⁵

§ 418. Venue of suits for combinations in restraint of import trade.

Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act [an act declaring combinations and conspiracies in restraint of import trade unlawful] may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found. . . .

Part of § 77, act Aug. 27, 1894, c. 349, 28 Stat. 570, U. S. Comp. Stat. 1901, p. 3203.

This provision is identical with a provision of an act of 1890, passed to protect trade and commerce against unlawful restraints and monopolies.⁶

§ 419. Venue of partition suit where United States are parties.

[Suit for partition where the United States is a joint tenant or tenant in common must, if brought in the circuit court], be brought in the circuit court of the district in which such land is situate.

Part of § 1, act May 17, 1898, c. 339, 30 Stat. 416, U. S. Comp. Stat. 1901, p. 516.

§ 420. Venue of suits for internal revenue taxes.

Taxes accruing under any law providing internal revenue may

⁵Post, § 1420, et seq.

Stat. 209, U. S. Comp. Stat. 1901, p.

⁶§ 7, act July 2, 1890, c. 647, 26 Stat. 302.

be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

R. S. § 733, U. S. Comp. Stat. 1901, p. 586.

This section was carried into the Revised Statutes from an act of 1866.⁸

§ 421. Venue of suits for penalties and forfeitures.

All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

R. S. § 732, U. S. Comp. Stat. 1901, p. 585.

This provision is general and applies to a number of penalties and forfeitures concerning which there is no other provision as to venue.¹⁰ Under its terms, an action to recover a penalty for the importation of a foreign laborer in violation of an act of Congress may be brought in the district in which such laborer enters, or in any district in which the defendant may be found.¹¹

§ 422. Venue of proceedings for forfeitures.

Proceedings on seizures, for forfeiture under any law of the United States, made on the high seas may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

R. S. § 734, U. S. Comp. Stat. 1901, p. 586.

A seizure being made on the high seas, jurisdiction attaches in the court of any district into which the property is brought.¹³

§ 423. — for trade with insurrectionary districts.

Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection, into other parts of the United States, or of any vessel or vehicle conveying such property or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted

⁸Act July 13, 1866, c. 184, 14 Stat. 111.

¹⁰Pentlarge v. Kirby, 19 Fed. 501.

¹¹United States v. Craig, 28 Fed. 799, 800.

¹³The Merino, 9 Wheat. 391, 6 L. ed. 118; the Abby, 1 Mason, 360, Fed. Cas. No. 14.

in any district court into which the property so seized may be taken, and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district.

R. S. § 564, U. S. Comp. Stat. 1901, p. 460.

The above provision was enacted in 1861.¹⁵ The President is authorized to close any port of entry in a collection district where duties cannot be collected on account of insurrection,¹⁶ and to proclaim any part of the country in insurrection.¹⁷

§ 424. — for forfeiture of captured insurrectionary property.

Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting or prompting an insurrection against the government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

R. S. § 735, U. S. Comp. Stat. 1901, p. 536.

The above provision as carried into the first edition of the Revised Statutes from an act of 1861,²⁰ contained the words "as prize" following the words "property captured" in the first clause. Those words were stricken out by an amending act of 1875,¹ and the provision as above set forth, was embodied in the second edition, or "the Revised Statutes of 1878." The object of the "Prize acts" of which this provision is a part, was to promote the suppression of the Rebellion by subjecting property employed in the aid of it with the owner's consent, to confiscation.² All property, whether real or personal, is liable,³ but seizure is necessary.⁴ R. S. § 5309 contains a somewhat similar provision providing that "prizes and capture" of property employed in the aid of insurrection "shall be condemned in the district or circuit court of the United States having jurisdiction of the amount or in admiralty in any district in which the same may be seized or into which they may be taken and proceedings first instituted."

¹⁵ Act July 13, 1861, c. 3, §§ 4, 5, 9, 12 Stat. 256.

¹⁶ R. S. § 5317.

¹⁷ R. S. § 5301.

²⁰ Act Aug. 6, 1861, c. 60, § 2, 12 Stat. 319.

¹ Act Feb. 18, 1875, c. 80, 18 Stat. 318.

² Union Ins. Co. v. United States, 6 Wall. 759, 18 L. ed. 879.

³ Idem; Titus v. United States, 20 Wall. 475, 22 L. ed. 400.

⁴ United States v. Stevenson, 3 Ben. 119, Fed. Cas. No. 16,396; Morris v. United States, 7 Wall. 578, 19 L. ed. 281.

§ 425. Venue of suits, civil and criminal, under submarine cable law.

Criminal actions and proceedings for a violation of the provisions of this act shall be commenced and prosecuted in the district court for the district within which the offense was committed, and when not committed within any judicial district, then in the district court for the district within which the offender may be found; and suits of a civil nature may be commenced in the district court for any district within which the defendant may be found and shall be served with process.

Part of § 13 of act Feb. 29, 1888, c. 17, 25 Stat. 43, U. S. Comp. Stat. 1901, p. 3590.

§ 426. Place of trial in criminal causes.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

U. S. Const. art. 3, § 2, cl. 3.

The trial of crimes by jury is considered in a following chapter.⁷ The above provision is confined in its application to crimes, its obvious intent being to exclude petty criminal cases.⁸ It forbids the finding of an indictment in one State for a crime committed in another, and where there can be no original indictment in a State there can be no complaint entertained there.⁹ The proper proceeding is to find an indictment in the State where the crime was committed and then demand the arrest in the State where the defendant is found.¹⁰ This provision is in conflict with that part of R. S. § 3894, which provides for the trial and punishment of offenses against the postal laws in any other district than where committed, and renders that portion of the section void.¹¹ The physical absence of a defendant from a state when the acceptance of his offer to render services for compensation in violation of R. S. § 1782, was dispatched by mail, does not deprive the Federal courts of that State of jurisdiction.¹² When the crime is not committed within a State it is not local and the trial "shall

⁷Post, § 1571, et seq.

¹¹United States v. Conrad, 59 Fed.

⁸Schick v. United States, 195 U. 466.

⁹S. 69, 49 L. ed. 102, 24 Sup. Ct. Rep. 826.

¹²Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688.

¹⁰In re Rosdeitscher, 33 Fed. 657.

¹¹In re Rosdeitscher, 33 Fed. 657.

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be at such place or places as Congress may by law have directed.”¹³ That clause imposes no restriction as to the place of trial “except that the trial cannot occur until Congress designates a place and may occur at any place which shall have been designated by Congress previous to the trial.”¹⁴

§ 427. Place of trial of offenses punishable with death.

The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

R. S. § 729, U. S. Comp. Stat. 1901, p. 585.

Special circuit court sessions for the trial of criminal causes are authorized by a previous section.¹⁵ The benefit of the above provision is waived if the defendant goes to trial without asking for a trial in the particular county.¹⁷

§ 428. Offenses on high seas and out of any district, where tried.

The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

R. S. § 730, U. S. Comp. Stat. 1901, p. 585.

The offense must be a violation of some law of the United States in order to be prosecuted under this provision.¹ It fixes the place of trial of a prosecution for an assault with a deadly weapon on the high seas;² of a charge of conducting a military expedition in violation of R. S. § 5286, where the only overt act was committed after the vessel left a United States port;³ of a murder committed on land within the exclusive jurisdiction of the United States, but not within any judicial district.⁴

The government does not have the election as to which of two districts the suit shall be brought in, but where the defendant is apprehended outside the jurisdiction the trial shall be in the district in which he shall first be brought. If apprehended in a particular district he must be tried in that

¹³United States v. Jackalow, 1 Black, 486, 17 L. ed. 225; United States v. Dawson, 15 How. 467, 14 L. ed. 775.

¹⁴Cook v. United States, 138 U. S. 182, 34 L. ed. 913, 11 Sup. Ct. Rep. 268.

¹⁵Ante, § 357.

¹⁷United States v. Cornell, 2 Mason, 91, Fed. Cas. No. 14,868.

¹United States v. Williams, 2 Fed. 61, 6 Sawy. 244.

²United States v. Arwo, 19 Wall. 486, 22 L. ed. 67. See also United States v. Peterson, 64 Fed. 145.

³United States v. Hughes, 70 Fed. 972.

⁴Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.

district.⁵ In order to be "brought" into the district it is necessary that the defendant be apprehended.⁶

§ 429. Crimes on Pacific islands deemed on American vessel.

All offenses against this act [an act to prevent the sale of fire-arms, opium and intoxicating liquors in islands of the Pacific] committed on any of said islands or on the waters, rocks or keys adjacent thereto shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States, and the courts of the United States shall have jurisdiction accordingly.

§ 3 of act Feb. 14, 1902, c. 18, 32 Stat. 331, U. S. Comp. Stat. 1903, p. 443.

§ 430. Offenses begun in one district and completed in another.

When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein.

R. S. § 731, U. S. Comp. Stat. 1901, p. 585.

The section was enacted in 1867.⁸ The word "circuit" as used therein is apparently used by mistake for the word "district." Under its provisions the offense, under R. S., § 3894, as amended in 1890, of knowingly causing lottery tickets to be delivered by mail is triable in the district in which such matter is received.⁹ So also bribing through the mail,¹⁰ or the tender of a contract for the payment of money in a letter, to induce an official to violate his duty¹¹ is triable in the district in which such money or contract is received.

But the provision does not apply to a libel written in one district and published in another.¹² Nor does it apply to an indictment, under R. S., § 3893, for mailing obscene matter, the act of depositing constituting the entire offense.¹³ So also the obtaining of reduced rates by false billing,

⁵United States v. Bird, 1 Spr. 299, Fed. Cas. No. 14,597. See, however, United States v. Thompson, 1 Sum. 168, Fed. Cas. No. 16,492. But see Kerr v. Shine, 136 Fed. 61, 69 C. C. A. 69.

⁶Kerr v. Shine, 136 Fed. 65, 69 C. C. A. 69.

⁸Act March 2, 1867, c. 169, § 30, 14 Stat. 484.

⁹Horner v. United States, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

¹⁰Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569.

¹¹In re Pallister, 136 U. S. 257, 34 L. ed. 515, 10 Sup. Ct. Rep. 1034.

¹²See In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102.

¹³United States v. Comerford, 25 Fed. 902, as to violation of interstate commerce act in permitting unlawful charges see United States v. Fowkes, 53 Fed. 13, 3 C. C. A. 394.

in violation of an act of 1889¹⁴ is not within the meaning of the above section, since it is the obtaining of the transportation by false pretenses which is prohibited and not the transportation itself.¹⁵

§ 431. Venue of equity proceedings against carriers for discrimination.

Every violation of this section [punishing failure to publish rate schedules and observe them, and rebates, concessions and discriminations] shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Part of § 1, act Feb. 19, 1903, 32 Stat. 847, as amended June 29, 1906, c. 3591, 34 Stat. 588.

The procedure in causes involving the commerce laws is given elsewhere.¹⁶

§ 432. — of proceedings by carriers against Commerce Commission.

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts.

Part of § 5, act June 29, 1906, c. 3591, 34 Stat. 592.

¹⁴Act March 3, 1889, c. 382, § 10, 25 Stat. 855.

¹⁵Davis v. United States, 104 Fed. 136, 43 C. C. A. 448.

¹⁶Post, § 1345, et seq.

§ 433. — of forfeiture proceedings against carrier violating Commission's order.

The forfeiture provided for in this act [i. e., of \$5,000 for failure to obey orders made under section fifteen of commerce act] shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

Part of § 5, of act June 29, 1906, c. 3591, 34 Stat. 591, amending earlier law.

A forfeiture of \$500 per day for each offense of failing to keep proper accounts and records is also by the act declared to be recoverable "in the same manner as other forfeitures provided for in this act."

§ 434. — of proceedings to enforce Commission's orders.

If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order.

Part of § 5, act June 29, 1906, c. 3591, 34 Stat. 591, amending earlier law.

§ 435. Venue of offense of issuing false passports.

[Any person who, without authority, shall grant, issue or verify any passport or like instrument] may be charged, proceeded against, tried, convicted and dealt with therefor in the district where he may be arrested or in custody.

Part of R. S., § 4078, as amended act June 14, 1902, c. 1088, 32 Stat. 386, U. S. Comp. Stat. 1905, p. 543.

CHAPTER 13.

JUDICIAL OFFICERS AND THEIR ACCOUNTS IN GENERAL.

- § 441. Cross references and matters not herein treated.
- § 442. "Officer" and "oath" defined.
- § 443. Relatives of judge not to be appointed officers.
- § 444. Double compensation forbidden.
- § 445. Extra compensation forbidden.
- § 446. No compensation for doing another's duties or extra services.
- § 447. No extra compensation for disbursing moneys.
- § 448. Judicial officers accounts certified by district judge.
- § 449. Approval of accounts and cost bills by court.
- § 450. Accounts to be in duplicate—originals sent to Washington.
- § 451. Accounts to be submitted to Attorney General.
- § 452. Supervisory power of Attorney General over accounts.
- § 453. No payments to officers in arrears.
- § 454. Statutes furnished judges, etc. remain public property.
- § 455. Payment of extraordinary expenses incurred by ministerial officers.
- § 456. Allowance for mileage.
- § 457. —to clerks, marshals and district attorneys.

§ 441. Cross references and matters not herein treated.

While the various provisions of law governing the appointment, qualifications, tenure, duties and compensation of judicial officers are given in this and following chapters, a number of statutory provisions dealing with judicial and other Federal officers, penal in character and forbidding political activity¹ or the accepting of bribes² or other acts of malfeasance, criminal and otherwise,³ are omitted because beyond the scope of this Code.

Author's section.

§ 442. "Officer" and "oath" defined.

In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February 25, 1871,
. . . reference to any officer shall include any person authorized

¹See act Jan. 16, 1883, c. 27, §§ 11–15, 22 Stat. 406, U. S. Comp. Stat. 1901, pp. 1223, 1224. ³E. g. R. S. § 1784 U. S. Comp. Stat. 1901, p. 1214, forbidding soliciting contributions for gifts to superior officers.

²R. S. § 5499, U. S. Comp. Stat. 1901, p. 3708.

by law to perform the duties of such office, unless the context shows such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

R. S., § 1, U. S. Comp. Stat. 1901, p. 3.

§ 443. Relatives of judge not to be appointed officers.

No person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

§ 7, act Mar. 3, 1887, c. 373, 24 Stat. 555, as amended § 7, act Aug. 13, 1888, c. 866, 25 Stat. 437, U. S. Comp. Stat. 1901, p. 579.

Since the provision applies to appointments "hereafter" made, a previous appointment is not invalidated thereby.⁶ An appointment, made in violation of this provision, should be attacked by a direct motion to set aside the order; it cannot be attacked collaterally.⁷ A decree by such appointee is not absolutely void so that the court will have power to set aside on motion at a subsequent term.⁸

§ 444. Double compensation forbidden.

No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

R. S. § 1763, U. S. Comp. Stat. 1901, p. 1205.

The appointment of persons holding an office, such as is described in this section, to any other office to which compensation is attached, is restricted by provisions of act July 31, 1894, c. 174, § 2, and act June 3, 1896, c. 314, § 1, set forth below.

This provision was enacted in 1852.¹⁰

§ 445. Extra compensation forbidden.

No civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law; provided, that this shall not be construed to

⁶Northwestern, etc. Ins. Co. v. Seaman, 80 Fed. 359. ⁸Farmers, etc. Co. v. Water Co. 80 Fed. 467.

⁷Elgutter v. Northwestern, etc. Ins. Co. 86 Fed. 500, 30 C. C. A. 218. ¹⁰Act Aug. 31, 1852, c. 108, 16 Stat. 100.

prevent the employment and payment by the department of justice of district attorneys as now allowed by law for the performances of services not covered by their salaries or fees.

§ 3, act June 20, 1874, c. 328, 18 Stat. 109, U. S. Comp. Stat. 1901, p. 1207.

§ 446. No compensation for doing another's duties or extra services.

No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

R. S. § 1764, U. S. Comp. Stat. 1901, p. 1206.

§ 447. No extra compensation for disbursing moneys.

No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation.

R. S. § 1765, U. S. Comp. Stat. 1901, p. 1207.

§ 448. Judicial officers' accounts certified by district judge.

The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: provided, that no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs.

Part of R. S. § 846, U. S. Comp. Stat. 1901, p. 647.

The above provision was carried into the Revised Statutes from an act of 1856.¹⁴ A proviso for payment of extraordinary expenses was added by act of 1875.¹⁵ The first clause of the provision providing for the examination and certification of accounts by district judges is apparently superseded by the provisions of the following code section. Such accounts are examined also by the attorney-general.¹⁶ It is the duty of the Supreme Court clerk and clerks of the circuit courts of appeals to make an annual accounting of fees earned during the year.¹⁷ Appropriations for the investigation of accounts of judicial officers have been annually made since 1884, by the sundry civil appropriation acts.¹⁸ Cases arising under this and under the following section will be considered under the latter section.

§ 449. Approval of accounts and cost bills by court.

Before any bill of cost shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money;^[a] and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid.^[b]

Part of § 1, act Feb. 22, 1875, c. 95, 18 Stat. 333, U. S. Comp. Stat. 1901, p. 648.

[a] In general—proof of account.

The above provision that the accounts on approval thereof, be forwarded to the Treasury accounting officers is superseded by a following section

¹⁴Act Aug. 16, 1856, c. 124, §§ 1, 1, 11 Stat. 49.

¹⁵Post, § 455.

¹⁶Post, § 451.

¹⁷See post, §§ 587, 588.

¹⁸For recent enactments see act June 28, 1902, c. 1301, § 1, 32 Stat. 474, and act March 3, 1903, c. 1007, § 1, 32 Stat. 1140.

providing that such accounts be first sent to the Attorney General and examined by him.¹ Prior to this enactment accounts mentioned herein were regulated by the previous section,² and such accounts were apparently to be heard by the judge without formal proceedings in open court.³ An account must be both "rendered" and "proved." It is "rendered" when it is presented.⁴

[b] Accounts to be approved by court.

The allowance of accounts by the courts is not a judicial act,⁵ being little more than a certificate of regularity and genuineness of the accounts and vouchers.⁶ Since the allowance or disallowance is made subject to the revision of the accounting officers of the Treasury⁷ the action of the court is largely formal and ex parte.⁸ But the approval of the account by the court is prima facie evidence of its correctness and is conclusive in the absence of clear and unequivocal proof.⁹ The provision is not intended to relieve from the penalties, prescribed by R. S. § 5438, for presenting false claims against the United States, and the judge passing on the claim or account is an officer of the civil service within the meaning of that section.¹⁰ Commissioner's accounts are to be forwarded to the district attorney of the particular district and by him presented to the court, and the Treasury department has a right to require some action by the district attorney and the court before it considers such claim.¹¹ The court refusing to act in such a case, the Court of Claims has jurisdiction although there has been no presentation to the Treasury department.¹²

§ 450. Accounts to be in duplicate—originals sent to Washington.

Accounts and vouchers of clerks, marshals and district attorneys shall be made in duplicate, to be marked respectively "original" and "duplicate." And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times. Nothing contained in this

¹Post, § 451.

²See *United States v. Strobeck*, 48 Fed. 902.

³In re District Attorney, 23 Fed. 29.

⁴*Butler v. United States*, 87 Fed. 655.

⁵*United States v. Strobach*, 48 Fed. 902.

⁶*United States v. Ralston*, 17 Fed. 895.

⁷*McMullen v. United States*, 146 U. S. 360, 36 L. ed. 1007, 13 Sup. Ct. Rep. 127.

⁸*United States v. McGourin*, 106 Fed. 291, 45 C. C. A. 291.

⁹*United States v. Jones*, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615; *United States v. McGourin*, 106 Fed. 288, 45 C. C. A. 291; *Hallett v. United States*, 63 Fed. 817; *Kinney v. United States*, 54 Fed. 315.

¹⁰*United States v. Strobach*, 48 Fed. 902.

¹¹*United States v. Knox*, 128 U. S. 230, 32 L. ed. 465, 9 Sup. Ct. Rep. 63.

¹²*Idem*.

act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force.

Part of § 1, act Feb. 22, 1875, c. 95, 18 Stat. 333, U. S. Comp. Stat. 1901, p. 649.

The term "duplicate" refers to the accounts and vouchers, and does not include the order of the court.¹⁴ This section and R. S. § 846¹⁵ reserve to the Treasury officers the right to revise accounts passed upon by the court, but such officers having passed an account allowed by the court and the account being paid, there can be no demand for repayment.¹⁶ There is no element of *res adjudicata* in their actions,¹⁷ and their rejection of a claim is not a determination of a "commission or department authorized to hear and determine" within the meaning of the Tucker act.¹⁸ Where a claim, having been presented, is suspended for further explanation,¹⁹ or until the proper vouchers are furnished or other reasonable requirements are complied with,²⁰ the court should not assume jurisdiction until final action is taken by the department, or a reasonable time has elapsed.

§ 451. Accounts to be submitted to Attorney General.

Before transmission to the department of the Treasury, the accounts of district attorneys, assistant attorneys, marshals, commissioners, clerks, and other officers of the courts of the United States, except consular courts, made out and approved as required by law, and accounts relating to prisoners convicted or held for trial in any court of the United States, and all other accounts relating to the business of the Department of Justice or of the courts of the United States other than consular courts, shall be sent with their vouchers to the Attorney General and examined under his supervision.

Part of § 13, act July 31, 1894, c. 174, 28 Stat. 210, U. S. Comp. Stat. 1901, p. 166.

The omitted portion of the section provides for the monthly payment of judges, Interstate Commerce Commissioners and other officers.

§ 452. Supervisory power of Attorney General over accounts.

The Attorney General shall exercise general supervisory powers

¹⁴United States v. Van Duzee, 52 Fed. 930, 3 C. C. A. 361, Affirming 48 Fed. 643.

¹⁵Ante, § 448.

¹⁶Tuthill v. United States, 38 Fed. 538.

¹⁷Barber v. United States, 35 Fed. 386.

¹⁸Erwin v. United States, 37 Fed. 470, 2 L.R.A. 229.

¹⁹Marvin v. United States, 114 Fed. 227.

²⁰United States v. Fletcher, 147 U. S. 667, 37 L. ed. 322, 13 Sup. Ct. Rep. 434.

over the accounts of district attorneys, marshals, clerks and other officers of the courts of the United States.

R. S. § 368, U. S. Comp. Stat. 1901, p. 210.

This provision was enacted in 1870.² The supervisory powers authorized thereby are the same as those which were vested in the Secretary of the Interior before the creation of the Department of Justice, being limited to the examination and auditing of accounts and the certification of balances. They do not extend to the allowance or disallowance of accounts.³

§ 453. No payments to officers in arrears.

No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the treasury all sums for which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the treasury, if required to do so by the party, his agent or attorney, shall report forthwith to the solicitor of the Treasury the balance due; and the solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties.

R. S. § 1766, U. S. Comp. Stat. 1901, p. 1208.

This provision was passed to secure and protect the government and to insure promptness on the part of public officers.⁴

§ 454. Statutes furnished judges, etc. remain public property.

All statutes heretofore or hereafter furnished by the United States to district judges, district attorneys and clerks of the United States courts under this or any other law, shall not become the property of these officers, but on the expiration of their official term shall be by them turned over and delivered to their respective successors in office.

Part of § 1, act Aug. 7, 1882, c. 433, 22 Stat. 336, U. S. Comp. Stat. 1901, p. 121.

§ 455. Payment of extraordinary expenses incurred by ministerial officers.

Where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the

²Act June 22, 1870, c. 150, § 15, 16 Stat. 164. ⁴United States v. Potter, Fed. Cas. No. 16,076.

³United States v. Waters, 133 U. S. 214, 215, 33 L. ed. 596, 10 Sup. Ct. Rep. 249.

payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary.

Proviso added to R. S. § 846,⁶ by act Feb. 18, 1875, c. 80, 18 Stat. 318, U. S. Comp. Stat. 1901, p. 647.

The President alone is authorized to allow payment of this class of expenses, and his decision should not be interfered with by the courts.⁷

§ 456. Allowance for mileage.

Hereafter only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, except marshals, district attorneys and clerks of the courts of the United States and their deputies; and all allowances for mileages and transportation in excess of the amount actually paid, except as above excepted, are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision.

§ 1 of act Mar. 3, 1875, c. 133, 18 Stat. 452, U. S. Comp. Stat. 1901, p. 1207.

Mileage as an element in fees charged or taxed is governed by other provisions.⁹ This section is a proviso taken from the Army appropriation act for the year ending June 30, 1876. It supersedes a somewhat similar provision contained in an act of 1874.¹⁰ By the addition of the word "hereafter" it is made permanent and the exception as to marshals, etc., is also added. Its object is to establish the principle of paying the actual expenses of persons traveling in the service of the government, and to abolish a specific mileage allowance. It applies to everyone holding employment or appointment under the government not within the exception.¹¹ An Indian agent is entitled under its provisions and under R. S. § 2077, to traveling expenses, including board while in transit, but not for board after his arrival.¹²

§ 457. — to clerks, marshals and district attorneys.

From and after the first day of January, 1875, no such officer or person [i. e., attorneys, marshals, clerks or their deputies] shall

⁶See ante, § 448.

¹¹United States v. Mouat, 124 U.

⁷Stanton v. United States, 37 Fed. S. 303, 31 L. ed. 463, 8 Sup. Ct. Rep. 252.

⁹See post, §§ 710, 712, 714, etc.

¹²United States v. Smith, 35 Fed.

¹⁰Act June 16, 1874, c. 285, § 1, 490. 18 Stat. 72.

become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.

Part of § 7, act Feb. 22, 1875, c. 95, 18 Stat. 334, U. S. Comp. Stat. 1901, p. 649.

The omitted portion of this section provides that the provisions of § 1 of the act of June 16, 1874 (mentioned in the note to the preceding section), should not apply to attorneys, marshals, clerks or their deputies. "Mileage or travel not actually and necessarily performed," apparently refers to cases where process is sent by mail to a deputy to be served at a distant place,¹³ and there is nothing to indicate there was an intention to do away with the allowance for travel actually performed.¹⁴ It does not deny the marshal full mileage on each writ served by him on different persons, although one journey only is necessary,¹⁵ and the fact that all the writs concern the same suit is immaterial.¹⁶ Sunday trips by a judicial officer to his home are not "travel actually and necessarily performed" within the meaning of the section.¹⁷ Mileage may be allowed such officer, however, where there is an adjournment over intervening judicial days during the term.¹⁸

¹³United States v. Fletcher, 147 U. S. 664, 37 L. ed. 323, 13 Sup. Ct. Rep. 434; Nixon v. United States, 82 Fed. 26.

¹⁴In re Crittenden, 2 Flipp. 212, Fed. Cas. No. 3,393.

¹⁵See Nixon v. United States, 82 Fed. 26; United States v. Harmon, 147 U. S. 279, 37 L. ed. 169, 13 Sup. Ct. Rep. 329; 16 Op. Atty. Gen. 165.

But see contra, United States v. Ralston, 17 Fed. 900-901.

¹⁶Nixon v. United States, 82 Fed. 29, 30.

¹⁷United States v. Shields, 153 U. S. 88, 38 L. ed. 646, 14 Sup. Ct. Rep. 735.

¹⁸Baxter v. United States, 51 Fed. 671, 2 C. C. A. 411.

CHAPTER 14.

UNITED STATES JUDGES.

- § 466. Oath of United States judges.
- § 467. Tenure of office and compensation.
- § 468. Appointment and tenure of judges of Court of Claims.
- § 469. Salaries of United States judges.
- § 470. Salaries to be paid monthly.
- § 471. When judge resigning, entitled to salary for life.
- § 472. Expenses allowed visiting judge holding criminal term in New York.
- § 473. Expenses of visiting district judge in New York.
- § 474. Expenses of judges attending circuit court of appeals.
- § 475. Expense allowances when district judges directed to hold court outside their districts.
- § 476. Judges prohibited from practicing law.
- § 477. Judges how paid—to whom certificate of absence sent.
- § 478. Officers to perform duties though suit by pauper without fees.

§ 466. Oath of United States judges.

The justices of the Supreme Court, the circuit judges and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

R. S. § 712, U. S. Comp. Stat. 1901, p. 578.

This provision was enacted in 1789.¹

§ 467. Tenure of office and compensation.

The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, re-

¹Act Sept. 24, 1789, c. 20, § 8, 1 Stat. 76.

ceive for their services, a compensation, which shall not be diminished during their continuance in office.

U. S. Const. art. 3, § 1, cl. 2.

In ordaining and establishing inferior courts Congress must confer on the judges thereof the constitutional tenure, i. e. "during good behavior."² Territorial courts are not "inferior courts" within the meaning of this provision, hence judges of such courts are subject to removal and suspension as other civil officers appointed by the President,³ and their salary may be diminished.⁴

§ 468. Appointment and tenure of judges of court of claims.

The Court of Claims . . . shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior.

Part of R. S. § 1049, U. S. Comp. Stat. 1901, p. 729.

The omitted part of the above section prescribes the salary of such judges and provides that they shall take oath to support the Constitution and faithfully discharge their duties. The provision as to salary is superseded by the following code section.

§ 469. Salaries of United States judges.

The following salaries shall be paid to the several judges hereinafter mentioned in lieu of the salaries now provided for by law, namely: To the Chief Justice of the Supreme Court of the United States the sum of thirteen thousand dollars a year, and to each of the associate justices thereof the sum of twelve thousand five hundred dollars a year. To each of the circuit judges the sum of seven thousand dollars a year. To each of the district judges the sum of six thousand dollars a year. To the chief justice of the Court of Claims the sum of six thousand five hundred dollars a year, and to each of the other judges thereof the sum of six thousand dollars a year. To the chief justice of the court of appeals of the District of Columbia the sum of seven thousand five hundred dollars a year, and to each of the associate justices thereof the sum of seven thousand dollars a year. To the chief justice and to each associate justice of the supreme court of the District of Columbia the sum of six thousand dollars a year. All of said salaries shall be

²Kentucky, etc. Co. v. Louisville R. Co. 37 Fed. 612, 2 L.R.A. 289.

³Howard v. United States, 22 Ct. Cl. 316.

⁴See Fisher's Case, 15 Ct. Cl. 324.

paid in monthly installments. One-half of the amount of said salaries which shall be paid to the chief justice and to the associate justices of the court of appeals of the District of Columbia and to the chief justice and to the associate justices of the supreme court of the District of Columbia shall be defrayed from the revenues of the District of Columbia.

Act Feb. 12, 1903, c. 547, 32 Stat. 825, U. S. Comp. Stat. 1903, p. 155.

§ 470. Salaries to be paid monthly.

Hereafter the salaries appropriated for the United States judges in the foregoing paragraph [i. e., Supreme Court justices, circuit and district judges and judges of the supreme court of the District of Columbia], and judges of the Court of Claims, and of the Territories, may be paid monthly.

Part of § 1, act Mar. 3, 1881, c. 130, 21 Stat. 412, U. S. Comp. Stat. 1901, p. 450.

A somewhat similar provision relating to judges in certain districts is contained in an act of Mar. 3, 1891,⁷ and a general provision that "judges receiving salaries from the Treasury of the United States shall be paid monthly," in an act of 1894.⁸ The previous section also contains a general provision for the monthly payment of judges, but judges of the Territories are not mentioned therein.

§ 471. When judge resigning, entitled to salary for life.

When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

R. S. § 714, U. S. Comp. Stat. 1901, p. 578.

This provision was carried into the Revised Statutes from an act of 1869.¹⁰ The word "salary" as used herein means a periodical payment depending upon the time, and not upon the amount of services rendered, hence the extra pay for the extra services performed, under R. S. § 613,¹¹ is not within the meaning of the term.¹²

⁷Act March 3, 1891, c. 541, § 1, U. S. Comp. Stat. 1901, p. 451.

⁸Post, § 477.

¹⁰Act April 10, 1869, c. 22, 16 Stat. 458.

⁴⁵

Fed. Proc.—35.

¹¹See following section.

¹²Benedict v. United States, 176 U. S. 360, 44 L. ed. 503, 20 Sup. Ct. Rep.

§ 472. Expenses allowed visiting judge holding criminal term in New York.

At every such term [of the circuit court for the southern district of New York appointed exclusively for the trial and disposal of criminal business] held by said judge of said eastern district [of New York] he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district.

Part of R. S. § 613, U. S. Comp. Stat. 1901, p. 494.

The section was originally enacted in 1873.¹⁴ The allowance therein of three hundred dollars per term to a judge of the eastern district holding criminal term in the southern district is not a part of the salary of such judge on his resignation under R. S. § 714.¹⁵

The remainder of the above section authorized the holding of such criminal terms and is given elsewhere.¹⁶

§ 473. Expenses of visiting district judge in New York.

Whenever a district judge, from another district, holds a district or circuit court in the southern district of New York, in pursuance of the preceding section, his expenses, not exceeding ten dollars a day, certified by him, shall be paid by the marshal of said district, as a part of the expenses of the court, and shall be allowed in the marshal's account.

R. S. § 597, U. S. Comp. Stat. 1901, p. 483.

This provision was enacted in 1872.¹⁷

§ 474. Expenses of judges attending circuit court of appeals.

Any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

§ 8, act Mar. 3, 1891, c. 517, 26 Stat. 828, U. S. Comp. Stat. 1901, p. 551.

¹⁴Act Feb. 7, 1873, c. 120, 17 Stat. 422. ¹⁶Ante, § 109.

¹⁵Post. § 471: *Benedict v. United States*, 176 U. S. 357, 44 L. ed. 503, 20 Sup. Ct. Rep. 458. ¹⁷Act March 5, 1872, c. 35, 17 Stat. 36.

§ 475. Expense allowances when district judges directed to hold court outside their districts.

It is usual to make provision in the annual appropriation acts each year for "reasonable expenses for travel and attendance of district judges directed to hold court outside of their districts, not to exceed ten dollars per day each, to be paid on written certificates of the judges, and such payments shall be allowed the marshal in the settlement of his accounts with the United States."¹⁹

Author's section.

§ 476. Judges prohibited from practicing law.

It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. And any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

R. S. § 713, U. S. Comp. Stat. 1901, p. 578.

This section was carried into the Revised Statutes from an act of 1812.¹

§ 477. Judges, how paid—to whom certificate of absence sent.

Judges receiving salaries from the Treasury of the United States shall be paid monthly by the disbursing officer of the Department of Justice, and to him all certificates of nonabsence or of the cause of absence of judges in the Territories shall be sent. Interstate Commerce Commissioners and other officers, now paid as judges are, shall be paid monthly by the proper disbursing officer or officers.

Part of § 13, act July 31, 1894, c. 174, 28 Stat. 210, U. S. Comp. Stat. 1901, p. 166.

§ 478. Officers to perform duties though suit by pauper without fees.

The officers of court shall issue, serve all process and perform all duties in such cases [i. e., suits in forma pauperis] and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

§ 3 of act July 20, 1892, c. 209, 27 Stat. 252, U. S. Comp. Stat. 1901, p. 707.

¹⁹This is the provision of the appropriation act of March 3, 1903, c. 788. 1007, § 1, 32 Stat. 1141.

¹Act Dec. 18, 1812, c. 5, 2 Stat.

CHAPTER 15.

ATTORNEYS AND COUNSELLORS.

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- § 557. Attorney General to supervise accounts.
- § 557½. Special counsel may be authorized to conduct proceedings in any district.

§ 487. Cross references and matters not herein treated.

The qualifications and rules governing attorneys in practice before executive departments as, for instance, in land department and pension matters, are outside the scope of this work. Neither does it seem advisable to attempt to include the statutes dealing with the duties of the Attorney General and the Department of Justice, or temporary statutes authorizing special counsel in

designated causes, or directing the law officers of the government to appear therein. In other portions of this work will be found regulations forbidding appointment of district attorneys or their assistants as receivers¹ or as commissioners;² regulating their fees;³ requiring them to pay costs excessively taxed;⁴ forbidding bankruptcy referees from practicing in bankruptcy;⁵ and payments to and priority of claim of bankrupt's attorney;⁶ regulating the fee to be charged on admission to circuit and district courts;⁷ forbidding judges to practice law;⁸ providing for the assignment of counsel to defendants in treason and capital cases,⁹ and prescribing district attorney's duty in appealing suits against the United States under the act of 1887.¹⁰

§ 488. Admission to practice before Supreme Court.

It shall be requisite to the admission of attorneys or counselors to practice in this court that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

Clause 1 of rule 2 of Supreme Court, promulgated Feb. 5, 1790, revised Dec. term 1858.¹¹

It is well settled that it rests with the court to determine who is qualified to become one of its officers as an attorney and counselor and for what cause he ought to be removed,¹² while Congress has a right to prescribe new qualifications it cannot exclude parties from the practice of law for past conduct, thus inflicting punishment for past offenses.¹³ Proceedings against attorneys for malpractice or unprofessional conduct need not be founded on formal allegations.¹⁴ They may be moved by third parties on affidavit, or taken by the court of its own motion; the only requisite being that, when not taken for matters occurring in open court, notice and opportunity be given for explanation and defense.¹⁵ Proceedings for disbarment have been sustained for participating in a lynching,¹⁶ for

¹Post, § 1123.

²Post, § 673.

³Post, § 717, et seq.

⁴Post, § 1833. See also post, § 1836.

⁵Post, § 2241.

⁶Post, § 2221.

⁷Post, § 711.

⁸Ante, § 476.

⁹Post, § 1587.

¹⁰Post, § 1481.

¹¹2 Dall. 399, 1 L. ed. 431, 21 How. L. ed. 559, 2 Sup. Ct. Rep. 582.

¹²19 How. 13, 15 L. ed. 565; Randall v. Brigham, 7 Wall. 535, 19 L. ed. 291.

¹³Ex parte Garland, 4 Wall. 380, 18 L. ed. 366.

¹⁴Randall v. Brigham, 7 Wall. 540, 19 L. ed. 293.

¹⁵Randall v. Brigham, 7 Wall. 540, 19 L. ed. 293. See also Ex parte Garland, 4 Wall. 379, 18 L. ed. 366.

¹⁶Ex parte Wall, 107 U. S. 281, 27

filing brief amounting to a libel on the court,¹⁷ for violating the confidence of a former client.¹⁸ While the court will not ordinarily disbar an attorney committing an indictable offense, not in his official character, prior to trial and conviction therefor, it may be done under special circumstances.¹⁹ Damages for removal after hearing will not lie against the judge.²⁰

§ 489. Oath on admission to bar of Supreme Court.

They shall respectively take and subscribe the following oath or affirmation, viz.: I, ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, uprightly and according to law, and that I will support the Constitution of the United States.

Clause 2 of Rule 2 of Supreme Court, promulgated Feb. 7, 1791.²

Conformably to an act of 1865³ the above oath was amended and the applicant required to swear that he had never voluntarily borne arms against the United States since he had been a citizen thereof, nor exercised the functions of any office under authority in hostility thereto, nor given aid and comfort to any persons in rebellion.⁴ That act was declared unconstitutional, however,⁵ and the amendment was rescinded.⁶

§ 490. Admission of women to practice before Supreme Court.

Any woman who shall have been a member of the bar of the highest court of any State or Territory or of the supreme court of the District of Columbia for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.

Act Feb. 15, 1879, c. 81, 20 Stat. 292, U. S. Comp. Stat. 1901, p. 590.

§ 491. Admission to practice before circuit court of appeals.

All attorneys and counselors admitted to practice in the Supreme Court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by Rule 2

¹⁷United States v. Green, 85 Fed. 1 Cranch, xvii, 1 Wheat. xiv, 1 Pet. 861. vi, 21 How. v.

¹⁸United States v. Costen, 38 Fed. 24; In re Boone, 83 Fed. 949. ³Act Jan. 24, 1865, 13 Stat. 424. ⁴2 Wall. vii.

¹⁹Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569. ⁵Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; In re Shorter. Fed. Cas. No. 12,811.

²⁰Randall v. Brigham, 7 Wall. 535, 19 L. ed. 291. ⁶December term 1866, 4 Wall. vii.

²²Dall. 399, 1 L. ed. 431. See also

of the Supreme Court of the United States, and on subscribing the roll, but no fee shall be charged therefor.

Rule 7 of circuit courts of appeals.

§ 492. Admission to practice in circuit and district courts.

The matter of admission to practice in the various circuit and district courts is governed by the rules of such courts, which should be consulted. By a provision of an act of 1902⁸ "no amount in excess of one dollar shall be received from any attorney in connection with his admission to practice in a circuit or district court."

Author's section.

§ 493. Parties may plead their own cases.

In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys-at-law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

R. S. § 747, U. S. Comp. Stat. 1901, p. 590.

This section was enacted in 1789.¹⁰ It may be taken as an acknowledgment by Congress that the admission of attorneys and counselors to practice is a matter within the judicial power of the United States.¹¹ An attorney being selected has exclusive control and management and his client cannot appoint an agent to represent him in the suit.¹² The presumption is that an attorney appearing for a party has authority to do so, and such authority must be questioned by direct attack.¹³ In criminal practice the district attorney is the prosecutor, no private prosecutor ever having been recognized.¹⁴

§ 494. Right of accused to counsel.

Every person who is indicted of treason, or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. . . .

Part of R. S. § 1034, U. S. Comp. Stat. 1901, p. 722, section given in full, post § 1587.

This provision is from an act of 1790.¹⁶

⁸Act June 28, 1902, c. 1301, § 1, 32 Stat. 475.

¹⁰Act Sept. 24, 1789, c. 20, § 35, 1 Stat. 92.

¹¹In re Shorter, Fed. Cas. No. 12,811.

¹²Nightingale v. Oregon, etc. R. R. 2 Sawy. 338, Fed. Cas. No. 10,264.

¹³Bonnifield v. Thorp, 71 Fed. 924.

¹⁴United States v. Stone, 8 Fed. 232. See also United States v. Blaisdell, 3 Ben. 143, Fed. Cas. No. 14,608.

¹⁶Act April 30, 1790, c. 9, § 29, 1 Stat. 118.

§ 495. Attorney may be requested to represent poor person.

The court may request any attorney of the court to represent such poor person [as, having taken the pauper's oath, shall commence an action], if it deems the cause worthy of a trial.

Part of § 4, of act of July 20, 1892, c. 209, 27 Stat. 252, U. S. Comp. Stat. 1901, p. 707.

While an attorney assigned by the court under the above provision will receive nothing in case of nonsuccess, he may if successful apply to the court for an order fixing fair compensation to be paid out of the fund recovered.¹⁷

§ 496. Officers forbidden to practice as attorneys.

No clerk, assistant or deputy clerk, of any Territorial, district or circuit court, or of the Court of Claims or the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney or counsel in any cause depending in either of said courts, or in any district for which he is acting as such officer.

R. S. § 748, U. S. Comp. Stat. 1901, p. 590.

§ 497. — penalty for practicing.

Whosoever violates the preceding section [see preceding section] shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice, and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

R. S. § 749, U. S. Comp. Stat. 1901, p. 591.

This provision was enacted in 1873.¹⁸

§ 498. Members of Congress not to practice in Court of Claims.

Members of either house of Congress shall not practice in the Court of Claims.

R. S. § 1058, U. S. Comp. Stat. 1901, p. 731.

§ 499. Federal officers may not act for claimants against United States.

Every officer of the United States, or person holding any place

¹⁷Whelan v. Manhattan R. Co. 86 Fed. 219. ¹⁸Act Jan. 16, 1873, c. 36, § 2, 17 Stat. 411.

of trust or profit, or discharging any official function under, or in connection with, any executive department of the government of the United States, or under the Senate or House of Representative of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner or by any means, otherwise than in discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars, or suffer imprisonment not more than one year, or both.

R. S. § 5498, U. S. Comp. Stat. 1901, p. 3707.

This section was enacted in 1853.¹ Members of the National Guard of the District of Columbia are not within its provisions.²

§ 500. Heads of departments not to employ counsel.

No head of a department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same.

R. S. § 189, U. S. Comp. Stat. 1901, p. 94.

This provision was carried into the Revised Statutes from an act of 1870.³ The duties of officers of the Department of Justice to render services to the heads of Departments are prescribed by R. S. § 361. Prior to the adoption of the above provision the heads of Departments were accustomed to employ district attorneys to examine into titles to lands sought to be purchased for the United States,⁴ and since its adoption such services have been required of district attorneys by the Department of Justice.⁵

§ 501. Indians may have counsel in suit against United States for depredations.

Any Indian or Indians interested in the proceedings [for collection of claims for Indian depredations] may appear and defend, by an attorney employed by such Indian or Indians with the

¹Act Feb. 26, 1853, c. 81, § 2, 10 Stat. 170.

²Act June 6, 1900, c. 789, § 1, 31 Stat. 577.

³Act June 22, 1870, c. 150, § 17, 16 Stat. 164.

⁴19 Op. Atty. Gen. 63.

⁵Weed v. United States, 82 Fed. 419.

approval of the Commissioner of Indian Affairs, if he or they shall choose so to do.

Part of § 4. act Mar. 3, 1891, c. 538, 26 Stat. 852, U. S. Comp. Stat. 1901, p. 761.

Indians appearing by their own attorney are not entitled to any other notice than the service of the petition upon the Attorney General.⁷

§ 502. One district attorney for every district.

The provisions contained in laws creating two districts where one previously existed, and providing for the appointment of district attorneys therein are not reproduced here, nor are the statutes providing for such appointments in newly admitted States. R. S. § 767 provided for a district attorney in every district except in Alabama, Georgia and South Carolina. Later laws have provided such officials for each district in Alabama and Georgia.⁸ South Carolina is really divided into two divisions rather than two districts.⁹ Existing laws provide for a district attorney for every district in the United States. The statutes dividing districts into divisions or prescribing terms to be held at different places in a district, have occasionally specified that the district attorney shall perform the duties pertaining to his office in the circuit and district courts when sitting in such divisions or places.¹⁰ But in the majority of enactments any such provision is omitted. It would seem to be merely declaratory of a duty which is sufficiently prescribed by the general laws upon the subject. The statutes governing many districts and divisions provide for deputy marshals and clerks therein, but never for deputy district attorneys.

Author's section.

The validity of the appointment of a district attorney is not subject to collateral attack, hence cannot be considered on a plea to an indictment.¹¹

§ 503. Assistant district attorneys.

Whenever, in the opinion of the district judge of any district or the chief justice of any Territory and the district attorney, evi-

⁷Jaeger v. United States, 27 Ct. Cl. of July 18, 1894, c. 144, § 8, 28 Stat. 115, U. S. Comp. Stat. 1901, p. 383.

⁸Georgia see act April 25, 1882, c. 87, § 1, 22 Stat. 47. Alabama: § 5, 24 Stat. 425, U. S. Comp. Stat. March 3, 1893, c. 220, 27 Stat. 745, 1901, p. 387.

U. S. Comp. Stat. 1901, p. 319, 335. ¹¹United States v. Mitchell, 136 Fed. 906.

⁹Ante, § 284.

¹⁰E. g. see act as to Mississippi

denced by writing, the public interest requires it, one or more assistant district attorneys may be appointed, by the Attorney General; but such opinion shall state to the Attorney General the facts as distinguished from conclusions, showing the necessity therefor.

Part of § 8, act May 28, 1896, c. 252, 29 Stat. 181, U. S. Comp. Stat. 1901, p. 613.

The remainder of the section prescribes the compensation of such assistants,¹² the allowances for traveling and other expenses of the district attorney and his assistants,¹³ and the official residence of the district attorney.¹⁴ The provisions of the section do not apply to the office of the district attorney and his assistants for the southern district of New York or for the District of Columbia.¹⁵ Assistant District Attorneys appointed hereunder are officers of the United States for their respective districts.¹⁶

§ 504. When district attorneys may employ clerks.

The district attorney of any judicial district, when the facts showing the necessity therefor are certified by the district judge to the Attorney General, may, with the approval of the Attorney General, and no longer than such approval lasts, employ necessary clerical assistance at such salary or salaries as shall be from time to time fixed by the Attorney General.

§ 15, act May 23, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 617.

By the express terms of § 24 of the above act this provision does not apply to the office of the district attorney for the southern district of New York, or for the District of Columbia.¹⁷ Whenever the Attorney General deems it necessary he may retain attorneys to assist the district attorneys in the discharge of their duties.¹⁸ But unless specially authorized by law, no compensation is allowed any person other than district attorneys or their assistants for legal services to the United States government or any branch or department thereof. When specially authorized it is allowed only on certificate of the Attorney General.²⁰

§ 505. Temporary appointment by district court to fill vacancy.

In case of a vacancy in . . . [the office of district attorney] the district court of the United States for the district when such vacancy exists, the supreme court of the Territory, and the Su-

¹²Post, § 515.

¹³Post, § 518.

¹⁴Post, § 507.

¹⁵Act May 28, 1896, c. 252, § 24, 29 Stat. 186.

¹⁶In re Leaken, 137 Fed. 680.

¹⁷Act May 28, 1896, § 24, c. 252, 29 Stat. 186.

¹⁸R. S. § 363.

²⁰R. S. § 365.

preme Court of the District of Columbia may appoint persons to exercise the duties of such offices within their respective jurisdictions, until such vacancy shall be filled.

Part of § 2, act June 24, 1898, c. 495, 30 Stat. 487, U. S. Comp. Stat. 1901, p. 618.

The section also provides similarly as to marshals.² A somewhat similar provision as to the appointment of a district attorney for the District of Columbia is found in an act of 1897.³

§ 506. Residence and duties of district attorney, and effect of removal or neglect.

Every . . . United States district attorney, shall reside permanently in the district where his official duties are to be performed, and shall give his personal attention thereto; and in case any such officer shall remove from his district, or shall fail to give personal attention to the duties of his office, except in case of sickness, such office shall be deemed vacant: Provided, That in the southern district of New York said officers may reside within twenty miles of their districts.

§ 2 of act June 20, 1874, c. 328, 18 Stat. 109, U. S. Comp. Stat. 1901, p. 622.

The section contains also a similar provision as to clerks of the circuit or district court,⁵ and marshals.⁶ The fact that a district attorney is not a permanent resident does not invalidate an indictment, where he is a de facto officer.⁷

§ 507. Designation of residence by Attorney General.

The Attorney General is authorized to fix and declare the place of the official residence of the district attorney and of each of his assistants: Provided, That the said assistants must be residents of the district for which they are appointed.

Part of § 8, act May 28, 1896, c. 252, 29 Stat. 181, U. S. Comp. Stat. 1901, p. 613.

§ 508. Term and oath of district attorney.

The provision of revised statutes that "District attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective

²See § 619.

⁶Post, § 623.

³Act Feb. 27, 1897, c. 341, 29 Stat. 600.

⁷United States v. Mitchell, 136 Fed. 906.

⁵Post, § 571.

dates;" and that "every district attorney, before entering upon his office, shall be sworn to a faithful execution thereof,"⁹ was qualified by an act of 1898 providing that "the attorneys . . . of the United States, including the District of Columbia and the Territories, shall continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead. But they shall be appointed and commissioned for the term for four years as now provided by law."¹⁰ The provision of the act of 1898 above mentioned applies also to marshals.¹¹ The President has power to remove a district attorney within the four years and to appoint his successor.¹²

Author's section.

§ 509. Salaries in lieu of fees,—services in circuit court of appeals.

On and after the first day of July, eighteen hundred and ninety-six . . . United States district attorneys . . . shall be paid for their official services, which, in the case of district attorneys, shall include services in the circuit courts of appeals of their respective circuits wherever sitting, salaries and compensation hereinafter provided and not otherwise.^{[a]-[c]}

Part of § 6, act May, 28, 1896, c. 252, 29 Stat. 179, U. S. Comp. Stat. 1901, p. 611.

[a] In general.

This section applies also to marshals.¹⁴ By § 24 of the same act the above section and two others were declared inapplicable to the southern district of New York and the District of Columbia. But an act of 1900 specified that so much of the above section as relates to services in the circuit court of appeals shall be applicable to the southern district of New York;¹⁵ and an act of 1905 fixed the salary in that district at \$10,000.¹⁶ Except in the District of Columbia, district attorneys are not allowed to receive fees in addition to their salary.¹⁷

[b] Earlier provision that compensation to be from fees in each year.

R. S. § 843¹⁸ provided that "the allowances for personal compensation

⁹R. S. § 769, U. S. Comp. Stat. 1901, p. 600.

¹⁰Act June 24, 1898, c. 495, § 1, 30 Stat. 487, U. S. Comp. Stat. 1901, p. 618.

¹¹Post, § 617.

¹²Parsons v. United States, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880; Taylor v. Kercheval, 82 Fed. 502; as to interpretation of R. S.

769, before the qualifying act of 1898, see Badger v. United States. 93 U. S. 599, 23 L. ed. 991.

¹⁴Post, § 633.

¹⁵Act June 6, 1900, c. 785, 31 Stat. 304.

¹⁶See post, § 512.

¹⁷See post, § 552.

¹⁸U. S. Comp. Stat. 1901, p. 646.

of district attorneys, . . . for each calendar year shall be made from the fees and emoluments of that year, and not otherwise." This seems to be superseded, though perhaps operative in the District of Columbia.

It also specifies clerks¹⁹ and marshals. Marshals, however, are now paid salaries in lieu of fees,²⁰ and it is questionable whether the section applies to them.

[c] Old provision forbidding allowances for rule day and double allowances when both courts in session.

By putting district attorneys upon a salary basis, R. S. § 831 was also superseded. It provided that "no per diem or other allowance shall be made to any district attorney . . . for attendance at rule days of a circuit or district court; and when the circuit and district courts sit at the same time, no greater per diem or other allowance shall be made to any such officer than for an attendance on one court."²¹

[d] District attorneys not to receive fees in addition to salary.

To remove any doubt as to the interpretation of the various enactments, Congress in 1905 declared that "in no case except in the District of Columbia shall United States District Attorneys hereafter receive fees of office in addition to the salary allowed them by law."²²

§ 510. Salaries in particular districts.

The United States district attorney for each of the following judicial districts of the United States shall be paid in lieu of the salaries, fees, per centums, and other compensations now allowed by law an annual salary as follows: For the northern and middle districts of the State of Alabama, each four thousand dollars; for the southern district of the State of Alabama, three thousand dollars; for the Territory of Arizona, four thousand dollars; for the eastern district of Arkansas, four thousand dollars; for the western district of Arkansas, five thousand dollars; for the northern district of California, four thousand five hundred dollars; . . . for the district of Colorado, four thousand dollars; for the district of Connecticut, two thousand five hundred dollars; for the district of Delaware, two thousand dollars; for the northern district of Florida, three thousand five hundred dollars; for the southern district of Florida, three thousand five hundred dollars; for the northern district of Georgia, five thousand dollars; for the southern district of Georgia, three thousand five hundred dollars; . . . for the northern district of Illinois, five thousand dollars; for the southern

¹⁹Post, § 582.

²⁰Post, § 633.

²¹U. S. Comp. Stat. 1901, p. 640.

²²Part of § 1, act March 3, 1905, c. 1483, 33 Stat. 1207, U. S. Comp. Stat.

1905, p. 159.

district of Illinois, five thousand dollars; for the district of Indiana, five thousand dollars; for the northern and southern districts of Iowa, each four thousand five hundred dollars; for the district of Kansas, four thousand five hundred dollars; for the district of Kentucky, five thousand dollars; for the eastern district of Louisiana, three thousand five hundred dollars; for the western district of Louisiana, two thousand five hundred dollars; for the district of Maine, three thousand dollars; for the district of Maryland, four thousand dollars; for the district of Massachusetts, five thousand dollars; for the eastern district of Michigan, four thousand dollars; for the western district of Michigan, three thousand five hundred dollars; for the district of Minnesota, four thousand dollars; for the northern and southern districts of Mississippi, each three thousand five hundred dollars; for the eastern district of Missouri, four thousand five hundred dollars; for the western district of Missouri, four thousand five hundred dollars; for the district of Montana, four thousand dollars; for the district of Nebraska, four thousand dollars; for the district of Nevada, three thousand dollars; for the district of New Hampshire, two thousand dollars; for the district of New Jersey, three thousand dollars; for the district of New Mexico, four thousand dollars; for the northern district of New York, four thousand five hundred dollars; for the eastern district of New York, four thousand five hundred dollars; for the eastern district of North Carolina, four thousand dollars; for the western district of North Carolina, four thousand five hundred dollars; for the district of North Dakota, four thousand dollars; for the northern and southern districts of Ohio, each four thousand five hundred dollars; for the district of Oklahoma, five thousand dollars; for the district of Oregon, four thousand five hundred dollars; for the eastern district of Pennsylvania, four thousand five hundred dollars; for the western district of Pennsylvania, four thousand five hundred dollars; for the district of Rhode Island, two thousand five hundred dollars; for the eastern and western districts of the district of South Carolina, four thousand five hundred dollars, two thousand five hundred dollars of which shall be for the performance of the duties of district attorney for the western district; for the district of South Dakota, four thousand dollars; for the eastern, middle and western districts of Tennessee, each four thousand five hundred dollars; for the northern district of Texas, three thousand five hundred dollars; for the eastern district of Texas, five thousand dollars; for the

western district of Texas, four thousand dollars; for the district of Utah, four thousand dollars; for the district of Vermont, three thousand dollars; for the eastern district of Virginia, four thousand dollars; for the western district of Virginia, four thousand five hundred dollars; for the district of Washington, four thousand five hundred dollars; for the district of West Virginia, four thousand five hundred dollars; for the eastern district of Wisconsin, four thousand dollars; for the western district of Wisconsin, four thousand dollars; for the district of Wyoming, four thousand dollars.

§ 9, act May 28, 1896, c. 252, 29 Stat. 181, U. S. Comp. Stat. 1901, pp. 613-615.

The omitted portions of the above section fixed the salary of the district attorney for the southern district of California at three thousand five hundred dollars, and that of the district attorney for the district of Idaho at three thousand dollars. An act of 1906 fixes the salary of these officers at four thousand dollars respectively.¹ The salary of the district attorney in the southern district of New York is the subject of a separate provision.²

§ 511. District Attorney's salary payable monthly.

All salaries provided by sections six to fifteen, inclusive, of this act [includes district attorneys and their assistants]³ shall be paid monthly by the Department of Justice.

§ 16 of act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 617.

§ 512. Salary in southern N. Y. district.

The district attorney for the southern district of New York shall hereafter receive a salary of ten thousand dollars per annum.

Part of § 1, act Mar. 3, 1905, c. 1483, 33 Stat. 1207, U. S. Comp. Stat. 1905, p. 157.

The above section supersedes the provision for a salary of six thousand dollars to the said district attorney contained in R. S. § 770.

§ 513. Payment of clerks and expenses in southern district of New York.

Clerks and messengers in the office of the United States district attorney for the southern district of New York shall hereafter be paid from this appropriation and subsequent appropriations for salaries and expenses of district attorneys, by the disbursing clerk of the Department of Justice, in such number and at such salaries as

¹Act June 30, 1906, c. 3914, 34 Stat. 753-754.

²Post, § 512.

³See ante, §§ 504, 509, 510; post, § 515.

may be fixed by the Attorney General, and that such office expenses of said district attorney as may be approved by the Attorney General shall also be paid in the same manner and from the same appropriations as similar expenses in other judicial districts, notwithstanding the provisions of section eight hundred and thirty-six, Revised Statutes.

From act June 30, 1906, c. 3914, 34 Stat. 754.

The foregoing is a proviso in the sundry civil appropriation act. Previously R. S. § 836 had provided that "There shall be paid to the district attorney for the southern district of New York, in addition to his salary, at the rate of six thousand dollars a year, such sum as shall be necessary, together with the costs and fees allowed him by law, to pay such amount as may be fixed by the Attorney General for the proper expenses of his office. But nothing in this or the preceding section shall forbid the allowance of additional compensation for services in prize causes, as provided in title 'Prize.'"⁵ R. S. § 835, limited the amount of fees which the district attorney could retain for his compensation. It is superseded by the act providing for the payment of salaries to the district attorneys in lieu of fees.⁶ The additional compensation allowed in prize cases is elsewhere stated.⁷

§ 514. Salary of district attorney in Oklahoma.

The district attorneys in the two districts of Oklahoma are to receive the fees and compensation now allowed by law to officers performing similar services for the United States in other districts.^{7 1/2}

§ 515. Compensation of assistant district attorney.

Such assistant district attorneys shall be paid such salary as the Attorney General may from time to time determine as to each, which shall in no case exceed two thousand five hundred dollars per annum.

Part of § 8 of act May, 28 1896, c. 252, 29 Stat. 181, U. S. Comp. Stat. 1901, p. 613.

§ 516. — assistants in certain districts may receive more.

The restriction of assistants' salaries to \$2,500 does not apply to assistants in the southern district of New York or in the District of

⁵U. S. Comp. Stat. 1901, p. 644.

⁶Ante, § 509.

⁷Post, §§ 1330, 1331.

^{7 1/2}Act June 19, 1906, c. 3335, § 13, 34 Stat. 275.

Columbia.⁸ Nor does it apply to the first assistant to the district attorney for the northern district of Illinois.⁹

Author's section.

§ 517. Office expenses allowed district attorneys.

The necessary office expenses of the district attorneys . . . shall be allowed when authorized by the attorney general.

§ 14, act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 617.

The above provision applies also to marshals.¹⁰ Disbursements for printing supplies and stenographers' services can be allowed only on proof that they were necessary.¹¹

§ 518. Allowances for traveling and other expenses.

The necessary expenses for lodging and subsistence actually paid, not exceeding four dollars per day and actual and necessary traveling expenses of the district attorney and his assistants, while absent from their respective official residences and necessarily employed in going to, returning from, and attending before any United States court, commissioner or other committing magistrate, and while otherwise necessarily absent from their respective official residences on official business shall be allowed and paid in the manner hereinafter provided.

Part of § 8, act of May 28, 1896, c. 252, 29 Stat. 181, U. S. Comp. Stat. 1901, p. 613.

By § 24 of this act, § 8, above, does not apply to the office of the district attorney and his assistants for the southern district of New York or for the District of Columbia. For the allowance and payment of expenses "in the manner hereinafter provided" see post, § 522. This provision supersedes an act of 1894,¹² providing as follows: "Hereafter the United States district attorney shall be allowed only mileage actually traveled to and from the place of hearing for his attendance in person or by his assistant, before a United States Commissioner or other committing magistrate, in each case, and no more."

§ 519. Duty to make quarterly expense accounts.

Whenever in this act an officer is allowed actual expenses [this

⁸See § 24 of act May 28, 1896, c. 252, U. S. Comp. Stat. 1901, p. 618.

⁹See act March 3, 1903, c. 1007, § 1, 32 Stat. 1141, U. S. Comp. Stat. 1903, p. 96.

¹⁰Post, § 637.

¹¹United States v. Colman, 76 Fed. 214, 22 C. C. A. 135.

¹²Act Aug. 18, 1894, c. 301, 28 Stat. 372.

includes district attorneys and their assistants] the account therefor shall be made out quarterly, in accordance with rules and regulations prescribed by the Attorney General. When made out the account shall be verified on oath before an officer authorized to administer oaths.

Part of § 13, act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 616.

The omitted portion of the section provides for the auditing of district attorneys' expense accounts,¹⁴ and prescribes also the duties of marshals as to their accounts.¹⁵

§ 520. Semi-annual return of fees and expenses.

Every district attorney . . . shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act. . . . Said returns shall be verified by the oath of the officer making them.

Part of R. S. § 833, U. S. Comp. Stat. 1901, p. 642.

This section also includes marshals,¹⁷ but is superseded by a later law requiring quarterly returns as to expenses and giving salaries in lieu of fees.¹⁸ This and the following section are superseded as to district attorneys other than the district attorney for the District of Columbia by the provision for the payment of salaries instead of fees.¹⁹ Except in the District of Columbia no district attorney can receive fees in addition to his salary.²⁰ The section also includes clerks of the circuit and district courts, but may be regarded as superseded as to them by a similar provision of an act of June 28, 1902.¹

§ 521. All fees included in return with certain exceptions.

The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven. All other fees,

¹⁴Post, § 522.

¹⁵Post, § 641.

¹⁷See post, § 641.

¹⁸Post, §§ 633, 634.

¹⁹Post, § 745. See also preceding section.

²⁰Ante, § 509 [d]

¹See post, § 589.

charges and emoluments to which a district attorney . . . may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the semiannual return required of said officers by the preceding section.³

R. S. § 834, U. S. Comp. Stat. 1901, p. 643.

This section also specifies marshals but is superseded.⁴ It is apparently in force as to district attorneys only in the District of Columbia and the southern district of New York.⁵

§ 522. Auditing of district attorney's expense accounts.

The expense accounts of the district attorneys and their assistants, when made out in accordance with this act, shall be submitted to and examined by the circuit court or district court of the district, and when approved by the court shall be audited and allowed as now provided for by law.

Part of § 13 of act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 616.

The section also requires expense accounts to be made out quarterly;⁶ and prescribes the duties of marshals as to their expense accounts.⁷

§ 523. Fees and accounts of attorneys for District of Columbia.

The emolument returns of the attorney of the United States for the District of Columbia shall be returned to the Attorney General, and the accounts of the said attorney shall be rendered, audited, and paid in the same manner as accounts of all other district attorneys are rendered, audited and paid.

Act Dec. 14, 1877, 20 Stat. 7, Sup. R. S. p. 149.

This provision as to returns seems covered by similar provisions set forth elsewhere.⁸

§ 524. Duties of district attorneys in general.

It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the

³See preceding section.

⁴See post. §§ 633, 634, 641.

⁵See ante, § 520, and note.

⁶Ante, § 519.

⁷Post, § 641.

⁸See ante, § 520, and note. See also § 521.

United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury.

R. S. § 771, U. S. Comp. Stat. 1901, p. 601.

The authority of the district attorney is derived from the acts of Congress⁹ and is limited to his particular district,¹⁰ hence when a case is transferred to the appellate court it passes beyond his control and if he appears in that court he acts only as special counsel, and not as district attorney¹¹ within his district. He is the only prosecutor recognized by law¹² and the courts will not recognize any suit, civil or criminal, by or on behalf of the United States as regularly before them unless prosecuted by the district attorney or some one properly authorized by him.¹³ The duty to "prosecute all civil actions" covers all cases in which the interests of the government are at stake, whether the subject of attack or defense.¹⁴ Thus it includes defense of habeas corpus to release Chinese from vessel;¹⁵ proceedings to condemn land for the benefit of the United States;¹⁶ proceedings under statutory provisions to recover damages against the United States for injuries done by flowage.¹⁷ It is the duty of the district attorney also, under this section, to conduct proceedings to recover a pension fraudulently received.¹⁸ In a criminal case, after indictment and before trial, he has power to enter a nolle prosequi.¹⁹ But he has no control over the course to be pursued while the charge is being examined by commissioner or grand jury.²⁰ But the fact that he was bitter in his prosecution and influenced the grand jury is no objection to an indictment.¹ A district attorney is not authorized to take a commissioner's warrant from the marshal's hands to determine whether it shall be executed.² He has the power to employ a stenographer to take testimony in a criminal case, without first applying to the Attorney General.³

⁹Levy Ct. v. Ringgold, 5 Pet. 453, S. 345, 41 L. ed. 184, 16 Sup. Ct. Rep. 8 L. ed. 189.

¹⁰United States v. Winston, 73 Fed. 149, 19 C. C. A. 419.

¹¹United States v. Winston, 170 U. S. 522, 42 L. ed. 1130, 18 Sup. Ct. Rep. 701; United States v. Garter, 170 U. S. 529, 42 L. ed. 1133, 18 Sup. Ct. Rep. 703.

¹²United States v. Stone, 8 Fed. 261; United States v. Doughty, 7 Blatchf. 424, Fed. Cas. No. 14,986.

¹³See Confiscation Cases, 7 Wall. 454, 19 L. ed. 198.

¹⁴United States v. Smith, 158 U. S. 354, 39 L. ed. 1011, 15 Sup. Ct. Rep. 846.

¹⁵Hilborn v. United States, 163 U.

¹⁶United States v. Johnson, 173 U. S. 363, 43 L. ed. 731, 19 Sup. Ct. Rep. 427.

¹⁷Colman v. United States, 66 Fed. 699, 14 C. C. A. 65.

¹⁸Ruhm v. United States, 66 Fed. 531.

¹⁹United States v. Schumann, 2 Abb. 523, Fed. Cas. No. 16,235.

²⁰Idem.

¹United States v. Mitchell, 136 Fed. 906.

²United States v. Scroggins, 3 Woods, 529, Fed. Cas. No. 16,244.

³Fish v. United States, 36 Fed. 677.

§ 525. Duty to defend officers of Congress.

In any action now pending, or which may be brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the district attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer; and all provisions of the eighth section of the act of July 28, 1866, entitled "An act to protect the revenue, and for other purposes," and also all provisions of the sections of former acts therein referred to, so far as the same relate to the removal of suits, the withholding of executions, and the paying of judgments against revenue or other officers of the United States, shall become applicable to such action and to all proceedings and matters whatsoever connected therewith, and the defense of such action shall thenceforth be conducted under the supervision and direction of the Attorney General.

§ 8 of act Mar. 3, 1875, c. 130, 18 Stat. 401, U. S. Comp. Stat. 1901, p. 602.

This provision is taken from the sundry civil appropriation act for the year ending June 30, 1876. The section of an act of 1866 referred to above is not re-enacted in the Revised Statutes, but the "provisions of the sections of former acts" which it refers to will be found elsewhere. They include provisions for the removal of suits against revenue officers,⁵ and for the withholding of executions against such officers and for the payment of judgments so recovered against them.⁶

§ 526. — duties to furnish information as to titles to public property.

The district attorneys of the United States, upon the application of the Attorney General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts.

Part of R. S. § 355, U. S. Comp. Stat. 1901, p. 206.

This section was enacted in 1841.⁸ The omitted portion provides that the opinion of the Attorney General shall be given as to the validity of title to land upon which public buildings are to be erected and for the procuring of additional evidence as to such title.

⁵Post, § 1145.

⁶Post, § 1863.

⁸Res. Sept. 11, 1841, No. 6, 5 Stat. 468.

§ 527. — to render legal services in purchases for government.

Hereafter all legal services connected with the procurement of titles to site for public buildings, other than for life-saving stations and pier-head head lights, shall be rendered by United States district attorneys: Provided, further, That hereafter, in the procurement of sites for such public buildings, it shall be the duty of the Attorney General to require of the grantors in each case to furnish, free of all expenses to the government, all requisite abstracts, official certifications, and evidences of title that the Attorney General may deem necessary.

Act Mar. 2, 1889, c. 411, § 1, 25 Stat. 941, U. S. Comp. Stat. 1901, p. 2518.

§ 528. — to conduct government suits respecting national banks.

All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

R. S. § 380, U. S. Comp. Stat. 1901, p. 213.

The effect of this provision is to impose upon the district attorneys the duty of conducting suits arising out of the national banking association laws, the United States or its agents being parties. It is immaterial whether the suit is brought in the name of the United States, or in that of the Comptroller, or in the name of a receiver,¹⁰ the latter being an "officer or agent" within the meaning of the section,¹¹ or whether it is commenced before or after the appointment of the receiver.¹² The provision in no way affects the jurisdiction of any court.¹³

§ 529. Duty as to suits for money due Post Office Department.

In the prosecution of any suit for money due the Post-Office Department, the United States attorney conducting the same shall obey the directions which may be given him by the Department of Justice.

R. S. § 381, U. S. Comp. Stat. 1901, p. 213.

This section was carried into the Revised Statutes from an act of 1872.¹⁵

¹⁰Van Antwerp v. Hulburt, 7 Blatchf. 426, Fed. Cas. No. 16,826. ¹²Bethel Bank v. Pahquioque Bank, 14 Wall. 400, 20 L. ed. 840.

¹¹Gibson v. Peters, 150 U. S. 344, 37 L. ed. 1104, 14 Sup. Ct. Rep. 134. ¹³Van Antwerp v. Hulburt, 7 Blatchf. 426, Fed. Cas. No. 16,826.

See also Short v. Hempburn 75 Fed. 113, 21 C. C. A. 252; Speckart v. Bank, 85 Fed. 18; Brown v. Smith, 88 Fed. 565. ¹⁵Act June 8, 1872, c. 335, § 309, 17 Stat. 324.

§ 530. Duty to represent government in prize cases.

The district attorneys of the several judicial districts shall represent the interests of the United States in all prize-causes, and shall not act as separate counsel for the captors on any private retainer or compensation from them, unless in a question between the claimants and the captors, on a demand for damages. They shall examine all fees, costs and expenses, sought to be charged on any prize-fund, and protect the interests of the captors and of the United States. The district attorneys of all districts in which any prize-causes are or may be pending shall, as often as once in three months, send to the Secretary of the Navy a statement of the condition of all prize-causes pending in their districts, in such form and embracing such particulars as the Secretary of the Navy shall require.

R. S. § 4619, U. S. Comp. Stat. 1901, p. 3128.

The proceedings in prize cases are provided by other sections.¹⁶ In prosecuting prize cases the district attorney acts as law officer of the government and not in any other capacity.¹⁷

§ 531. Duty as to restoration of records and compensation therefor.

Judges [of United States courts] may direct the performance . . . by the United States attorneys, . . . of any duty incident thereto [i. e. incident to the restoration of records lost or destroyed, in which the United States are interested]; and said . . . attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.

Part of R. S. § 904, as amended Jan. 31, 1879, c. 39, 20 Stat. 277.

This provision applies also to United States clerks.¹⁸ Except in the District of Columbia fees are now no longer allowed district attorneys in addition to their salary.¹⁹

§ 532. Duty to represent Indians.

In all States and Territories where there are reservations or al-

¹⁶R. S. § 4618.

¹⁸Post, § 597.

¹⁷The Anna, Blatchf. Pr. Cas. 337,
Fed. Cas. No. 402.

¹⁹Ante, § 509 [d]

lotted Indians the United States district attorney shall represent them in all suits at law and in equity.

Act Mar. 2, 1893, c. 209, 27 Stat. 631.

By the Indian Depredation Claims Act,¹ it is made the duty of the Attorney General to appear and defend the interests of the Indians and the government in suits arising thereunder.

§ 533. — to institute government condemnation proceedings.

It shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act [an act authorizing condemnation of land for sites for public buildings, etc., by the Secretary of the Treasury, or other government officer], or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

Part of § 1, act Aug. 1, 1888, c. 728, 25 Stat. 357, U. S. Comp. Stat. 1901, p. 2516.

§ 534. — to abate unlawful enclosure of public lands.

It shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated [i. e. by the enclosure or the assertion of right to public land without title] showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or Territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants.

Part of § 2, act Feb. 25, 1885, c. 149, 23 Stat. 321, U. S. Comp. Stat. 1901, p. 1525.

The remainder of the section confers jurisdiction on the circuit and district courts and authorizes an order for the destruction of such enclosure.³

¹Act March 3, 1891, c. 568, § 4, 26 Stat. 852, 853.

³Ante, § 154.

If the inclosure is of less than one hundred and sixty acres the Secretary of the Interior must first authorize suit.⁴

§ 535. — to restrain combinations in restraint of import trade.

It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain . . . violations [of section 73 of the act of August 27, 1894, declaring combinations and conspiracies in restraint of import trade unlawful.]

Part of § 74 of act of Aug. 27, 1894, c. 349, 28 Stat. 570, U. S. Comp. Stat. 1901, p. 3203.

The omitted part of the section invests the circuit court with jurisdiction⁵ and prescribes the procedure.⁶

§ 536. — to prevent violations of anti-trust act of 1890.

It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain . . . violations [of the anti-trust act of 1890.]

Part of § 4, act July 2, 1890, c. 647, 26 Stat. 209, U. S. Comp. Stat. 1901, p. 3201.

The section also invests the circuit court with jurisdiction⁷ and prescribes the procedure.⁸

§ 537. — to prosecute violations of commerce commission's orders.

It shall be the duty of the various district attorneys, under the direction of the attorney general of the United States, to prosecute for the recovery of forfeitures [provided by the Interstate Commerce law as amended].¹⁰

Part of § 16, act Feb. 4, 1887, c. 104, 24 Stat. 384, as amended June 29, 1906, § 5, c. 3591, 34 Stat. 591.

⁴See § 7, of above act, U. S. Comp. Stat. 1901, p. 1528.

⁵Ante, § 144.

⁶Post, § 1345.

⁷Ante, § 142.

⁸Post, § 1345.

¹⁰Post, § 1349.

§ 538. — to prosecute violations of act prohibiting transportation of diseased cattle.

It shall be the duty of the several United States district attorneys to prosecute all violations of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any district or circuit court of the United States or Territorial court holden within the district in which the violation of this act has been committed.

§ 9, act May 29, 1884, c. 60, 23 Stat. 33, U. S. Comp. Stat. 1901, p. 3185.

§ 539. — to prosecute suits in equity against carriers violating published rates.

It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings [i. e. proceedings in equity against carriers violating their published rates].¹²

Part of § 3, act Feb. 14, 1903, c. 708, 32 Stat. 848, U. S. Comp. Stat. 1905, p. 601.

The other portions of § 3 are contained in another chapter.¹³

§ 540. Duty to proceed against marshal failing to pay over fines.

In case of failure [i. e. of the marshal to pay all fines collected by him or his deputy under R. S., § 1659, respecting the militia, into the Treasury within two months after he has received the same] it shall be the duty of the Comptroller of the Treasury to give notice to the district attorney of the United States, who shall proceed against the marshal in the district court, by attachment, for the recovery of the same.

Part of R. S. § 1660, U. S. Comp. Stat. 1901, p. 1130.

§ 541. — to prosecute offenders against alien immigration laws.

It shall be the duty of the district attorney of the proper district to prosecute every such suit [i. e. suits for penalties for violation of the alien immigrant law of 1903] when brought by the United States.

¹²See post, § 1359.

¹³Post, §§ 1359, et seq.

Part of § 5, act Mar. 3, 1903, c. 1012, 32 Stat. 1214, U. S. Comp. Stat. 1905, p. 277.

The omitted portion of the above provision prescribes the penalty for the violation of the above mentioned immigrant law. The whole provision supersedes a similar enactment of 1885.¹⁵

§ 542. — to prosecute owner of obstructing bridge, refusing to alter same.

If at the end of such time [as the Secretary of War has given to the owner of a bridge obstructing navigation, to alter same] the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings [to punish such failure to alter, as a misdemeanor] hereinafter mentioned may be taken.

Part of § 18, act Mar. 3, 1899, c. 425, 30 Stat. 1153, U. S. Comp. Stat. 1901, p. 3545.

§ 543. — to prosecute persons presenting false claims.

It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety [of the Revised Statutes punishing the making of false claims against the United States] by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

R. S. § 3492, U. S. Comp. Stat. 1901, p. 2329.

This provision was enacted in 1863.¹⁷

§ 544. — to prosecute revenue frauds.

It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty or forfeiture has been incurred in the district of such attorney for the violation of any law

¹⁵Act Feb. 26, 1885, c. 164. § 3, ¹⁷Act March 2, 1863, c. 67, 12 Stat. U. S. Comp. Stat. 1901, p. 1291. 698.

of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties and forfeitures in such cases provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the commissioner of internal revenue, for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of; provided, that the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment.

R. S. § 838, as amended Feb. 27, 1877, c. 69, 19 Stat. 241, U. S. Comp. Stat. 1901, p. 644.

The amendment consisted in inserting the word "the" after the words "it shall be" in the first line. Since everywhere except in the District of Columbia, the district attorneys receive salary in place of fees¹⁸ which are now no longer allowed,¹⁹ the above provision as to compensation may be regarded as superseded.

§ 545. Duty to make return to Treasury of suits.

Every district attorney shall, immediately after the end of every term of the circuit and district court for his district, forward to the Solicitor of the Treasury, except in the cases provided in the next section¹ a full and particular statement accompanied by the certificate of the clerks of said courts, respectively, of all causes pending in said courts, and of all causes decided therein during such term, in which the United States are party. He shall also, on the first day of October in each year, make a return to said solicitor of the number of suits and proceedings commenced, pending and determined within his district during the fiscal year next preceding the date of such return, showing the date when such proceeding or suit in each case was commenced. If the determination thereof has been delayed or continued beyond the usual or reasonable period. the reasons must be set forth, and a statement must be made of

¹⁸Ante, § 509.

¹⁹Ante, § 509. [d]

¹Post, § 547.

the measures taken by the district attorney to press such proceedings or suits to a close.

R. S. § 773, U. S. Comp. Stat. 1901, p. 603.

§ 546. Duty to transmit to Treasury, statement of suits for fines, etc.

Every district attorney shall, on instituting any suit for the recovery of any fine, penalty, or forfeiture, immediately transmit to the Solicitor of the Treasury a statement thereof.

R. S. § 772, U. S. Comp. Stat. 1901, p. 603.

This section was enacted in 1830.³ ♦

§ 547. — to make return of revenue suits to commissioner.

When any suit or proceeding arising under the internal revenue laws, to which the United States are party, or any suit or proceeding against a collector or other officer of the internal revenue, wherein a district attorney appears, is commenced, the attorney for the district in which it is brought shall immediately report to the commissioner of internal revenue the full particulars relating to the same; and he shall, immediately after the end of each term of the court in which such suit or proceeding is pending, forward to the said commissioner a full and particular statement of its condition.

R. S. § 774, U. S. Comp. Stat. 1901, p. 603.

Taken from an act of 1867.⁴

§ 548. — to report on postoffice suits.

Each district attorney shall, immediately after the end of every term in which any suit for moneys due on account of the Postoffice Department has been pending in his district, forward to the Department of Justice a statement of any judgment or order made, or step taken in the same, during such term, accompanied by a certificate of the clerk, showing the parties to and amount of every such judgment, with such other information as the Department of Justice may require; and the said attorney shall direct speedy and effectual execution upon said judgment, and the United States marshal to

³Act May 29, 1830, c. 153, § 4, 4 Stat. 415.

⁴Act March 2, 1867, c. 169, § 3, 14 Stat. 471, 472.

whom the same is directed shall make returns of the proceedings to the Department of Justice, at such times as it may direct.

R. S. § 775, U. S. Comp. Stat. 1901, p. 604.

§ 549. Liability of district attorney on receiving a bond for suit.

Whenever the Solicitor of the Treasury receives information from a collector of duties that such collector has delivered any bond for duties to a district attorney for suit, the Solicitor of the Treasury shall make such entry thereof as that the attorney may duly appear chargeable therewith, until the amount has been paid to the United States, or he has obtained judgment thereon and delivered execution to the marshal, or otherwise been duly discharged therefrom.

R. S. § 373, U. S. Comp. Stat. 1901, p. 211.

This section is taken from an act of 1830.⁶

§ 550. Rules respecting suits where United States are parties.

The Solicitor of the Treasury shall establish such regulations, not inconsistent with law. . . . with the approbation of the Attorney General, for the observance of district attorneys . . . respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers, and the prompt collection of all revenues and debts due and accruing to the United States.

Part of R. S. § 377, U. S. Comp. Stat. 1901, p. 212.

By R. S. § 3215,⁷ the commissioner of internal revenue is given a similar power to establish rules in suits under the internal revenue laws to which the United States are parties.

§ 551. Attorney General to supervise district attorneys and marshals.

The Attorney General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney General an account of their official proceedings, and of the state and condition of their

⁶Act May 29, 1830, 153, § 3, 4 Stat. 414. ⁷U. S. Comp. Stat. 1901, p. 2084.

respective offices, in such time and manner as the Attorney General may direct.

R. S. § 362, U. S. Comp. Stat. 1901, p. 208.

§ 552. — to retain counsel to assist district attorneys.

The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

R. S. § 363, U. S. Comp. Stat. 1901, p. 208.

§ 553. — to provide other departments with counsel.

Whenever the head of a department or bureau gives the Attorney General due notice that the interests of the United States require the service of counsel upon the examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such department or bureau, the Attorney General shall provide for such service.

R. S. § 364, U. S. Comp. Stat. 1901, p. 208.

§ 554. Restrictions on payment of special counsel fees.

No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or department of the government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the district attorneys.

R. S. § 365, U. S. Comp. Stat. 1901, p. 209.

§ 555. Appointment and oath of special counsel.

Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any

case in which the government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.

Act June 22, 1870, c. 150, § 17, 16 Stat. 164, R. S. § 366, U. S. Comp. Stat. 1901, p. 209.

Foreign counsel employed by the Attorney General are not required to take the oath of office above provided.¹

§ 556. Solicitor General or other officers may be sent to any district.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

R. S. § 367, U. S. Comp. Stat. 1901, p. 209.

§ 557. Attorney General to supervise accounts.

The Attorney General shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks and other officers of the courts of the United States.

R. S. § 368, U. S. Comp. Stat. 1901, p. 210.

§ 557¹/₂. Special counsel may be authorized to conduct proceedings in any district.

The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.

Act June 30, 1906, c. 3935, 34 Stat. 816.

¹Act June 30, 1906, c. 3914, 34 Stat. 754. See also earlier appropriation acts with same provision.

CHAPTER 16.

CLERKS OF UNITED STATES COURTS.

- § 558. Cross references and matters not included.
- § 559. Appointment of Supreme Court clerk.
- § 560. Appointment of Supreme Court deputy clerks.
- § 561. Residence, disabilities and duties of Supreme Court clerk.
- § 562. Court of Claims clerk and deputies.
- § 563. Appointment, duties and salary of clerks of circuit court of appeals.
- § 564. Appointment of circuit court clerks.
- § 565. Appointment and removal of circuit court clerks in ninth circuit.
- § 566. Deputy circuit clerks—clerks death—liability for defaults.
- § 567. Appointment of district court clerks.
- § 568. Deputy district clerks—appointment and defaults—clerks death.
- § 569. Particular provisions as to circuit and district court clerks and deputies in various districts.
- § 570. Oath of clerks.
- § 571. Place of residence of circuit and district court clerks.
- § 572. Bond of circuit, district and Supreme Court clerks.
- § 573. Bond of clerk of Court of Claims.
- § 574. Bond of deputy circuit and district court clerks.
- § 575. Increase of bond.
- § 576. Compensation of Supreme Court clerk.
- § 577. Compensation of clerks of circuit court of appeals.
- § 578. Salary of clerk of Court of Claims and assistant.
- § 579. General provision as to compensation in circuit and district court.
- § 580. —fees and compensation in California, Oregon and Nevada.
- § 581. —additional compensation in prize cases.
- § 582. Compensation in each year must be from fees thereof.
- § 583. Clerks not to charge unearned fees.
- § 584. No allowance for rule days, nor double allowance when both courts in session.
- § 584½. No per diem except when court opens.
- § 585. Salaries of deputy circuit clerks paid by clerks and allowed as expenses.
- § 586. Salaries of deputy district clerks paid by clerks and allowed as expenses.
- § 587. Duty of Supreme Court clerk to account and pay over surplus fees.
- § 588. Duty of circuit courts of appeals clerks to account and pay over surplus fees.
- § 589. Circuit and district clerks to account semi-annually as to fees.

- § 590. Naturalization fees and return thereof to bureau.
- § 591. Surplus fees to be paid into Treasury.
- § 592. Auditing of returns which may show a surplus.
- § 593. Court of Claims clerk to report as to judgments rendered and decisions of court.
- § 594. Power of Court of Claims clerk to disburse funds—settlement of accounts.
- § 595. Duty of clerks to account to court for moneys deposited in causes during term.
- § 596. Circuit and district clerks to report to Treasury judgments in cases where United States are parties.
- § 597. Duty as to restoration of records and compensation therefor.
- § 598. Removal of clerk failing to report etc.—appointment of successor.
- § 599. Criminal punishment of clerk failing to report.
- § 600. Punishment for failing to deposit moneys in registry.
- § 601. Power of clerks to administer oaths.
- § 602. —power to administer oaths in admiralty cases.
- § 603. Circuit or district court clerk not to act as receiver or master.
- § 604. Duty to be in office on first Mondays, for equity cases.
- § 605. —to report moneys paid in revenue cases.
- § 606. Attorney General to require clerks to account for moneys—docket books.

§ 558. Cross-references and matters not included.

Elsewhere will be found enactments prescribing duties of the clerk in issuing attachments against delinquent postmasters, etc.;²⁰ and in naturalization proceedings;¹ forbidding clerks acting as commissioners;² or attorneys.³ Provisions respecting clerks' fees are contained in the chapter on fees.⁴ Clerks have sometimes power to adjourn court⁵ and to make orders in admiralty.⁶ They issue writs of error.⁷ They are required to keep certain records in bankruptcy.⁸ Provisions of the Federal statutes permitting naturalization⁹ or timber culture proofs¹⁰ or homestead entry proofs¹¹ before clerks of courts of record, are not included.

Author's section.

²⁰Post, § 1401.

¹Post, §§ 2395–2396.

²Post, § 673.

³Ante, § 496.

⁴Post, § 707, et seq.

⁵Ante, §§ 362–364.

⁶Ante, § 183.

⁷Post, § 1925.

⁸Ante, § 386.

⁹See act Feb. 1, 1876, c. 5, 19 Stat. 2, U. S. Comp. Stat. 1901, p. 1331.

¹⁰See act March 4, 1896, c. 40, 29 Stat. 43, U. S. Comp. Stat. 1901, p. 1537.

¹¹See R. S. § 2294, U. S. Comp. Stat. 191, p. 1396.

§ 559. Appointment of Supreme Court clerk.

The Supreme Court shall have power to appoint a clerk . . . for said court. . . .

R. S. § 677, U. S. Comp. Stat. 1901, p. 559.

The section provides also for the appointment of a marshal¹³ and a reporter.

§ 560. Appointment of Supreme Court deputy clerks.

One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. •In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name, until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasance committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

R. S. § 678, U. S. Comp. Stat. 1901, p. 559.

This section was enacted in 1872.¹⁵

§ 561. Residence, disabilities and duties of Supreme Court clerk.

The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practise either as attorney or counselor in this court or in any other court while he shall continue to be clerk of this court. The clerk shall not permit any original record or paper to be taken from the court room, or from the office without an order from the court; but records on appeals and writs of error, exclusive of original papers sent up herewith, may be taken to a printer to be printed, under the requirement of Rule 10.

Clauses 1 and 2 of rule 1 of Supreme Court as revised and corrected December term, 1858,¹⁶ and Nov. 13, 1882.¹⁷

The clerk is also required to keep the records of the old court of appeals.¹⁸

¹³Post, § 614.

¹⁵Act June 8, 1872, c. 336, 17 Stat. 330.

¹⁶21 How. v.

¹⁷106 U. S. vii.

¹⁸Ante § 380.

§ 562. Court of claims Clerk and deputies.

The said court [of claims] shall appoint a chief clerk, an assistant clerk, if deemed necessary, . . . The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or, if not, at the next session. . . .

R. S. § 1053, U. S. Comp. Stat. 1901, p. 730.

The section also provides for a bailiff and messenger.¹

§ 563. Appointment, duties and salary of clerks of circuit court of appeals.

The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable.

Part of § 2, act Mar. 3, 1891, c. 517, 26 Stat. 826, U. S. Comp. Stat. 1901, p. 547.

The duty of such clerks to account and pay over surplus fees is set forth in a following section.² Their salary is three thousand dollars a year.³ The rules in different circuits contain various provisions as to their residence, oath, bond duties and disabilities.⁴

§ 564. Appointment of circuit court clerks.

Hereafter all appointments of clerks of circuit courts of the United States shall be made by the circuit judges of the respective circuits in which such circuit courts are or may be hereafter established; and all provisions of law inconsistent herewith are hereby repealed.

Part of § 3, act Feb. 6, 1889, c. 113, 25 Stat. 655, U. S. Comp. Stat. 1901, p. 497.

The appointment of a clerk for the circuit court by the circuit judge of the particular circuit is provided also by R. S. § 619. The same person may be both clerk of the circuit court and of the circuit court of appeals.⁵

¹Post, § 684.

²Post, § 588.

³Post, § 577.

⁴See Rule 5 in each circuit as printed in the Appendix.

⁵United States v. Harsha, 56 Fed. 953.

A clerk is essentially a ministerial officer, hence when process is directed to be issued it is his duty to comply, and he is liable for failure to do so.⁶

§ 565. Appointment and removal of circuit court clerks in ninth circuit.

In the ninth circuit of the United States a circuit judge may appoint or remove the clerk of the circuit court for the district in which the circuit judge resides. In all other cases clerks of such courts shall be appointed as provided for by existing laws.

§1 of appropriation act Mar. 3, 1893, c. 211, 27 Stat. 714, U. S. Comp. Stat. 1901, p. 497.

§ 566. Deputy circuit clerks—clerks' death—liability for defaults.

One or more deputies of any clerk of a circuit court may be appointed by such court, on the application of the clerk, and may be removed at the pleasure of judges authorized to make the appointment. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office, and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults and misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond, shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

R. S. § 624, U. S. Comp. Stat. 1901, p. 498.

There are various provisions as to the appointment of deputy clerks and their residence and as to liability for their misfeasances and defaults in special statutes applicable to particular districts. These are to be found in a note to a subsequent section of the code.³

§ 567. Appointment of district court clerks.

A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law.

R. S. § 555, U. S. Comp. Stat. 1901, p. 451.

⁶United States v. Bell, 127 Fed. 1002.

³See post, § 569, and notes.

§ 568. Deputy district clerks—appointment and defaults—clerk's death.

One or more deputies of any clerk of a district court may be appointed by the court, on the application of the clerk, and may be removed at the pleasure of judges authorized to make the appointment. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond, shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

R. S. § 558, U. S. Comp. Stat. 1901, p. 452.

Particular provisions regarding deputies in various districts will be found in a note to the next section of this code.

§ 569. Particular provisions as to circuit and district court clerks and deputies, in various districts.

There are circuit and district court clerks in each of the various judicial districts in the several States, just as there are separate circuit and district courts in every district.¹⁰ In some instances, however, one person acts as clerk for both courts. It would serve no useful purpose to reproduce here the various statutes authorizing the appointment of clerks in district newly created, and they are omitted. But provisions for additional clerks or deputies, of either or both courts, at different places within a district; and provisions for the establishment of clerk's offices at designated places in a district, are contained in many statutes providing for terms of court in a district, or for the creation of judicial divisions of a district, and these are collected in a note hereto. Some of the statutes creating these judicial divisions omit provisions for clerks or deputies or clerk's officers therein, leaving the regulation thereof to the general statutory law.

Author's section.

[a] Alabama, Arkansas and California.

The act of 1903 creating a southern division of the northern district of

¹⁰Ante, § 103.

Alabama requires that "the clerks of the circuit and district courts of the southern division of the northern district of Alabama shall maintain an office in charge of themselves or a deputy at said city of Anniston which shall be kept open at all times for the transaction of the business of said courts."¹¹ In the northern division of the southern district the clerk and marshal of the district are required to attend the terms at Selma, no additional clerk being authorized, though "if, in the opinion of the court, it shall become necessary, a deputy clerk may be appointed."¹² There is the same provision for the terms at Tuscaloosa, in the western division of the northern district.¹³

By R. S. § 556, as amended in 1877,¹⁴ two district court clerks were authorized in the eastern district of Arkansas, one having office and residing at Little Rock and the other at Helena. By act of 1897 one additional circuit court clerk and one additional district court clerk were authorized, to reside and keep office at Batesville in the eastern district;¹⁵ and additional clerks for each of those courts were authorized at Texarkana in the western district by act of 1898;¹⁶ and by act of 1902 creating the Harrison division of the western district it was provided "that there shall be appointed, in the manner required by law, a clerk, who shall keep his office at the city of Harrison."¹⁷

In the southern district of the state of California it is provided by act of 1900¹⁸ that "except when court is in session, and a judge present, [at Fresno] the clerk's office of the said courts may be at Los Angeles, where all records for said courts may be kept, and all duties performed; but should, in the judgment of the district judge and the clerk, the business of said courts hereafter warrant the employment of a deputy clerk at Fresno, California, a deputy clerk may be appointed to reside and keep his office at Fresno." An act of 1906 providing terms in the northern district at Eureka required the circuit and district court clerks and marshals in that district to perform the duties pertaining to their offices for the terms at Eureka.¹⁹

[b] Georgia.

The act of 1880 dividing the southern district of Georgia into two divisions provided that "no additional clerk or marshal shall be appointed in said district."²⁰ The act creating the northeastern, southwestern and

¹¹Act Feb. 16, 1903, c. 554, § 6, 32 Stat. 832, U. S. Comp. Stat. 1903, p. 53.

¹²Act March 3, 1905, c. 1419, § 2, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 78.

¹³Ibid, § 8.

¹⁴U. S. Comp. Stat. 1901, p. 451.

¹⁵Act Feb. 20, 1897, c. 269, § 8, 29 Stat. 592, U. S. Comp. Stat. 1901, p. 322.

¹⁶Act July 7, 1898, c. 571, § 1, 30 Stat. 682, U. S. Comp. Stat. 1901, p. 323.

¹⁷Act March 18, 1902, c. 269, § 5, 32 Stat. 72, U. S. Comp. Stat. 1903, p. 55.

¹⁸Act May 29, 1900, c. 594, 31 Stat. 220, U. S. Comp. Stat. 1901, p. 328.

¹⁹Act June 29, 1906, c. 3626, 34 Stat. 631.

²⁰Act Jan. 29, 1880, c. 17, § 2, 21 Stat. 63, U. S. Comp. Stat. 1901, p. 334. Albany division: Act March 3, 1905, c. 1431, 33 Stat. 999, as amended 34 Stat. 547.

Albany divisions of that district contained the same clause but with the further provision in the case of the northeastern and southwestern divisions, that "if in the opinion of the court it shall become necessary, a deputy clerk may be appointed."²¹ In the northern Georgia district, the act creating the western division provided that "the clerk of the district and the clerk of the circuit court shall appoint a deputy clerk for the courts for said division, and the marshal of said northern district shall provide suitable rooms for the occupancy of said courts and the officers thereof."²² The act creating the northwestern division thereof provided for similar appointment of deputies "who shall reside and maintain an office at the city of Rome each of whom, in the absence of the clerks, shall exercise all the powers and perform all the duties of his principal within the division for which he shall be appointed: Provided, That the appointment of such deputies shall be approved by the court for which they shall be respectively appointed, and they may be removed by such court at pleasure."²³ The act creating the eastern division thereof provided that no additional clerk be appointed, but "a deputy clerk may be appointed by the court to the duties of that office in the eastern division . . . The compensation of the clerks shall not be changed or affected by the failure to appoint a deputy clerk at Athens."¹

[c] Idaho and Illinois.

The act of 1892 respecting the divisions of the district of Idaho provided "That the clerk of the circuit and district courts for said district shall each appoint a deputy clerk at the place where their respective courts are required to be held in the division of the district in which such clerk shall not himself reside, each of whom shall, in the absence of the clerk, exercise all the powers, and perform all the duties of clerk within the division for which he shall be appointed; provided, that the appointment of such deputies shall be approved by the court for which they shall respectively be appointed and may be annulled by such court at its pleasure, and the clerks shall be responsible for the official acts and negligence of all such deputies."²

In the act of 1905 redistricting Illinois it is provided for the northern district that "the marshal and clerk of said district shall each, respectively, appoint at least one deputy to reside in said city of Freeport, unless he shall reside there himself, and also maintain an office at that place of holding court."³ The same act provides in the case of the southern district that "the clerks of the circuit and district courts of the southern district of Illinois shall be respectively the clerks of the courts of both divisions of the said district; that each of said clerks or his deputies shall

²¹Act Feb. 15, 1889, c. 168, § 2, 25 Stat. 671, U. S. Comp. Stat. 1901, p. 337; act June 30, 1902, c. 1338, § 2, 32 Stat. 550.

²²Act March 3, 1891, c. 566, § 4, 26 Stat. 1110, U. S. Comp. Stat. 1901, p. 339.

²³Act April 12, 1900, c. 185, § 4, 31 Stat. 74, U. S. Comp. Stat. 1901, p. 340.

¹Act Feb. 23, 1901, c. 621, § 2, 31 Stat. 818, U. S. Comp. Stat. 1901, p. 241.

²Act July 5, 1892, c. 145, § 5, 27 Stat. 73, U. S. Comp. Stat. 1901, p. 343.

³Act March 3, 1905, c. 1427, § 6, 33 Stat. 993, U. S. Comp. Stat. 1905, p. 91.

keep an office open at all times at each of the places of holding of said court and shall there keep the record, files and documents pertaining to the court of that division; and said clerks shall be entitled to the same fees now allowed by law. In addition to his powers to appoint deputies, as now prescribed by law, each of said clerks shall be empowered to appoint, with the approval of the court, a chief deputy for a court of that division in which he himself may not reside, who shall have all the powers of the clerk in his absence. That the marshal and clerk for said southern district of Illinois shall respectively appoint at least one deputy residing in the said northern division, and also maintain an office at that place of holding court."⁴

[d] Indiana and Iowa.

By R. S. § 625⁸ in the district of Indiana a deputy clerk of the circuit court must be appointed for said court held at New Albany, and a deputy clerk for said court held at Evansville, who shall reside and keep their offices at said places respectively. Each deputy shall keep in his office full records of all actions and proceedings in the circuit court held at the same place, and shall have the same power to issue all process from the said court that is or may be given to the clerks of other circuit courts in like cases." There are similar provisions for the district court in R. S. § 559;⁹ and in later acts for deputy clerks at Fort Wayne and Hammond.¹⁰

Prior to the establishment of two districts in Iowa R. S. § 560 provided that "in the district of Iowa a deputy clerk of the district court shall be appointed to each place in the four divisions of said district where said court is required to be held, each of whom, in the absence of the clerk, may exercise all the official powers of clerk, at the place and within the division for which he is appointed." An act of 1880 provided that "the clerk of the district court shall be the clerk of the circuit court at all the places where the same is held in said district, except at Des Moines."¹¹ The act making two districts, each having judicial divisions, provided that "there shall be appointed by the judge of the northern district of Iowa, with the approval of the circuit judge of the eighth judicial circuit, a clerk for the district and circuit courts in and for said northern district of Iowa. The persons now acting as clerks for the district of Iowa shall be the clerks for the southern district of Iowa."¹² The statute of 1900 creating a southern division of the southern Iowa district provided that "the clerk of the circuit and district courts for said southern district and the marshal of said district shall each appoint a deputy, who shall reside and maintain an office at Creston, in Union County: Provided, That the appointment of such deputy shall be approved by the court for which they shall be re-

⁴Ibid, § 10.

⁸U. S. Comp. Stat. 1901, p. 498.

⁹U. S. Comp. Stat. 1901, p. 453.

¹⁰Act March 3, 1881, c. 154, § 2, 21 Stat. 511; act Feb. 14, 1899, c. 155, § 2, 30 Stat. 836, U. S. Comp. Stat. 1901, pp. 348, 349.

¹¹Act June 4, 1880, c. 120, 21 Stat. 155.

¹²Act July 20, 1882, c. 312, § 4, 22 Stat. 172, U. S. Comp. Stat. 1901, p. 350.

and the clerk and marshal shall be responsible for the official acts and neglects of all their deputies."¹⁴ The act of 1904 creating the Davenport division, provided that "the clerks of the circuit and district courts of said district shall maintain an office, in charge of themselves or a deputy, at the said city of Davenport, Iowa, for the transaction of the business of said division."¹⁵

[e] Kansas.

By act of 1879 the clerk of the district court and marshal were required to appoint a deputy to reside and keep their offices at Fort Scott, and who in the absence of their principals were required to do and perform all the duties appertaining to said offices for the circuit and district courts.¹⁷ There was later a similar provision for deputies at Salina¹⁸ and an act of 1892 added this proviso as to deputies at Fort Scott, viz.: that "the appointment of such deputy shall be approved by the court for which they shall be respectively appointed, and they may be removed by such court at pleasure, and the clerk and marshal shall be responsible for the official acts and neglects of all their deputies."¹⁹ An act of 1890 provided that "the clerks of the circuit and district courts for said district shall each appoint a deputy clerk at the city of Wichita, each of whom shall, in the absence of the clerk, exercise all the powers and perform all the duties of clerk within the division for which he shall be appointed; provided, that the appointment of such deputies shall be approved by the court for which they shall be respectively appointed, and they may be removed by such court at pleasure; and the clerk shall be responsible for the official acts and neglects of all such deputies."²⁰ The appointment of deputies to reside at Fort Scott under the same conditions is provided for by act of 1892.²¹

[f] Kentucky and Louisiana.

By R. S. § 557,¹ "in the district of Kentucky a clerk of the district court shall be appointed at each place of holding the court, in the same manner and subject to the same duties and responsibilities which are or may be provided concerning clerks in independent districts." There is a similar provision as to circuit court clerks.² The act of 1888 establishing the Owensborough division provided that "in and for the Owensborough division, the clerk of the district of Kentucky at Louisville shall appoint a

¹⁴Act June 1, 1900, c. 601, § 4, 31 Stat. 250, U. S. Comp. Stat. 1901, p. 354.

¹⁵Act April 28, 1904, c. 1800, § 4, 33 Stat. 547, U. S. Comp. Stat. 1905, p. 98.

¹⁷Act March 3, 1879, c. 177, § 2, 20 Stat. 355, U. S. Comp. Stat. 1901, p. 355.

¹⁸Act Aug. 9, 1888, c. 819, § 2, 25 Stat. 392.

¹⁹Act May 3, 1892, c. 59, § 4, 27 Stat. 24, U. S. Comp. Stat. 1901, p. 358.

²⁰Act June 9, 1890, c. 403, § 3, 26 Stat. 129, U. S. Comp. Stat. 1901, p. 351.

²¹Act May 3, 1892, c. 59, § 4, 27 Stat. 24, U. S. Comp. Stat. 1901, p. 358.

¹U. S. Comp. Stat. 1901, p. 452.

²R. S. § 620, U. S. Comp. Stat. 1901, p. 497.

deputy who shall reside at Owensborough, and in case of the death or removal of said deputy, or from other cause it becomes necessary, he shall appoint a successor or successors to said deputy in like manner in all respects as by law he may now appoint and remove deputies; and he may require bond of said deputy to himself, with surety for the faithful discharge of his duties and for indemnity in case of breach, on which actions may be maintained in said district court; and said deputy shall keep and preserve the records of the court at Owensborough; issue all writs, precepts, and process, and perform all other duties devolved upon his principal.”³

For the divisions of the western district of Louisiana, it is provided that “a deputy clerk of the district court shall be appointed at each place in the four divisions of said western district where said court is required to be held, each of whom, in the absence of the clerk, may exercise all the official powers of the clerk at the place and within the division for which he is appointed.”⁴ And for the divisions of the eastern district that “a deputy clerk of the district court shall be appointed at each place in the two divisions of said eastern district where said court is required to be held, each of whom, in the absence of the clerk, may exercise all the official powers of clerk at the place and within the division for which he is appointed.”⁵ The act creating the Lake Charles division provided that “the clerks of the circuit and district courts of said district shall maintain an office in charge of themselves or deputy at the said city of Lake Charles, which shall be kept open at all times for the transaction of the business of said division; Provided, however, That suitable rooms and accommodations are furnished for holding said courts free of expense to the government of the United States.”⁶

[g] Maryland and Michigan.

The act of 1892⁷ requiring circuit and district court terms at Cumberland, provides that the clerk of the district is to appoint at least one deputy to reside in said city of Cumberland, “unless he shall reside there himself, and also maintain an office at that place of holding court.” In the western district of Michigan an act of 1878 provides that “the clerk of the circuit and district courts for the western district of Michigan shall appoint a deputy clerk for said courts, held at Marquette, who shall reside and keep his office at that place; and said deputy shall keep in his office full records of all actions and proceedings in the said circuit and district courts for the northern division of said district held at that place, and shall have the same power to issue all processes from the said courts and

³Act Aug. 8, 1888, c. 792, § 3, 25 Stat. 438, U. S. Comp. Stat. 1901, p. 360, U. S. Comp. Stat. 1901, 367.

p. 360.

⁴Act Aug. 8, 1888, c. 789, § 6, 25 Stat. 441, U. S. Comp. Stat. 1905, Stat. 388, U. S. Comp. Stat. 1901, p. 101.

ip. 366.

⁵Act Aug. 13, 1888, c. 869, § 6, 25 Stat. 11, U. S. Comp. Stat. 1901, p. 368.

⁶Act March 2, 1905, c. 1308, § 4, 33 Stat. 841, U. S. Comp. Stat. 1905,

⁷Act March 21, 1892, c. 20 § 2, 27

perform any other duty that is or may be given to the clerks of other circuit and district courts in like cases.”⁸ By act of 1894 governing the eastern district “the clerks of the circuit and district courts for the eastern district of Michigan shall each keep his office at the city of Detroit, and shall each appoint a deputy clerk for said courts held at Bay City, who shall reside and keep his office at that place, and such deputy clerk or clerks shall keep in his office dockets and full records of all actions and proceedings in said circuit and district courts for the northern division of said district held at that place, and shall have the same power to issue all processes from said courts, and perform any other duty that is or may be given to the clerks of other circuit and district courts in like cases.”⁹

[h] Minnesota and Mississippi.

An act of 1890 provided that “the clerks of the circuit and district courts of the district of Minnesota shall each appoint a deputy clerk at the place where their respective courts are required to be held in the division of the district in which such clerk shall not himself reside, who shall keep his office and reside at the place appointed for holding said courts in the division of such residence, and shall keep the records of said courts for such division, and, in the absence of the clerk, may exercise all the official powers of the clerks within the division for which he is appointed; provided, that the appointment of such deputies shall be approved by the court for which they shall have been respectively appointed, and may be annulled by such court at its pleasure; and the clerks shall be responsible for the official acts and negligence of their respective deputies.”¹⁰ In the northern Mississippi district an act of 1882 provides that “the clerk of the northern judicial district of Mississippi shall be sole clerk of the courts of both divisions of the said district, to be appointed in the manner now prescribed by law; that the said clerk or his deputies shall reside at each of the places of holding said courts, and shall there keep an office, and the records, files and documents pertaining to the court of that division; and said clerk shall be entitled to the same fees now allowed to him by law. In addition to his powers to appoint deputies as now prescribed by law, said clerk shall be required to appoint a chief deputy for the court of that division in which he himself may not reside, who shall have all the powers of the clerk in his absence, and shall reside at the place of holding the court for the other division where the chief clerk does not reside.”¹¹ In the southern Mississippi district an act of 1887 requires the marshal and clerks of the southern district to appoint deputies to reside at Vicksburg for the

⁸Act June 19, 1878, c. 326, § 4, 20 Stat. 176, U. S. Comp. Stat. 1901, p. 371.

¹⁰Act April 26, 1890, c. 167, § 5, 26 Stat. 73, U. S. Comp. Stat. 1901, p. 376.

⁹Act April 30, 1894, c. 66, § 4, 28 Stat. 67, U. S. Comp. Stat. 1901, p. 374.

¹¹Act June 15, 1882, c. 218, § 4, 22 Stat. 102, U. S. Comp. Stat. 1901, p. 379.

western judicial division and act in place of their principles.¹² There are similar provisions for deputies at Mississippi City in the southern division, and at Meridian in the eastern division.¹³

[i] Missouri, North Carolina and North Dakota.

In Missouri there is a clerk for each court at St. Louis, Hannibal, St. Joseph, Kansas City, Jefferson City and Springfield.¹⁴ In the creation of the southwestern division of the western district it was provided that the courts should meet at Joplin therein, and the clerk's office should be at Springfeld; but "should in the judgment of the district judge, the business of said courts hereafter warrant a deputy clerk at Joplin . . . a deputy clerk [may be] appointed to reside and keep his office at Joplin."¹⁵ There was the same provision in an act of 1905, as to a deputy and new books at Cape Girardeau for the southeastern division of the eastern district, the clerks from St. Louis to act meanwhile.¹⁷

R. S. § 621¹⁸ provides that "in the western district of North Carolina the circuit and district judges shall appoint three clerks, each of whom shall be clerks both of the circuit and district courts for said western district of North Carolina. One shall reside and keep his office at Statesville, one shall reside and keep his office at Asheville, and the third shall reside and keep his office at Greensborough." An act of 1902 provides that "the circuit and district judges for the eastern district shall appoint, besides a clerk of said court held at Raleigh, an additional clerk, who shall reside and keep his office at Wilmington, and be clerk both of the district and circuit court held at Wilmington, and who shall have the custody and control of the records of said courts, shall give the same bond required of the clerk of circuit and district courts of said district, and shall receive the same fees and compensation for services performed by clerks of such courts now fixed by law."¹⁹ A statute of 1903 establishing court terms at Wilkesboro provides that "the clerk of the United States circuit and district courts at Statesville, North Carolina, shall be the clerk of the United States circuit and district courts at Wilkesboro, and he shall appoint a deputy clerk of said court, to reside at Wilkesboro, with the usual power of a deputy clerk in such cases, whose compensation shall be such proportion of the fees accruing from business done in said courts at Wilkesboro as shall be fixed by the judge of said district."²⁰ In establishing terms of court at Washington, N. C. Congress provided by act of 1905 that "the clerk of the United States circuit and district courts at the city of

¹²Act Feb. 28, 1887, c. 279, § 4, 24 Stat. 431, U. S. Comp. Stat. 1901, p. 381. ¹⁷Act Jan. 31, 1905, c. 287, § 3, 33 Stat. 627, U. S. Comp. Stat. 1905, p. 103.

¹³Act April 4, 1888, c. 58, § 4, 25 Stat. 78; act July 18, 1894, c. 144, § 7, 28 Stat. 115, U. S. Comp. Stat. 1901, p. 382, 383. ¹⁸U. S. Comp. Stat. 1901, p. 497.

¹⁵Ante, § 381 [jj]. ¹⁹Act April 15, 1902, c. 508, 32 Stat. 106, U. S. Comp. Stat. 1903, p. 62. ²⁰Act. Feb. 23, 1903, c. 749, § 2, 32 Stat. 853, U. S. Comp. Stat. 1903, p. 62.

¹⁶Act Jan. 24, 1901, c. 164, § 4, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 390.

Raleigh, North Carolina, shall be the clerk of the United States circuit and district courts at Washington, North Carolina, and said courts, respectively, may, on the application of the clerk, appoint a deputy clerk, with the usual powers of a deputy clerk in such cases, who shall reside at Washington, North Carolina, and whose compensation shall be such proportion of the fees accruing from business done in said courts at Washington, North Carolina, as shall be fixed by the judge of said district: Provided, That the city of Washington, North Carolina, shall provide and furnish at its own expense a suitable and convenient place for holding the circuit and district courts of the United States at Washington, North Carolina."²¹

In the North Dakota district an act of 1906 provides that "the clerk of the circuit and district courts for said district shall each appoint a deputy clerk at the place where their respective courts are required to be held in the division of the district in which such clerk shall not himself reside, each of whom shall, in the absence of the clerk, exercise all the powers and perform all the duties of clerk within the division for which he shall be appointed: Provided, That the appointment of such deputies shall be approved by the court for which they shall have been respectively appointed, and may be annulled by such court at its pleasure, and the clerks shall be responsible for the official acts and negligence of all such deputies."²²

[j] Oklahoma, Ohio, South Carolina and South Dakota.

In Oklahoma there are two districts and the act provides for the appointment of a clerk for each district "who shall keep his office at Muskogee and Guthrie, respectively, for the time being."¹

The statutes providing judicial divisions in the Ohio districts expressly declare that no additional circuit or district court clerks shall be appointed.³

In South Carolina—"The office of the clerk of said court [the circuit court] shall be kept in the cities of Charleston and of Greenville, and the clerk shall reside in one of the said cities and shall have a deputy in the other."⁴ "The office of the clerk of the district court shall be kept in the city of Greenville, and also in the city of Charleston, and the clerk shall reside in one of said cities, and shall have a deputy in the other."⁵

In South Dakota "the clerk of the circuit court and the clerk of the district court respectively shall reside and have their principal office at Sioux Falls, and each of said clerks may appoint a deputy to reside and have an office at Pierre and Deadwood."⁷

²¹Act March 3, 1905, c. 1437, § 2, 33 Stat. 1004, U. S. Comp. Stat. 1905, p. 107.

²²Act June 29, 1906, c. 3595, § 6, 34 Stat. 610.

¹§ 13, act June 16, 1906, c. 3335, 34 Stat. 275.

³Act June 8, 1878, c. 169, § 2, 20 Stat. 102; act Feb. 4, 1880, c. 18, § 3, 21 Stat. 64, U. S. Comp. Stat. 1901, p. 402, 403.

⁴Act Apr. 26, 1890, c. 165, § 2, 26 Stat. 71, U. S. Comp. Stat. 1901, p. 408.

⁵Act Apr. 26, 1890, c. 165, § 5, 26 Stat. 72, U. S. Comp. Stat. 1901, p. 409.

⁷Act Feb. 27, 1890, c. 21, § 6, 26 Stat. 15, U. S. Comp. Stat. 1901, p. 411.

[k] Tennessee.

In the western district of Tennessee "the clerks of the circuit and district courts for said district, and the marshal of the district, shall each appoint a deputy of their respective courts at the place in the eastern division of said district where their said courts are required to be held, who shall, in the absence of the clerk, exercise all the powers and perform all the duties of clerk within said division; provided, that the appointments of such deputies shall be approved by the court for which they shall be respectively appointed, and may be annulled by such court at its pleasure."⁸ In the eastern district of Tennessee an act of 1880 respecting terms at Chattanooga, provided that no additional clerk or marshal be appointed but that "the clerks of the district and circuit courts for the eastern district of Tennessee, and the marshal and district attorney for said district, shall perform the duties appertaining to their offices respectively for said courts. And the said clerks and marshals shall each appoint a deputy to reside and keep their offices in the city of Chattanooga, and who shall, in the absence of their principals, do and perform all the duties appertaining to their offices respectively."¹⁰ And an act of 1900 creating a north-eastern division therein provided that no additional clerk or marshal be appointed but that "the clerks of the district and circuit courts for the eastern district of Tennessee, and the marshal and district attorney for said district, shall perform the duties appertaining to their offices, respectively, for said courts of said northeastern division judicial district, and except when court is in session, and a judge present, the clerk's office of the said courts may be at Knoxville, where all records for said courts may be kept as of the same court, and all duties performed as though the clerk were at Greeneville, but should, in the judgment of the district judge and the clerk, the business of said courts hereafter warrant the employment of a deputy clerk at Greeneville, Tennessee, new books and records, may be opened for the courts herein created, and kept at Greeneville, and a deputy clerk appointed to reside and keep his office at Greeneville."¹¹ An act of 1906 respecting the eastern district superseded these provisions and declared that "the clerks of said circuit and district courts for the eastern district of Tennessee may reside and keep their offices, respectively, in either the city of Knoxville, Chattanooga or Greenville; but said clerks shall each, respectively, appoint a deputy to reside and keep their offices in each of the above-named cities other than the one in which said clerks shall respectively reside and keep their offices; that the said deputy clerks shall, in the absence of their principals, do and perform all the duties appertaining to their offices, respectively."¹²

⁸Act June 20, 1878, c. 359, § 1, 20 Stat. 235, U. S. Comp. Stat. 1901, p. 415. ¹¹Act Feb. 7, 1900, c. 10, § 3. 31 Stat. 5, U. S. Comp. Stat. 1901, p. 419.

¹⁰Act June 11, 1880, c. 203, § 4, 21 Stat. 175, U. S. Comp. Stat. 1901, p. 416. ¹²Act June 18, 1906, c. 3341, § 3, 34 Stat. 298.

[1] Texas.

In the northern district of Texas, an act of 1879 provided that "the district judge of the northern district shall appoint a clerk of said court, who shall reside at one of the places designated in this act for holding the courts, and two deputies shall be appointed by the clerk, one of whom shall reside at each of the other places designated for holding the courts."¹³ An act of 1896 provided that "there shall be appointed in the manner required by law, a deputy clerk who shall keep his office at the city of Fort Worth," and also one each for Abilene and San Angelo.¹⁴ In the eastern Texas district an act of 1897 required that "the clerks of the circuit and district courts for said district shall maintain an office in charge of themselves or a deputy at . . . Beaumont, . . . which shall be kept open at all times for the transaction of the business of said division."¹⁵ In 1901 provision was made for the Sherman division in the eastern district and it was declared that "the clerk of the circuit court of said eastern district shall maintain an office, in charge of himself or a deputy, at the said city of Sherman, which shall be kept open at all times for the transaction of the business of said division; and the district judge for the said eastern district shall appoint a clerk of the district court who shall maintain an office at the said city of Sherman, which shall be kept open at all times for the transaction of the business of said division."¹⁶

An act of 1903 required clerks of circuit and district courts to maintain offices at Texarkana for the Texarkana division "in charge of themselves or a deputy, which shall be kept open at all times for the transaction of the business of said division."¹⁷ In the western district of Texas an act of 1884 creating the El Paso division provided that a deputy clerk be appointed in the manner provided by law, to keep his office in El Paso.¹⁸ In 1899 a similar statute was passed for a Laredo division and deputy.¹⁹ In the Del Rio division the respective clerks are required to keep an office open at all times for the transaction of the business of the division, in charge of themselves or a deputy.²⁰ There is the same provision for the Victoria division.²¹ The act of 1902 creating the southern district of Texas provides that "the clerk of the district court appointed in the southern judicial district as created by this act shall reside at one of the places designated therein for holding courts, and such clerk shall appoint at least three

¹³Act Feb. 24, 1879, c. 97, § 9, 20 Stat. 320, U. S. Comp. Stat. 1901, p. 426.

¹⁴Act June 11, 1896, c. 422, § 4, 29 Stat. 457, U. S. Comp. Stat. 1901, p. 430.

¹⁵Act Feb. 8, 1897, c. 178, § 5, 29 Stat. 516, U. S. Comp. Stat. 1901, p. 431.

¹⁶Act Feb. 19, 1901, c. 382, § 5, as amended Mar. 3, 1901, c. 881, 31 Stat. 1458, U. S. Comp. Stat. 1901, p. 434.

¹⁷Act Mar. 2, 1903, c. 974, § 4, 32 Stat. 927, U. S. Comp. Stat. 1903, p. 75.

¹⁸Act June 3, 1884, c. 64, § 3, 23 Stat. 36, U. S. Comp. Stat. 1901, p. 428.

¹⁹Act Mar. 2, 1899, c. 393, § 3, 30 Stat. 1002, U. S. Comp. Stat. 1901, p. 432.

²⁰Act June 9, 1906, c. 3063, § 4, 34 Stat. 226.

²¹Act Apr. 18, 1906, c. 1636, § 4, 34 Stat. 122.

deputies, one of whom shall reside at each of the other places in said district designated for holding courts therein."¹

[m] Utah.

In the Utah district an act of 1897 provided that "the clerks of the circuit and district courts for said district shall each appoint a deputy clerk at each of the places where their respective courts are required to be held in the divisions of the district, except in the division in which such clerk shall himself reside, each of which deputies shall, in the absence of the clerk, exercise all the powers and perform all the duties of the clerk within the division for which he shall be appointed; provided, that the appointment of such deputies shall be approved by the court, for which they shall have been respectively appointed, and may be annulled by such court at its pleasure."² The act of 1894 admitting Utah required the clerks of the circuit and district courts to keep their offices at the capital of the State.³

[n] Virginia.

By R. S. § 622⁴ it was provided that "in the western district of Virginia the circuit and district judges shall appoint four clerks, each of whom shall be clerks both of the circuit and district courts of said district. One of these clerks shall reside and keep his office at Lynchburg, another shall reside and keep his office at Abingdon, another shall reside and keep his office at Danville, and the fourth shall reside and keep his office at Harrisonburgh, in said district." But an act of 1902 provided that "in the western district of Virginia the clerk of the circuit and district courts at Lynchburg shall appoint two deputy clerks, each of whom shall be deputy clerk both of the circuit and district courts, and one of whom shall reside and keep his office in the city of Charlottesville, and the other in the city of Roanoke, for the purpose, in said respective cities, of taking charge and custody of the court records and papers, attending the sessions of the said courts, issuing all proper process, and discharging all the clerical duties in connection with the business of said courts."⁵ By an act of 1906 the clerk at Lynchburg was given the same authority to appoint a clerk at Bigstone Gap.⁶ The eastern district of Virginia is regulated by an act of 1899 which provided that "within and for the eastern district of Virginia, there shall be only one clerk, to be appointed by the judge of the district court, and said clerk may have as many deputies as may be necessary, to be appointed

¹Act Mar. 11, 1902, c. 183, § 16, 32 Stat. 69, U. S. Comp. Stat. 1903, p. 73.

²Act Mar. 2, 1897, c. 366, § 4, 29 Stat. 620, U. S. Comp. Stat. 1901, p. 435.

³Act July 16, 1894, c. 138, § 16, 28 Stat. 110, U. S. Comp. Stat. 1901, p. 435.

⁴U. S. Comp. Stat. 1901, p. 497.

⁵Act June 30, 1902, c. 1339, § 2, 32 Stat. 552, U. S. Comp. Stat. 1903, p. 76.

⁶Act June 28, 1906, c. 3576, 34 Stat. 547, amending act Apr. 22, 1904, c. 1421, § 2, 33 Stat. 249, U. S. Comp. Stat. 1905, p. 125.

as now provided by law.”⁷ The statute further validated the acts of persons previously acting as clerks therein.

[o] Washington.

An act of 1890 provided that “the clerk of the circuit and district courts for said district shall each appoint a deputy clerk at the place where their respective courts are required to be held in the division of the district in which such clerk shall not himself reside, each of whom shall, in the absence of the clerk, exercise all the powers and perform all the duties of the clerk within the division for which he shall be appointed; provided, that the appointment of such deputies shall be approved by the court for which they shall have been respectively appointed, and may be annulled by such court at its pleasure, and the clerks shall be responsible for the official acts and negligence of all such deputies.”⁸ In 1905 Washington was divided into two districts but no provision as to residence or appointment of deputy clerks was made. The act required that the offices of clerks, marshals, etc., in each district, be filled “in the manner provided by law.” It also declared that “the clerks for said districts shall receive the same fees and emoluments as are now prescribed by law for the clerks of the circuit and district courts of the northern district of California.”¹⁰

[p] Wisconsin and Wyoming.

By R. S. § 623,¹¹ U. S. Comp. Stat. 1901, p. 498, “in the western district of Wisconsin the circuit and district judges shall appoint two clerks, each of whom shall be clerks both of the circuit and district courts for said district. One shall reside and keep his office at Madison, and the other shall reside and keep his office at La Crosse.” An act of 1900 providing for circuit and district court terms at Superior, declared that “the clerk of the United States circuit and district courts at Madison, Wisconsin, shall be the clerk of the United States circuit and district courts, at Superior, Wisconsin, and he shall appoint a deputy clerk of said courts to reside at Superior, Wisconsin, with the usual powers of a deputy clerk in such cases, whose compensation shall be such proportion of the fees accruing from business done in the said courts at Superior as shall be fixed by the judge of said western district.”¹²

The act organizing the Federal courts in Wyoming upon its admission as a State provided that “clerks shall be appointed for said courts [i. e. the circuit and district courts] in the district of Wyoming, who shall

⁷Act Mar. 3, 1899, c. 452, § 1, 30 Stat. 1368, U. S. Comp. Stat. 1901, p. 453.

⁹Act Apr. 5, 1890, c. 65, § 5, 26 Stat. 45, U. S. Comp. Stat. 1901, p. 439.

¹⁰Act Mar. 2, 1905, c. 1305, § 6, 33 Stat. 824, U. S. Comp. Stat. 1905, p. 127.

¹¹U. S. Comp. Stat. 1901, p. 498.

¹²Act May 26, 1900, c. 591, § 2, 31 Stat. 219, U. S. Comp. Stat. 1901, p. 444.

keep their offices at the capital of the State." An act of 1892 requiring terms of circuit and district courts at Evanston declared that "the marshal and clerk of said district shall each, respectively, appoint at least one deputy, to reside in said town of Evanston, unless he himself shall reside there, and he shall also maintain an office at that place."¹³

§ 570. Oath of clerks.

The clerk of the Supreme Court, and every clerk and deputy clerk of a circuit or district court, shall, before he enters upon the execution of his office, take an oath or affirmation in the following form: "I, A. B., being appointed a clerk of —, do solemnly swear (or affirm) that I will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God." The words "so help me God" shall be omitted in all cases where an affirmation is admitted instead of an oath.

R. S. § 794, U. S. Comp. Stat. 1901, p. 619.

§ 571. Place of residence of circuit and district court clerks.

Every clerk of the circuit or district court of the United States . . . shall reside permanently in the district where his official duties are to be performed, and shall give his personal attention thereto; and in case any such officer shall remove from his district, or shall fail to give personal attention to the duties of his office, except in case of sickness, such office shall be deemed vacant: Provided, That in the southern district of New York said officers may reside within twenty miles of their districts.

§ 2 of act June 20, 1874, c. 328, 18 Stat. 109, U. S. Comp. Stat. 1901, p. 622.

The provision applies also to district attorneys¹⁴ and marshals.¹⁵ The official residence of such officers is filed by the Attorney General.¹⁶ In some districts there are special provisions as to place of residence.¹⁷

§ 572. Bond of circuit, district and Supreme Court clerks.

The clerks of the Supreme Court and the circuit and district courts, respectively, shall each, before he enters upon the execution

¹³Act May 23, 1892, c. 77, § 2, 27 Stat. 39, U. S. Comp. Stat. 1901, p. 445.

¹⁴Ante, § 506.

¹⁵Post, § 623.

¹⁶Ante, § 507. Post, § 624.

¹⁷See ante, § 569, notes.

of his office, give bonds, with sufficient sureties, to be approved by the court for which he is appointed, to the United States, in the sum of not less than five, and not more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk; and it shall be the duty of the district attorneys of the United States, upon requirement by the Attorney General, to give thirty days' notice of motion in their several courts that new bonds, in accordance with the terms of this act, are required to be executed; and upon failure of any clerk to execute such new bonds, his office shall be deemed vacant. The Attorney General may at any time, upon like notice, through the district attorney, require a bond of increased amount, in his discretion, from any of said clerks within the limit of the amount above specified; and the failure of the clerk to execute the same shall in like manner vacate his office. All bonds given by the clerks shall, after approval, be recorded in their respective offices, and copies thereof from the records, certified by the clerks respectively, under seal of court, shall be competent evidence in any court. The original bond shall be filed in the Department of Justice.

§ 3, act Feb. 22, 1875, c. 95, 18 Stat. 333, U. S. Comp. Stat. 1901, p. 619.

Conditions added to the bond that the clerk shall faithfully account for all moneys or that he shall faithfully perform the duties of his office by himself or by his deputies, does not vitiate it.¹⁸ The fact that the custody of certain money is not a part of the clerk's duties, will not release his sureties.¹⁹ A clerk's bond is available to a private suitor to indemnify himself on failure of clerk to perform his duties,²⁰ although the United States is sole obligee thereon.¹

§ 573. Bond of clerk of Court of Claims.

The chief clerk [of the Court of Claims] shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the Secretary of the Treasury.

R. S. § 1055, U. S. Comp. Stat. 1901, p. 731.

This section is from an act of 1856.³

¹⁸United States v. Ambrose, 2 Fed. 552.

¹United States v. Bell, 135 Fed. 336, 68 C. C. A. 144.

¹⁹In re Finks, 41 Fed. 383.

³Act Aug. 6, 1856, c. 61, § 3, 11

²⁰United States v. Bell, 127 Fed. Stat. 30.

1002. See Howard v. United States, 102 Fed. 77, 42 C. C. A. 169.

§ 574. Bond of deputy circuit and district court clerks.

Any circuit or district court may require any deputy clerk thereof to give bond to the United States for the faithful discharge of his duty as such deputy, in the same penalty, and with surety in the same manner, as is required by law of clerks; and such bond shall be recorded and preserved in like manner, but the taking of such bond shall not affect the legal responsibility of the clerk for the acts of such deputy.

R. S. § 796 U. S. Comp. Stat. 1901, p. 620.

The statute creating the Owensboro division in Kentucky specifically provided that the district clerk might require the Owensboro deputy to give bond "to himself, with surety for the faithful discharge of his duties and for indemnity in case of breach, on which actions may be maintained in said district court."⁴

§ 575. Increase of bond.

Whenever the business of the courts in any judicial district shall make it necessary in the opinion of the Attorney General, for the clerk . . . to furnish greater security than the official bond now required by law, a bond in a sum not to exceed forty thousand dollars shall be given when required by the Attorney General, who shall fix the amount thereof.

§ 2, act Feb. 22, 1875, c. 95, 18 Stat. 333, U. S. Comp. Stat. 1901, p. 620.

The section makes similar provision as to marshals.⁶

§ 576. Compensation of Supreme Court clerk.

The clerk of the Supreme Court of the United States shall not hereafter retain of the fees and emoluments of his office for his personal compensation over and above his necessary clerk-hire and the incidental expenses of his office, certified to by the court, or by one of its justices appointed by it for that purpose, and to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year; and the surplus of such fees and emoluments shall be paid into the Treasury as provided by law in cases of clerks of the circuit and district courts of the United States: And provided further, That so much of section three of the

⁴Act Aug. 8, 1888, c. 792, § 3, 25 Stat. 390, U. S. Comp. Stat. 1901, p. 360.

⁶Post, § 628.

act of February 28, 1799, as relates to the compensation of said clerk for his attendance in the court is hereby repealed.

From appropriation act Mar. 3, 1883, c. 143, § 1, 22 Stat. 631, U. S. Comp. Stat. 1901, p. 650.

It is the duty of the Supreme Court clerk to annually account and pay over surplus fees.⁸

§ 577. Compensation of clerks of circuit court of appeals.

The act of 1891 establishing the circuit courts of appeals declared that the salary of the clerk "shall be three thousand dollars a year, to be paid in equal proportions quarterly."⁹ The act further provided that the clerks "shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts."¹⁰ Since 1894 the amount of fees which such clerks have been allowed to retain as compensation (in addition to the salary of \$3,000), has been restricted to \$500.

Author's section.

The two provisions of the act of 1891 left the intent of Congress in some doubt. By declaring that the clerks should be allowed the same compensation as clerks of the circuit courts, Congress did not intend merely to make the fees chargeable to litigants the same in the two courts.¹¹ Either it meant to give a salary of \$3,000, and in addition, fees up to a total of \$3,500, provided the same were earned; or else to give a total compensation of \$3,500 if at least \$500 was earned in fees.¹² The matter was set at rest in 1894 by providing that the clerks might retain \$500 by way of compensation, from fees received, in addition to getting the salary of \$3,000.¹³

§ 578. Salary of clerk of Court of Claims and assistant.

The salary of the chief clerk [of the Court of Claims] shall be three thousand dollars a year, of the assistant clerk, two thousand a year, . . . payable quarterly from the Treasury.

R. S. § 1054, U. S. Comp. Stat. 1901, p. 730.

The section provides also for the salary of the bailiff and messenger.¹⁵

⁸Post, § 587.

⁹§ 2, Act Mar. 3, 1891, c. 517, 26 Stat. 826, U. S. Comp. Stat. 1901, p. 547.

¹⁰Ibid. § 9.

¹¹Morton v. United States, 59 Fed. 351; United States v. Morton, 65 Fed. 204, 13 C. C. A. 151.

¹²Ibid.

¹³Act July 31, 1894, c. 174. See post, § 588, giving the provisions of the act of 1900, which superseded the earlier provision of 1894.

¹⁵Post, § 686.

§ 579. General provision as to compensation in circuit and district court.

No clerk of a district court, or clerk of a circuit court, shall be allowed by the Attorney General, except as provided in the next section, and in section eight hundred and forty-two,¹⁷ to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year.

R. S. § 839, U. S. Comp. Stat. 1901, p. 645.

By R. S. 844,¹⁸ surplus fees are required to be paid into the Treasury. Fees belong to the clerks only to the limit of the maximum of their compensation, and when such limit is exceeded they belong to the government.¹⁹ In revenue cases, the government being successful, the clerk may retain his fees out of moneys collected as in other cases.²⁰ The compensation of the clerk under the above provision is not a fixed compensation within the meaning of an act of 1894¹ forbidding any officer having an annual salary amounting to twenty-five hundred dollars to hold any other compensatory office.² "Necessary office expenses" include office rent with interest,³ reasonable binding and express charges.⁴ But hotel expenses while the court is held at a place other than where the clerk is required to keep office are not within the meaning of the term.⁵

§ 580. — fees and compensation in California, Oregon and Nevada.

The clerks of the several circuit and district courts in California, Oregon and Nevada shall be entitled to charge and receive double the fees hereinbefore allowed to clerks, and shall be allowed, respectively, by the Attorney General, to retain of the fees so received by them, for their personal compensation, over and above the necessary expenses of their offices, including the salaries of deputy clerks, and necessary clerk hire, to be audited by the proper ac-

¹⁷Post, §§ 580, 581.

¹⁸See post, § 591.

¹⁹United States v. Wolters, 51 Fed. 899.

²⁰See in re United States v. Cigars, 2 Fed. 494.

¹Act July 30, 1894.

²United States v. Durlacher, 63 Fed. 672.

³United States v. Cogswell. 3 Sumn. 204, Fed. Cas. No. 14,825.

⁴Cavender v. Cavender, 10 Fed. 828.

⁵United States v. Gorham. 6

counting officers of the Treasury Department, any sum not exceeding seven thousand dollars a year, not exceeding that rate for any times less than a year: Provided, that whenever, in either of the said districts, the same person holds the office of clerk of both the circuit and district courts, he shall be allowed by the Attorney General to retain for his personal compensation, as aforesaid, only such sum as herein allowed to be retained by a person holding the office of clerk of only one of the said courts.

R. S. § 840, U. S. Comp. Stat. 1901, p. 646.

§ 581. — additional compensation in prize cases.

Clerks . . . may be allowed to retain, for all official services in prize causes, an additional compensation not exceeding in amount one-half of the maximum compensation allowed to them, respectively, by the three preceding sections.

R. S. § 842, U. S. Comp. Stat. 1901, p. 646.

This section was enacted in 1864.⁷ It includes marshals also, but its application to such officers is superseded by an act of 1896 providing for the payment to them of salaries.⁸

§ 582. Compensation in each year must be from fees thereof.

The allowances for personal compensation of . . . clerks . . . for each calendar year, shall be made from the fees and emoluments of that year, and not otherwise.

R. S. § 843, U. S. Comp. Stat. 1901, p. 646.

This section also includes district attorneys⁹ and marshals, but it apparently no longer applies to the latter since such officer is paid salary in lieu of fees,¹⁰ nor to the former except in the District of Columbia.

§ 583. Clerks not to charge unearned fees.

It shall be unlawful for any clerk of any court of the United States to include in his emolument, account, or return any fee or fees not actually earned and due at the time such account or return is required by law to be made, and no fees not actually earned shall be allowed in any such account.

From appropriation act of Mar. 2, 1895, c. 189, 28 Stat. 910, U. S. Comp. Stat. 1901, p. 642.

Blatchf. 530, Fed. Cas. No. 15,235.

⁷Act June 30, 1864, c. 174, § 19, 13 Stat. 312.

⁸Post, § 633.

⁹Ante, § 509a and note.

¹⁰Post, § 633.

§ 584. No allowance for rule days, nor double allowance when both courts in session.

No *per diem* or other allowance shall be made to any . . . clerk of a circuit court, clerk of a district court, . . . for attendance at rule days of a circuit or district court; and when the circuit and district courts sit at the same time no greater *per diem* or other allowance shall be made to any such officer than for an attendance on one court.

R. S. § 831, U. S. Comp. Stat. 1901, p. 640.

This provision was enacted in 1853.¹² It is made applicable also to marshals and deputy marshals and district attorneys, but since an act of 1896 such officers are paid by fixed salary instead of fees, except in the case of district attorneys for the District of Columbia.¹³

§ 584½. No per diem except when court opens.

[No] part of any money appropriated [shall] be used in payment of a *per diem* compensation to any . . . clerk . . . for attendance in court except for days when the court is open by the judge for business or business is actually transacted in court, and when they attend under section five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which fact shall be certified in the approval of their accounts.

From appropriation act of Mar. 3, 1887, c. 362, 24 Stat. 541, U. S. Comp. Stat. 1901, p. 641.

The above provision also specifies marshals, as to whom it is superseded by the law placing them on a salary basis,¹⁴ and district attorneys, as to whom it is also superseded except in the case of the District of Columbia.¹⁵

§ 585. Salaries of deputy circuit clerks paid by clerks and allowed as expenses.

The compensations of deputies of clerks of the circuit courts shall be paid by the clerks, respectively, and allowed in the same manner that other expenses of the clerks' offices are paid and allowed.

R. S. § 626, U. S. Comp. Stat. 1901, p. 499.

¹²Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 167.

¹³Post, § 633, ante, § 509.

¹⁴Post, §§ 633, 634.

¹⁵Ante, §§ 509, 510.

This provision is taken from an act of 1872.¹⁶ As to allowance and payment of expenses of the clerk's office see post, § 589, ante, §§ 448 et seq.

§ 586. Salaries of deputy district clerks paid by clerks and allowed as expenses.

The compensation of deputies of the clerks of the district courts shall be paid by the clerks, respectively, and allowed in the same manner that other expenses of the clerks offices are paid and allowed.

R. S. § 561, U. S. Comp. Stat. 1901, p. 454.

From an act of 1872.¹⁸ See note to previous section.

§ 587. Duty of Supreme Court clerk to account and pay over surplus fees.

The clerk of the Supreme Court of the United States, on the first day of January in each year, or within thirty days thereafter, shall, on a form prescribed by the Attorney General, make to the Attorney General a return, under oath, of all fees and costs collected by him in cases disposed of at the preceding term or terms of the court, and of all emoluments hereafter collected by him, and after deducting from such collections his compensation as provided in paragraph nine of the act of March 3, 1883 (Twenty-second Statutes at Large, six hundred and three, six hundred and thirty-one), and the incidental expenses of his office, including clerk hire, such expenses to be certified by the chief justice, and audited and allowed by the proper accounting officers of the Treasury, shall at the time of making such returns pay any surplus that may remain into the Treasury of the United States.

Part of § 8, act Mar. 15, 1898, c. 68, 30 Stat. 317, U. S. Comp. Stat. 1901, p. 651.

The section provides also that naturalization fees shall be included in the return of all clerks.²⁰ The section also provides for the repeal of any laws or parts of laws in conflict therewith.

§ 588. Duty of circuit courts of appeals clerks to account and pay over surplus fees.

Clerks of the United States circuit courts of appeals, annually and within thirty days after the thirtieth day of June in each year, shall make a return to the Attorney General of the United States of

¹⁶Act June 8, 1872, c. 336, 17 Stat. 330.

¹⁸Act June 8, 1872, c. 336, 17 Stat. 330.

²⁰Post, § 590.

all the fees and emoluments of their offices respectively. Such return shall cover all fees and emoluments earned during the preceding year and also the necessary office expenses for such year including clerk hire, the compensation of the clerk not to exceed five hundred dollars per annum as now provided by law. Such expenses including clerk hire shall be certified by the senior circuit judge of the proper circuit, and audited and allowed by the proper accounting officers of the Treasury Department. The respective clerks of the circuit courts of appeals, after deducting such expenses and clerk hire, shall, at the time of making such returns, pay into the Treasury of the United States the balance of such fees and emoluments. In case the amounts claimed for such expenses and clerk hire have not been audited by such accounting officers prior to the time fixed for making such returns and payment, said clerks may retain the sums claimed by them respectively until the audit is made, and in case any sum so claimed and retained is not allowed, the amount disallowed shall, within ten days after notice of disallowance, be paid into the Treasury of the United States.

Part of § 1, act June 6, 1900, c. 791, 31 Stat. 639, U. S. Comp. Stat. 1901, p. 651.

The prior provision of the act of 1894 required the return to be to the Secretary of the Treasury.²¹

§ 589. Circuit and district clerks to account semiannually as to fees.

Each clerk of the district and circuit courts shall, on the first days of January and July of each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, written returns for the half year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year; and the word "emoluments" shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, and all other amounts received for services in any way connected with the clerk's office.

²¹Act July 31, 1894, c. 174, § 1, 28 Stat. 203. See ante, § 577, note.

Part of § 1, act June 28, 1902, c. 1301, 32 Stat. 475, U. S. Comp. Stat. 1905, p. 160.

The section also contains a proviso that no amount in excess of one dollar shall be received from any attorney in connection with his admission to practice in the circuit and district court.¹ In the appropriation act of 1906² there is a further provision requiring an accounting of money deposited as security, collected on behalf of the United States, etc., which being later superseded this provision so far as covering the same subject matter.

§ 590. Naturalization fees and return thereof to bureau.

The provision of the act of 1898³ for return of naturalization fees in the same manner as other fees, was superseded by the naturalization act of 1906, the requirements of which in this respect, are given elsewhere.⁴

Author's section.

§ 591. Surplus fees to be paid into Treasury.

Every . . . clerk . . . shall, at the time of making his half-yearly return to the Attorney General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

R. S. § 844, U. S. Comp. Stat. 1901, p. 647.

The section specifies also district attorneys and marshals, but except in the case of the district attorney for the District of Columbia, it no longer applies to such officers, payment being made by them to the clerk of the court.⁵ This section is not a revenue law within the meaning of R. S. § 699, providing for a writ of error without regard to the value in dispute upon a judgment in a civil action for enforcement of a revenue law.⁶

§ 592. Auditing of returns which may show a surplus.

In every case where the return of a . . . clerk . . . shows that a surplus may exist, the Attorney General shall cause such returns to be carefully examined, and the accounts of dis-

¹Post § 711.

²See Post, § 606.

³§ 8, act Mar. 15, 1898, c. 68, 30 Stat. 317, U. S. Comp. Stat. 1901, p. 651. See *United States v. McMillan*, 165 U. S. 517, 41 L. ed. 810, 17 Sup. Ct. Rep. 395.

⁴§ 13, act June 29, 1906, c. 3592, 34 Stat. 600, 601. See post, § 752, et seq.

⁵Post, § 745.

⁶*United States v. Hill*, 123 U. S. 681, 31 L. ed. 275, 8 Sup. Ct. Rep. 308.

bursements to be regularly audited by the proper officer of his Department, and an account to be opened with such officer in proper books to be provided for that purpose.

R. S. § 845, U. S. Comp. Stat. 1901, p. 647.

The section specifies district attorneys and marshals also.

§ 593. Court of Claims clerk to report as to judgments rendered and decisions of court.

On the first day of every December session of Congress, the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof, and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. And at the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the solicitor, the comptrollers, and the auditors of the Treasury; to the commissioners of the general land office and of Indian affairs; to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States.

R. S. § 1057, U. S. Comp. Stat. 1901, p. 731.

§ 594. Power of Court of Claims clerk to disburse funds—settlement of accounts.

The said clerk [of the Court of Claims] shall have authority, when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the Treasury in the same way as the accounts of other disbursing agents of the government are settled.

R. S. § 1056, U. S. Comp. Stat. 1901, p. 731.

§ 595. Duty of clerks to account to court for moneys deposited in causes during term.

At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they were deposited, and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court.

R. S. § 798, U. S. Comp. Stat. 1901, p. 621.

§ 596. Circuit and district clerks to report to Treasury judgments in cases where United States are parties.

Every clerk of a circuit or district court shall, within thirty days after the adjournment of each term thereof, forward to the Solicitor of the Treasury a list of all judgments and decrees, to which the United States are parties, which have been entered in said courts, respectively, during such term, showing the amount adjudged or decreed, in each case, for or against the United States, and the term to which execution thereon will be returnable.

R. S. § 797, U. S. Comp. Stat. 1901, p. 620.

In 1879 the section was amended by the addition of a provision requiring the clerk to make out a report to the internal revenue commissioner and prescribing its contents.⁸

§ 597. Duty as to restoration of records and compensation therefor.

Judges [of United States courts] may direct the performance, by the clerks of said courts [of the United States] respectively . . . of any duties incident thereto [i. e. incident to the restoration of records lost or destroyed, in which the United States are interested] ; and said clerks . . . shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.

Part of R. S. § 904, U. S. Comp. Stat. 1901, p. 677.

§ 598. Removal of clerk failing to report, etc.,—appointment of successor.

If any clerk of any district or circuit court of the United States shall wilfully refuse or neglect to make any report, certificate, statement or other document required by law to be by him made, or shall wilfully refuse or neglect to forward any such report, certificate, statement or document to the department, officer or person to whom, by law, the same should be forwarded, the President of the United States is empowered, and it is hereby made his duty, in every such case, to remove such clerk so offending from office, by an order in writing for that purpose. And upon the presentation of

⁸Post, § 605.

such order, or a copy thereof, authenticated by the Attorney General of the United States, to the judge of the court whereof such offender is clerk, such clerk shall thereupon be deemed to be out of office, and shall not exercise the functions thereof. And such district judge, in the case of the clerk of a district court, shall appoint a successor; and in the case of the clerk of a circuit court, the circuit judge shall appoint a successor. And such person so removed shall not be eligible to any appointment as clerk or deputy clerk for the period of two years next after such removal.

§ 5, act Feb. 22, 1875, c. 95, 18 Stat. 334, U. S. Comp. Stat. 1901, p. 621.

§ 599. Criminal punishment of clerk failing to report.

If any clerk mentioned in the preceding section¹⁰ shall wilfully refuse or neglect to make or to forward any such report, certificate, statement or document therein mentioned, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, in the discretion of the court; but a conviction under this section shall not be necessary as a condition precedent to the removal from office provided for in this act.

§ 6, act Feb. 22, 1875, c. 95, 18 Stat. 334, U. S. Comp. Stat. 1901, p. 622.

§ 600. Punishment for failing to deposit moneys in registry.

Every clerk or other officer of a court of the United States, who fails forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer, assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court, or who retains or converts to his own use or to the use of another any such money, is guilty of embezzlement and shall be punished by fine not less than five hundred dollars, and not more than the amount embezzled, or by imprisonment not less than one year nor more than ten years, or by both such fine and imprisonment; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement, of parties under the direction of the court.

R. S. § 5504, as amended Feb. 18, 1875, 18 Stat. 320, U. S. Comp. Stat. 1901, p. 3710.

¹⁰Ante, § 598.

By R. S. §§ 3616, 3617,¹¹ it is the duty of marshals, district attorneys, clerks etc., to pay moneys received into a United States depository without deduction. Persons receiving money which ought to have been deposited are guilty of embezzlement.¹²

§ 601. Power of clerks to administer oaths.

All clerks and all deputy clerks of United States courts are hereby authorized to administer oaths.

Part of § 1, act Mar. 2, 1901, c. 514, 31 Stat. 956, amending § 19, act May 28, 1896, c. 252, U. S. Comp. Stat. 1901, p. 499.

The above provision specifies also United States commissioners.¹³

§ 602. — power to administer oaths in admiralty cases.

The clerks of the district and circuit courts may, in the absence or in case of the disability of the judges, administer oaths to all persons identifying papers found on board of vessels or elsewhere, to be used on trials in admiralty causes.

R. S. § 799, U. S. Comp. Stat. 1901, p. 622.

This provision was carried into the Revised Statutes from an act of 1792.¹⁴

§ 603. Circuit or district court clerk not to act as receiver or master.

No clerk of the district or circuit courts of the United States, or their deputies shall be appointed a receiver or a master in any case except where the judge of said court shall determine that special reasons exist therefor to be assigned in the order of appointment.

Act Mar. 3, 1879, c. 183, 20 Stat. 415, U. S. Comp. Stat. 1901, p. 591.

The appointment of a clerk as master without special reason, although irregular, makes such officer a de facto incumbent, and he cannot be ousted in a collateral proceeding.¹⁵

§ 604. Duty to be in office on first Mondays, for equity cases.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course, and applied for, or had by the parties, or their solicitors, in all

¹¹U. S. Comp. Stat. 1901, p. 2413.

¹⁴Act May 8, 1792, c. 36, § 10, 1

¹²R. S. § 5505, U. S. Comp. Stat. Stat. 278.

1901, p. 3711.

¹³Post, § 676.

¹⁶Northwestern, etc. Co. v. Seaman, 80 Fed. 357.

causes pending in equity, in pursuance of the rules hereby prescribed.

Equity rule 2, promulgated October term, 1842.¹⁸

§ 605. — to report moneys paid in revenue cases.

Every clerk of a circuit or district court . . . shall . . . at the close of each quarter, or within ten days thereafter, report to the Commissioner of Internal Revenue all moneys paid into court on account of cases arising under the internal revenue laws, as well as all moneys paid on suits on bonds of collectors of internal revenue. The report shall show the name and nature of each case, the date of payment into court, the amount paid on account of debt, tax or penalty, and also the amount on account of costs. If such money, or any portion thereof, has been paid by the clerk to any internal revenue officer or other person, the report shall show to whom each of such payments was made; and if to an internal revenue officer, it shall be accompanied by the receipt of such officer.

R. S. § 797, as amended Mar. 1, 1879, c. 125, § 2, 20 Stat. 327, U. S. Comp. Stat. 1901, p. 621.

§ 606. Attorney General to require clerks to account for moneys—docket books.

The Attorney General shall hereafter, under rules and regulations prescribed by him, require the clerks of the United States circuit and district courts, clerks of the Territorial courts, clerks of the United States courts for the Indian Territory, and the clerks of the United States courts in Alaska to report and account for all moneys received by them on account of or as security for fees and costs, and to report and account for all amounts collected or received by them on behalf of the United States on account of judgments, fines, forfeitures, penalties and costs. The Attorney General shall also hereafter require such clerks to report and account for any other moneys received by them in their official capacity, whether on behalf of the United States or otherwise, and the Attorney General shall hereafter prescribe such docket or dockets or other books as he may deem proper to be kept and used by such clerks in recording, reporting and accounting for moneys mentioned above in this paragraph, and in recording all fees and emoluments earned by them, which

¹⁸See Post, § 802, as to equity rules.

dockets or other books shall be kept and used by said clerks in accordance with rules and regulations prescribed by the Attorney General.

Act June 30, 1906, c. 3914, 34 Stat. 754.

This provision is later than that of the act of 1898 given above,¹ and to a certain extent, at least, supersedes it.

¹See ante, § 589.

CHAPTER 17.

UNITED STATES MARSHALS.

- § 613. Cross references and matters affecting marshals not included herein.
- § 614. Power of Supreme Court to appoint a marshal.
- § 615. Compensation and duties of Supreme Court marshal.
- § 616. District marshal to act for circuit court of appeals.
- § 617. Terms of office of marshals.
- § 618. Appointment of marshals and deputies in the various districts.
- § 619. Temporary appointments to fill vacancy.
- § 620. Appointments, compensation and expenses of office deputies.
- § 621. —of field deputies.
- § 622. Deputies to continue after marshal's death—liability for their misfeasances.
- § 623. Residence and duties of marshals and effect of removals or neglect.
- § 624. Designation of official residence by Attorney General.
- § 625. Oaths of marshals and deputies.
- § 626. Who may administer the oath.
- § 627. Marshal's bonds, recording and evidence thereof.
- § 628. Increase of bond.
- § 629. Suit on marshal's bond—costs.
- § 630. Bond not exhausted by one suit, but continues.
- § 631. Limitation of action on bond.
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- § 633. Salaries in lieu of fees.
- § 634. Marshal's salaries in particular cases.
- § 635. Salaries payable monthly.
- § 636. Certain compensation and fees denied to deputies.
- § 637. Office expenses of marshals.
- § 638. Traveling expenses and for transportation of prisoners.
- § 639. Certain expense allowances to marshal.
- § 640. Allowances for expenses in case of prize.
- § 641. Quarterly expense accounts, verification, approval, allowance and returns.
- § 642. Effect of removal or expiration of term on unserved process.
- § 643. —effect upon persons in custody.
- § 644. Duties of marshal in general.
- § 645. Duty to provide court rooms.
- § 646. Duty to execute awards of foreign consuls.
- § 647. —returns to Treasury on executions for money due United States.

- § 648. —returns to Post Office Department on executions in post office cases.
- § 649. —returns to Department of Justice on executions in post office cases.
- § 650. Duty as to places of confinement of prisoners.
- § 651. Duty to make other provision for safekeeping prisoners.
- § 652. —to prosecute for violations of law as to transport of animals.
- § 653. Duty in deportation of Chinese.
- § 654. Duty to deliver offender's body for dissection.
- § 655. Duty of marshal in removing alien enemies.
- § 656. —to seize piratical vessels.
- § 657. Miscellaneous duties imposed on marshals.
- § 658. Treasury department rules as to suits by United States for moneys.
- § 659. Custody of goods seized under revenue laws.
- § 660. Powers of marshals in executing laws.
- § 661. Other powers of marshals.
- § 662. Forbidden to accept gifts, etc., to compromise revenue suits.
- § 663. Unserved process surrendered by retiring marshal or deputy.

§ 613. Cross references and matters affecting marshals not included herein.

The statutory provisions as to marshal's fees are given in a subsequent chapter.¹ The provisions as to mileage² and other provisions applicable generally to judicial officers will be found elsewhere.³ Elsewhere also will be found enactments dealing with transmission of accounts to Attorney General;⁵ with the execution of writs of removal of prisoners and other matters of criminal procedure;⁶ with the duty of the marshal to satisfy execution in judgments for duties and the money in which he shall accept payment;⁷ with the duty of the marshal in executing attachments in postal suits;⁸ with his duty to execute a deed on purchase by the United States at execution sale;⁹ with the power of the marshal to adjourn court;¹⁰ appointment of jury attendants by marshals.¹¹ Elsewhere will be found sections dealing with the prohibition against marshals practising law,¹² with the service of writs of *venire facias*, and other duties respecting juries,¹³ with the service of process and the par-

¹Post § 712 et seq.; as to fees in bankruptcy, see post §§ 2222, 2223.

²Post, 714; ante, § 456.

³Ante, §§ 441, et seq.

⁵Ante, § 451.

⁶Post, §§ 1583, 1611, 1612.

⁷Post, § 1396,

⁸Post, § 1401.

⁹Post, § 2318.

¹⁰See ante §§ 362-364.

¹¹Post, § 687.

¹²Ante, § 496.

¹³Post, §§ 1706.

ties by whom process is served in case of the marshal's disability,¹⁴ with the power of marshals to stay a warrant of arrest on proceedings in rem in admiralty,¹⁵ with his duty in cases where defendant giving bail in one district is committed in another;¹⁶ and in cases of execution and attachment;¹⁷ and in cases where court is adjourned to some other place by reason of epidemic.¹⁸ There are other provisions affecting marshals which are not within the scope of this work. The provisions of law as to deposits of public moneys by them are not included;¹⁹ nor the penal section punishing the using and not depositing of moneys belonging to the registry;²⁰ nor the provisions as to his duties in prize causes;¹ nor the provision punishing his refusal to receive or execute process in behalf of civil rights;² nor the provision for delivery to him of persons found on board seized slave vessels.³ The statutes respecting marshals in consular courts are omitted.⁴

Author's section.

§ 614. Power of Supreme Court to appoint a marshal.

The Supreme Court shall have power to appoint . . . a marshal for said court . . .

R. S. § 677, U. S. Comp. Stat. 1901, p. 559.

The section specifies also a clerk⁵ and a reporter.

§ 615. Compensation and duties of Supreme Court marshal.

The marshal is entitled to receive a salary at the rate of three thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the chief justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the chief justice, he may appoint assistants and messengers to attend

¹⁴Post, §§ 853-.

¹⁵Post, § 1220.

¹⁶Post, § 1553.

¹⁷Post, § 1858, et seq.

¹⁸Ante, § 306.

¹⁹See R. S. §§ 3616, 3617, 3619, U. S. Comp. Stat. 1901, pp. 2413, 2415.

²⁰See R. S. § 5504, U. S. Comp. Stat. 1901, p. 3710.

¹See R. S. §§ 4623, 4628, 4629, U.

S. Comp. Stat. 1901, p. 3130, 3131, 3132.

²See R. S. § 5517, U. S. Comp. Stat. 1901, p. 3713.

³See R. S. § 5559, U. S. Comp. Stat. 1901, p. 3735.

⁴See R. S. §§ 4111-4116, U. S. Comp. Stat. 1901, p. 2776.

⁵Ante, § 559.

the court, with the compensation allowed to officers of the House of Representatives of similar grade.

R. S. § 680, U. S. Comp. Stat. 1901, p. 560.

The fees of marshal of the Supreme Court are set forth elsewhere.⁶

§ 616. District marshal to act for circuit court of appeals.

So much of section 2 of the act approved March 3, 1891, to establish circuit courts of appeals as authorizes the appointment of a marshal to each of said courts at a salary of two thousand five hundred dollars be and the same is hereby, repealed, and the duties and powers imposed upon said marshals under the said act shall be performed by the United States marshals in and for the districts where terms of said courts may be held, and to this end said marshals shall be the marshals of said circuit court of appeals.

§ 1, act July 16, 1892, c. 196, 27 Stat. 222, U. S. Comp. Stat. 1901, p. 555.

The sixth rule originally promulgated for the circuit courts of appeal in all the circuits made provision as to the duties of the marshal and criers in that court. In the first, eighth and ninth circuits this rule has since been modified.⁷

§ 617. Terms of office of marshals.

By R. S. § 779 it was provided that "marshals shall be appointed for a term of four years." To obviate the inconveniences of an interval between the expiration of one term and a new appointment, a law of 1898 declared that "The attorneys and marshals of the United States, including the District of Columbia and the Territories, shall continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead. But they shall be appointed and commissioned for the term of four years as now provided by law."⁸

Author's section.

§ 618. Appointment of marshals and deputies in the various districts.

By R. S. § 776 the appointment of a marshal for each district was provided "except in the middle district of Alabama, and the northern district of Georgia, and the western district of South

⁶Post, § 713.

⁸Act June 24, 1898, c. 495, § 1,

⁷See the rules as printed in the 30 Stat. 487.
appendix.

Carolina" the marshal in other districts of those States being required to act in the excepted districts. The exceptions as to Alabama⁹ and as to Georgia¹⁰ are superseded by later laws. South Carolina really constitutes but one district having eastern and western divisions.¹¹ Various special provisions as to marshals and their place of residence in particular districts and the appointment of deputies therein are collected in the note to this section. An act of 1889 abolishing circuit court powers previously exercised by district courts in the western district of Arkansas, northern district of Mississippi, and western district of South Carolina, and creating circuit courts therein required that "the marshals of the United States in and for said respective districts shall act as marshals of said circuit courts."¹² There are also statutory provisions for the appointment of marshals in the Federal judicial districts created upon the admission of new States to the Union,¹³ or created by the division of existing districts. The statutes creating new districts by the subdivision of an existing district or districts usually designate the district to which the existing marshal shall be assigned and provide another appointment for the other district.¹⁴ Sometimes these statutes provide that the act creating the new district shall not affect the tenure of office of existing officers.¹⁵ None of these enactments vary the general provisions of law as to appointment, tenure, powers, duties or compensation of marshals, and in their operation are executed rather than executory. It would serve no useful purpose to set them forth at length in this work. The existing laws require one marshal for each district. The practitioner should advise himself of any reorganization of or change in judicial districts hereafter made.

Author's section.

⁹Act Mar. 3, 1893, c. 220, 27 Stat. 745, U. S. Comp. Stat. 1901, p. 319.

¹⁰Act Apr. 25, 1882, c. 87, § 1, 22 Stat. 47, U. S. Comp. Stat. 1901, p. 335.

¹¹See ante, § 103.

¹²Act Feb. 6, 1889, c. 113, 25 Stat. 655, U. S. Comp. Stat. 1901, p. 493.

¹³E. g. see Colorado: act June 26, 1876, c. 147, § 4, 19 Stat. 61, U. S. Comp. Stat. 1901, p. 329.

¹⁴E. g. West Virginia: act Jan. 22, 1901, c. 105, §§ 4, 6, 31 Stat. 736, U. S. Comp. Stat. 1901, p. 441. Illinois: act Mar. 3, 1905, c. 1427, 33 Stat. 996.

¹⁵E. g. California: act Aug. 5, 1886, c. 928, § 10, 24 Stat. 310, U. S. Comp. Stat. 1901, p. 326. Texas: act Mar. 3, 1901, c. 881, § 19, 32 Stat. 69, U. S. Comp. Stat. 1903, p. 74.

[a] Georgia, Illinois and Indiana.

The acts creating the eastern division of the northern district of Georgia and the southwestern and Albany divisions of the southern district provide that no additional marshal or other officer be appointed, but that the existing officers perform the duties of their positions therein.¹⁶ A statute governing the northern district of Illinois provides for a deputy marshal and his place of residence; and other statutes provide similarly as to deputies and place of residence in the southern district of Illinois.¹⁷ In the Indiana district the act providing for terms of court at Fort Wayne and Hammond require the marshal to discharge the duties of his office for the terms of court there held, and also require him to appoint deputies to reside and keep office there and keep the records pertaining to their offices at those places.¹⁸

[b] Iowa, Kansas and Kentucky.

The act creating the southern division of the southern district of Iowa provided for the appointment and residence of a deputy marshal at Creston.²⁰ In Kansas provisions as to deputy marshals at Fort Scott and Salina, and their residence and duties and the liability of the marshal for the acts of the Fort Scott deputy, are given in a preceding section.¹ The act creating the Owensboro division in Kentucky provided that the marshal "shall, by himself or deputy, attend upon the terms of the court in said division; and he may appoint a deputy to reside at Owensborough (and shall do so if ordered by the court), who shall discharge all the duties of marshal; and the marshal may require a bond of indemnity to himself with surety for the faithful discharge of his duties and for indemnity in case of breach, on which actions may be maintained in said district court."²

[c] Maryland and Michigan.

There is a provision for a deputy marshal in the Maryland district, at Cumberland, similar to the provision for a deputy clerk there.³ In the western district of Michigan a statute specifically requires the marshal to perform the duties of his office in both the northern and southern divisions and to keep an office and a deputy at Marquette in the northern

¹⁶Act Feb. 28, 1901, c. 621, § 2, § 2, 30 Stat. 836, U. S. Comp. Stat. 31 Stat. 818, U. S. Comp. Stat. 1901, 1901, p. 348, 349.

p. 341; act June 30, 1902, c. 1338, § 2, 32 Stat. 550, U. S. Comp. Stat. § 569. [d].

1903, p. 57; act Mar. 3, 1905, c. 1431, 33 Stat. 979, U. S. Comp. Stat. 1905, p. 87 as amended by act of 1906.

¹⁷See acts quoted and cited ante, § 569. [e].

¹⁸Act Mar. 3, 1881, c. 154, § 2, 21 Stat. 511; act Feb. 14, 1899, c. 155, § 569. [e].

²⁰See act quoted and cited ante, § 569. [e].

¹See act quoted and cited ante, § 569. [e].

²Act Aug. 8, 1888, c. 792, § 4, 25 Stat. 390, U. S. Comp. Stat. 1901, p. 360.

³See act quoted and cited ante, § 569. [e].

division.⁴ There is a similar provision in the eastern Michigan district regarding the two divisions for a deputy at Bay City.⁵

[d] Mississippi and Missouri.

In the northern district of Mississippi a statute specifically declares that the marshal shall act for both divisions thereof with the fees and duties prescribed by law; that process shall be directed to him and be served by him or his deputies upon the parties whenever found in the northern district; and he is required to "have an office and at least one general deputy residing at the place of holding court in each division unless he shall reside there himself."⁶ In the southern district of Mississippi the marshal is required to appoint a deputy who shall reside at Vicksburg and act as marshal of the courts there in place of his principal;⁷ and another deputy with similar powers at Mississippi City;⁸ and another with similar powers at Meridian.⁹ The statute governing the eastern and western districts of Missouri specifically requires that the marshal in each district act in all the divisions thereof, with the fees, duties and liabilities, provided by general law; that process for a division be directed to the marshal of the district wherein it lies, who may serve it anywhere in the district; and that he "shall keep an office and at least one general deputy residing at the place of holding courts in each division, excepting the division in which he may himself reside."¹⁰ A later statute creating the southwestern division of the western district required the marshal of the district to perform the duties of his office therein.¹¹

Provisions as to the powers and duties of marshals in the eastern and western districts of Tennessee and for a deputy at Chattanooga and at Jackson are quoted elsewhere.¹² The act creating the northeastern division of the eastern district required the marshal of the district to perform his duties therein, but made no provision for a deputy.¹³ An act providing for terms of circuit and district court at Charlottesville and Roanoke in Virginia requires the marshal for the western district to discharge the duties of his office for the terms of court there held.¹⁴ In the act govern-

⁴Act June 19, 1878, c. 326, § 5, 20 Stat. 176, U. S. Comp. Stat. 1901, p. 371.

⁵Act Feb. 28, 1887, c. 269, § 2, 24 Stat. 423; act Apr. 30, 1894, c. 66, § 5, 28 Stat. 68, U. S. Comp. Stat. 1901, p. 372, 374.

⁶Act June 15, 1882, c. 218, § 5, 22 Stat. 102, U. S. Comp. Stat. 1901, p. 379.

⁷Act Feb. 28, 1887, c. 279, § 4, 24 Stat. 431, U. S. Comp. Stat. 1901, p. 381.

⁸Act Apr. 4, 1888, c. 58 § 4, 25 Stat. 79, U. S. Comp. Stat. 1901, p. 382.

⁹Act July 18, 1894, c. 144, § 7, 28 Stat. 115, U. S. Comp. Stat. 1901, p. 383.

¹⁰Act Feb. 28, 1887, c. 271, § 5, 24 Stat. 426, U. S. Comp. Stat. 1901, p. 387.

¹¹Act Jan. 24, 1901, 164, § 3, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 390.

¹²Ante, § 569.[k]

¹³Act Feb. 7, 1900, c. 10, § 3, 31 Stat. 5, U. S. Comp. Stat. 1901, p. 419.

¹⁴Act Feb. 3, 1903, c. 398, § 2, 32 Stat. 794, U. S. Comp. Stat. 1903, p. 77.

ing Wyoming there is a provision for a deputy at Evanston;¹⁵ and the statute respecting the Yellowstone National Park provides that "the marshal of the United States for the district of Wyoming may appoint one or more deputy marshals for said park, who shall reside in said park."¹⁶

§ 619. Temporary appointments to fill vacancy.

In case of a vacancy in either of said offices [i. e. United States attorney or marshal], the district court of the United States for the district where such vacancy exists, the supreme court of the Territory, and the supreme court of the District of Columbia may appoint persons to exercise the duties of such offices within their respective jurisdictions, until such vacancy shall be filled.

§ 2 of act June 24, 1898, c. 495, 30 Stat. 487, U. S. Comp. Stat. 1901, p. 618.

It would seem that this enactment supersedes R. S. § 793,¹⁸ which provided that "in case of a vacancy in the office of district attorney or marshal within any circuit, the circuit justice of such circuit may fill the same, and the person appointed by him shall serve until an appointment is made by the President, and the appointee is duly qualified, and no longer. The appointment made by said justice shall be in writing and shall be filed in the clerk's office of the circuit court, and a copy thereof shall be entered upon the journal of said court. Any marshal so appointed shall give bond, as if appointed by the President, and the bond shall be approved by said justice. It shall then be filed in the clerk's office of said court, and a copy shall be entered on the journal of the court. A certified copy of such entry shall be prima facie proof of the execution of such bond, and of the contents thereof." It is held that the intent of the section just quoted is not to enable the circuit court justice to oust the power of the President,¹⁹ but that it merely authorizes him to fill the vacancy until the President shall act.²⁰

§ 620. Appointments, compensation and expenses of office deputies.

When, in the opinion of the Attorney General, the public interest requires it, he may, on the recommendation of the marshal, which recommendation shall state the facts as distinguished from conclusions, showing necessity for the same, allow the marshals to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the Attorney General from time to time, and paid as hereinafter provided. When any of such office deputies is engaged in

¹⁵Quoted and cited ante, § 569.[D]

¹⁶Act May 7, 1894, c. 72, § 6, 28 Stat. 75, U. S. Comp. Stat. 1901, p. 1564.

¹⁸U. S. Comp. Stat. 1901, p. 610.

¹⁹Such power is given under Const. Stat. 75, U. S. Comp. Stat. 1901, p. § 2, art. 2.

²⁰In re Farrow, 3 Fed. 112.

the service or attempted service of any writ, process, subpoena, or other order of the court, or when necessarily absent from the place of his regular employment, on official business, he shall be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence, not to exceed two dollars per day, and the necessary actual expenses in transporting prisoners, including necessary guard hire; and he shall make and render accounts thereof as hereinafter provided.

§ 10, act May 28, 1896, c. 252, 29 Stat. 182, U. S. Comp. Stat. 1901, p. 615.

It would seem that this section and the one next following supersede R. S. § 780 which provided that "every marshal may appoint one or more deputies, who shall be removable from office by the judge of the district court or by the circuit court for the district, at the pleasure of either." Prior to the above enactment of 1896, deputy marshals were all on the same footing, holding office at the pleasure of the marshal unless removed by the court.² They were not officers of the United States³ and stood on the same footing with regard to the marshal as an ordinary employee.⁴ It is held that the above provision does not change their position, as regards tenure of office, which expires at the expiration of the marshals term.⁵

§ 621. — of field deputies.

At any time when, in the opinion of the marshal of any district, the public interest will thereby be promoted, he may appoint one or more deputy marshals for such district, who shall be known as field deputies, and, who, unless sooner removed by the district court as now provided by law shall hold office during the pleasure of the marshal, except as hereinafter provided, and who shall each, as his compensation, receive three-fourths of the gross fees, including mileage, as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and in addition shall be allowed his actual necessary expenses, not exceeding two dollars a day, while endeavoring to arrest, under process, a person charged with or convicted of crime: Provided, that a field deputy may elect to receive actual expenses on any trip in lieu of mileage: Provided, that in special cases where,

²Priddie v. Thompson, 82 Fed. 186.

⁵Dudley v. James, 83 Fed. 345.

³Powell v. United States, 60 Fed. 687.

See contra, Priddie v. Thompson, 82 Fed. 186, holding marshal cannot re-

⁴Douglas v. Wallace, 161 U. S. 346, 40 L. ed. 727, 16 Sup. Ct. Rep. 485.

move office deputy.

in his judgment, justice requires, the Attorney General may make an additional allowance, not, however, in any case to make the aggregate annual compensation of any field deputy in excess of twenty-five hundred dollars, nor more than three-fourths of the gross fees earned by such field deputy. The marshal, immediately after making any appointment or appointments under this section, shall report the same to the Attorney General, stating the facts as distinguished from conclusions constituting the reason for such appointment, and the Attorney General may at any time cancel any such appointment as the public interest may require.

Part of § 11, act May 28, 1896, c. 252, 29 Stat. 182, U. S. Comp. Stat. 1901, p. 615.

The omitted part of the above provision provided for double fees for field deputies in certain districts during the fiscal year 1897.

§ 622. Deputies to continue after marshal's death—liability for their misfeasances.

In case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed, and shall execute the same in the name of the deceased until another marshal is appointed, as provided in this chapter, and duly qualified. The defaults or misfeasances in office of such deputies in the meantime shall be adjudged a breach of the condition of the bond given by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputies, during such interval, as he would be entitled to if the marshal had continued in life and in the exercise of his said office until his successor was appointed and duly qualified.

R. S. § 789, U. S. Comp. Stat. 1901, p. 609.

This section was first enacted in 1789.⁷

§ 623. Residence and duties of marshals and effect of removals or neglect.

Every . . . United States marshal . . . shall reside permanently in the district where his official duties are to be performed, and shall give his personal attention thereto; and in case any such officer shall remove from his district, or shall fail to give

⁷Act Sept. 24, 1789, c. 20, § 28, 1 Stat. 87.

personal attention to the duties of his office, except in case of sickness, such office shall be deemed vacant: Provided, That in the southern district of New York said officers may reside within twenty miles of their districts.

§ 2, of act June 20, 1874, c. 328, 18 Stat. 109, U. S. Comp. Stat. 1901, p. 622.

The provision specifies also clerks of the district and circuit courts and district attorneys.⁸

§ 624. Designation of official residence by Attorney General.

The marshal's official residence shall be deemed to be at one of the places of holding court in the district, and the Attorney General shall be authorized to fix and declare the place of such official residence.

Part of § 12, act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 616.

It is provided by § 24 of the same act that this and other provisions shall not apply to Alaska.

§ 625. Oaths of marshals and deputies.

Every marshal and deputy marshal shall, before he enters upon the duties of his appointment, take, before the district judge of the district, an oath of affirmation in the following form: "I, A. B., do solemnly swear (or affirm) that I will faithfully execute all lawful precepts directed to the marshal of the district of —, under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the district of —, during my continuance in said office, and take only my lawful fees. So help me God." The words "so help me God" shall be omitted in all cases where an affirmation is admitted instead of an oath: Provided, that when any person who is appointed deputy marshal resides and is more than twenty miles from the place where the district judge resides and is, the said oath of office may be taken by him before any judge or justice of any State court within the same district, or before any justice of the peace having authority therein, or before any notary public duly appointed in such State, or before any commissioner of a circuit court for such district, and shall, when certified by such officer to the

⁸Ante, §§ 506, 571.

said district judge, be as effectual as if taken before such district judge.

R. S. § 782, U. S. Comp. Stat. 1901, p. 606.

In administering the above oath the district judge does not perform a judicial function, and he cannot pass upon the President's right to make the appointment.⁹ The commission, and the performance of duties by a deputy marshal, raise a presumption that the required oath has been taken, which is conclusive in the absence of contrary proof.¹⁰ The fact that a deputy marshal in charge of a jury is not specially sworn is no ground for setting aside a criminal verdict in the absence of objection and after the court's caution to the jury not to separate or talk with strangers.¹¹

§ 626. Who may administer the oath.

That the oath or oaths required to be taken by marshals and deputy marshals before entering upon the duties of their respective offices may be administered by any officer of the United States or of any State authorized by law to administer oaths.

From appropriation act of Dec. 22, 1896, c. 3, 29 Stat. 481, U. S. Comp. Stat. 1901, p. 606.

§ 627. Marshal's bond, recording and evidence thereof.

Every marshal, before he enters on the duties of his office, shall give bond before the district judge of the district, jointly and severally with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by said judge, in the sum of twenty thousand dollars, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the district court or circuit court sitting within the district, and copies thereof, certified by the clerk, under the seal of the said court, shall be competent evidence in any court of justice.

R. S. § 783, U. S. Comp. Stat. 1901, p. 607.

A later act creating the southern district in Texas provides that "the marshals and their deputies shall give the bond required of marshals and deputy marshals under the provisions of existing law."¹² Under the above provision two sureties are necessary to the bond, which must be approved

⁹In re Yancey, 28 Fed. 445.

¹²Act Mar. 11, 1902, c. 183, § 15,

¹⁰United States v. Hudson, 1 Hask. 527, Fed. Cas. No. 15,412.

32 Stat. 69, U. S. Comp. Stat. 1903, p. 73.

¹¹United States v. Ball, 163 U. S. 674, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192.

by the district judge, and a marshal is not qualified until such bond is given and until it is received by the proper official.¹⁴

§ 628. Increase of bond.

Whenever the business of the courts in any judicial district shall make it necessary in the opinion of the Attorney General, for the . . . marshal to furnish greater securities than the official bond now required by law, a bond in a sum not to exceed forty thousand dollars shall be given when required by the Attorney General, who shall fix the amount thereof.

§ 2, act Feb. 22, 1875, c. 95, 18 Stat. 333, U. S. Comp. Stat. 1901, p. 620.

This provision specifies clerks also.¹⁵

§ 629. Suit on marshal's bond—costs.

In case of a breach of the condition of the marshal's bond, any person thereby injured may institute in his own name and for his sole use a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form. If such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant; and the United States shall in no case be liable for the same.

R. S. § 784, U. S. Comp. Stat. 1901, p. 607.

The section was enacted in 1806.¹⁶ While it authorizes the injured party to bring suit in his own name, the suit may also be brought by the United States.¹⁷ In such case the judgment is for the penalty and it apparently may be held by the United States as security for the party injured.¹⁸ But if the suit is brought in the name of a private person it is for his sole use, and his recovery is the damages legally assessed.¹⁹ If the government has no right to sue on the bond, an individual has none, hence no action lies on the bond by a deputy for money due him retained by the marshal.²⁰

§ 630. Bond not exhausted by one suit, but continues.

The said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by breach of the condition of the same, until the whole penalty has been recov-

¹⁴Jackson v. Simonton, 4 Cr. C. C. 433, Fed. Cas. No. 14,921; Hagood v. 255, Fed. Cas. No. 7147. Blythe, 37 Fed. 252.

¹⁵Ante, § 575.

¹⁸Hagood v. Blythe, 37 Fed. 252.

¹⁶Act April 10, 1806, c. 21, § 2,

¹⁹Idem.

²Stat. 373.

²⁰Bollin v. Blythe, 46 Fed. 181.

¹⁷United States v. Davidson, 1 Biss.

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ered; and the proceedings shall always be as directed in the preceding section.

R. S. § 785, U. S. Comp. Stat. 1901, p. 607.

This provision was originally enacted in 1806.² Its meaning is that the person injured may bring suit on the bond in his own name, notwithstanding a judgment already had on it.³

§ 631. Limitation of action on bond.

No suit on a marshal's bond shall be maintained unless it is commenced within six years after the right of action accrues, saving, nevertheless, the rights of infants, married women and insane persons, so that they sue within three years after their disabilities are removed.

R. S. § 786, U. S. Comp. Stat. 1901, p. 607.

This section, enacted in 1806,⁵ does not apply to suits by the United States,⁶ nor does it begin to run against a claim for proceeds of marshals' sale suspended by appeal until after affirmance of the decree.⁷

§ 632. Deputies' bond in Kentucky and suit thereon.

The marshal may require a bond of indemnity to himself [from the deputy at Owensboro, Kentucky] with surety for the faithful discharge of his duties and for indemnity in case of breach, on which actions may be maintained in said district court [of the United States.]

Part of § 4, act Aug. 8, 1888, c. 792, 25 Stat. 390, U. S. Comp. Stat. 1901, p. 360.

§ 633. Salaries in lieu of fees.

On and after the 1st day of July, 1896 . . . United States marshals . . . shall be paid for their official services . . . salaries and compensation hereinafter provided and not otherwise.

Part of § 6 of act May 28, 1896, c. 252, 29 Stat. 179, U. S. Comp. Stat. 1901, p. 611.

The section also provided that the fees previously allowed marshals and district attorneys should be paid thereafter to the clerk and be by him paid into the Treasury.⁸

²Act April 6, 1806, c. 21, § 3, 2 States v. Godbold, 3 Woods, 550, Stat. 374 Fed. Cas. No. 15,219.

³Hagood v. Blythe, 37 Fed. 252.

⁷Montgomery v. Hernandez, 12

⁵Act April 10, 1806, c. 21, § 4, 2 Stat. 374.

Wheat. 129, 6 L. ed. 575.

⁶United States v. Rand, 4 Sawy. 509.

⁸See post, § 745. See also ante §

272, Fed. Cas. No. 16,116; United

§ 634. Marshal's salaries in particular cases.

The United States marshal for each judicial district of the United States shall be paid, in lieu of the salaries, fees, per centums and other compensation now allowed by law, an annual salary as follows: For the northern and middle districts of the State of Alabama, each four thousand dollars; for the southern district of the State of Alabama, three thousand dollars; for the Territory of Arizona, four thousand dollars; for the eastern district of Arkansas, four thousand dollars; for the western district of Arkansas, five thousand dollars; for the northern district of California, four thousand dollars; . . . for the district of Colorado, four thousand dollars; for the district of Connecticut, two thousand dollars; for the district of Delaware, two thousand dollars; for the District of Columbia, five thousand five hundred dollars; for the northern and southern districts of Florida, each three thousand dollars; for the northern district of Georgia, five thousand dollars; for the southern district of Georgia, three thousand five hundred dollars; . . . for the northern district of Illinois, five thousand dollars; for the southern district of Illinois, four thousand five hundred dollars; for the district of Indiana, four thousand five hundred dollars; for the northern and southern districts of Iowa, each four thousand dollars; for the district of Kansas, four thousand dollars; for the district of Kentucky, five thousand dollars; for the eastern district of Louisiana, three thousand dollars; for the western district of Louisiana, two thousand five hundred dollars; for the district of Maine, three thousand dollars; for the district of Maryland, three thousand five hundred dollars; for the district of Massachusetts, five thousand dollars; for the eastern district of Michigan, four thousand dollars, for the western district of Michigan, three thousand dollars; for the district of Minnesota, four thousand dollars; for the northern and southern districts of Mississippi, each three thousand dollars; for the eastern district of Missouri, four thousand dollars; for the western district of Missouri, four thousand dollars; for the district of New Jersey, three thousand five hundred dollars; for the district of Nebraska, three thousand five hundred dollars; for the district of Nevada, two thousand five hundred dollars; for the district of New Hampshire, two thousand dollars; for the district of New Jersey, three thousand dollars; for the district of New Mexico, four thousand dollars; for the northern district of New York, five thousand dollars; for the

eastern district of New York, four thousand dollars; for the southern district of New York, five thousand dollars; for the eastern district of North Carolina, four thousand dollars; for the western district of North Carolina, four thousand five hundred dollars; for the district of North Dakota, four thousand dollars; for the northern and southern districts of Ohio, each four thousand dollars; for the district of Oklahoma, five thousand dollars; for the district of Oregon, four thousand dollars; for the eastern district of Pennsylvania, four thousand dollars; for the western district of Pennsylvania, four thousand dollars; for the district of Rhode Island, two thousand dollars; for the eastern and western districts of the district of South Carolina, four thousand five hundred dollars, two thousand five hundred dollars of which shall be for the performance of the duties of marshal of the western district; for the district of South Dakota, four thousand dollars; for the eastern, middle and western districts of Tennessee, each four thousand dollars; for the northern district of Texas, three thousand dollars; for the eastern district of Texas, five thousand dollars; for the western district of Texas, four thousand dollars; for the district of Utah, three thousand five hundred dollars; for the district of Vermont, two thousand five hundred dollars; for the eastern district of Virginia, three thousand five hundred dollars; for the western district of Virginia, four thousand dollars; for the district of Washington, four thousand dollars; for the district of West Virginia, four thousand dollars; for the eastern district of Wisconsin, four thousand dollars; for the western district of Wisconsin, four thousand dollars; for the district of Wyoming, three thousand five hundred dollars.

§ 9, act May 28, 1896, c. 252, 29 Stat. 181, U. S. Comp. Stat. 1901, p. 613-615.

The omitted portions of the above section provide an annual salary of three thousand dollars for the marshal of the southern district of California and the district of Idaho. The sundry civil appropriation act of 1906 raises the salary of these officers to four thousand dollars.⁹ By § 24 of the same act it is provided that the above section does not apply to Alaska. The salaries of each of the marshals in Oklahoma are to be the same as in other districts.¹⁰ The above enactment necessarily superseded R. S. § 841, fixing the maximum compensation allowable to marshals out of fees collected. It also superseded R. S. § 842¹¹ in so far as allowing marshals

⁹Act June 30, 1906, c. 3914, 34 Stat. 753.

¹⁰Act June 19, 1906, § 13, c. 3335, 34 Stat. 275.

¹¹See ante, § 581.

additional compensation in prize cases; and R. S. § 843¹² in so far as applicable to marshals. A later law creating a middle district in Pennsylvania provides that the marshal's salary shall be the same as in the western district, i. e., \$4,000;¹³ and in the new eastern district of Kentucky the same as in the older Kentucky district, i. e., \$5,000;¹⁴ and in the new western district of New York the same as in the northern district, i. e., \$5,000.¹⁵ The marshal in the new southern district of Texas is given a salary of \$3,500 per annum, payable as the marshals . . . in other districts are paid under the provisions of existing law."¹⁶

§ 635. Salaries payable monthly.

All salaries provided by section six to fifteen, [includes marshals salaries] inclusive, of this act, shall be paid monthly by the Department of Justice.

§ 16 of act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 617.

§ 636. Certain compensation and fees denied to deputies.

No officer or field deputy shall receive compensation as bailiff, and no field deputy shall receive fees for representing the marshal in court.

Proviso of § 13, act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 617.

§ 637. Office expenses of marshals.

The necessary office expenses of the . . . marshals shall be allowed when authorized by the Attorney General.

§ 14 of act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 617.

This provision applies to district attorneys also.¹⁹

§ 638. Traveling expenses and for transportation of prisoners.

The marshal when attending court, at any place other than his official residence, and when engaged in the service or attempted service of any process, writ or subpoena, and when otherwise necessarily absent from his official residence, on official business, shall be allowed his necessary expenses for lodging and subsistence not ex-

¹²Ante, § 582.

¹³Act Mar. 2, 1901, c. 801, § 5, 31 Stat. 881, U. S. Comp. Stat. 1901, p. 406.

¹⁴Act Feb. 12, 1901, c. 355, § 7, 31 Stat. 782, U. S. Comp. Stat. 1901, p. 362.

¹⁵Act May 12, 1900, c. 391, § 9, 31 Stat. 176, U. S. Comp. Stat. 1901, p. 396.

¹⁶Act Mar. 11, 1902, c. 183, § 15, 32 Stat. 69, U. S. Comp. Stat. 1903, p. 73.

¹⁹Ante, § 517.

ceeding four dollars per day and his actual necessary traveling expenses. He shall also be allowed the actual necessary expenses in transporting prisoners, including necessary guard hire. An account of such expenses shall be made out and paid as hereinafter provided.

Part of § 12 of act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 616.

The omitted portion prescribes the official residence of the marshal.¹ R. S. § 5546 and an act of 1891² deal with the duty of marshals in transporting prisoners. The provision as to expenses for transporting prisoners contained in the act of 1891 would seem to be superseded by the above section.

§ 639. Certain expense allowances to marshal.

There shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offense, for the maintenance of prisoners of the United States confined in jail for any criminal offense; also, for his reasonable actual expense for the transportation of criminals, and of the marshal and guards, to prisons designated by the Attorney General, and for hire and subsistence in that behalf, as hereinbefore provided; also, his fees for the commitment or discharge of prisoners; his expenses necessarily incurred for fuel, lights, and other contingencies that may accrue in holding the courts within his district, and providing the books necessary to record the proceedings thereof; provided, that he shall not incur, or be allowed, an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of a building and making improvements thereon, without first submitting a statement and estimates to the Attorney General and getting his instructions in the premises.

R. S. § 830, U. S. Comp. Stat. 1901, p. 639.

Much of the above section is superseded by later enactments. In so far as it provides fees payable by the United States in criminal cases it is superseded by the law of 1896, giving salaries in lieu of fees.³ The provision as to expense allowance for transportation of criminals is also superseded.⁴ The clause as to office expenses must be construed in connection

¹Ante, § 624.

³Ante, §§ 633, 634.

²Act Mar. 3, 1891, c. 529, § 5, 26 Stat. 839, U. S. Comp. Stat. 1901, p. 3723, 3726.

⁴Ante, § 638.

with the later enactment allowing office expenses only when approved by the Attorney General.⁵ The provision regarding expenses for fuel, light and record books for the courts seems to be unaffected by later statutes. Hack and carriage hire have been allowed the marshal in the transportation of criminals,⁶ also the actual expenses incurred by hiring guards,⁷ including money paid for their meals.⁸ He is also allowed for the maintenance of prisoners in custody awaiting examination, but not in jail,⁹ and for money expended for meals to jurors while they are deliberating on their verdict.¹⁰ The expenses of hiring bailiffs ordered by the court have been allowed as "other contingencies that may accrue in holding courts" within the meaning of the section.¹¹

§ 640. Allowances for expenses in case of prize.

The marshal be allowed his actual and necessary expenses for the custody, care, preservation, insurance, sale or other disposal of the prize-property, and for executing any order of the court respecting the same . . . No charges of the marshal for expenses or disbursements shall be allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated.

Part of R. S. § 4645, U. S. Comp. Stat. 1901, p. 3137.

The remainder of the section confers certain commissions upon the marshal by way of compensation; but it must be regarded as superseded by the act of 1896¹² as to salaries.

§ 641. Quarterly expense accounts, verification, approval, allowance and returns.

Whenever in this act an officer [this includes marshals and their deputies] is allowed actual expenses, the account therefor shall be made out quarterly, in accordance with rules and regulations prescribed by the Attorney General. When made out the account shall be verified on oath before an officer authorized to administer oaths. The expense accounts of the marshals and their office deputies and the accounts of the field deputies shall be paid by the marshals; said accounts . . . when made out in accordance with this act, shall

⁵Ante, § 637.

⁶Kinney v. United States, 54 Fed. 313; United States v. Harmon, 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327.

⁷United States v. Ebbs, 49 Fed. 149; United States v. Dill, 86 Fed. 79, 29 C. C. A. 586.

⁸Kinney v. United States, 54 Fed.

313. See also Swift v. United States, 128 Fed. 763.

⁹Donahower v. United States, 77 Fed. 153.

¹⁰Idem. And see Campbell v. United States, 65 Fed. 777, 13 C. C. A. 128.

¹¹United States v. Swift, 139 Fed. 225, (C. C. A.)

¹²See ante, §§ 633, 634.

be submitted to and examined by the circuit court or district court of the district, and when approved by the court shall be audited and allowed as now provided for by law. Each marshal shall make such returns of the earnings and expenses of his office as shall be required under rules and regulations prescribed by the Attorney General.

Part of § 13, act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 616.

This seems to supersede R. S. 833,¹⁴ requiring semiannual returns as to fees and expenses, in so far as applicable to marshals. That section provided that "every . . .¹⁵ marshal shall, on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in return the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them." But R. S. § 846, as to inspection and approval of accounts by the judges, is still in force.¹⁶

§ 642. Effect of removal or expiration of term on unserved process.

The first portion of R. S. § 790 provided that: "every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed expires, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office." But this would seem to be superseded by a provision in a statute of 1899 requiring that "hereafter all unserved process remaining in the hands of a United States marshal or his deputies, when the marshal ceases to be such, shall be immediately delivered to the succeeding marshal upon request; and when a deputy United States marshal resigns or is removed he shall, upon request, deliver

¹⁴U. S. Comp. Stat. 1901, p. 642. ante, § 520; and clerks, ante, § 589.

¹⁵Includes also district attorneys, ¹⁶See Ante § 448.

to the United States marshal for the district all process remaining in his hands."¹⁸ The remaining portion of R. S. § 790 is unaffected by this law of 1899 and is given elsewhere.¹⁹

Author's section.

Although the term of office of a marshal has expired, it is still his duty to settle his accounts with the government, which duty is discharged under the sanction of his official oath and the obligation of his bond.²⁰

§ 643. — effect upon persons in custody.

The marshal shall be held responsible for the delivery to his successor of all prisoners who may be in his custody at the time of his removal, or when the term for which he is appointed expires; and for that purpose he may retain such prisoners in his custody until his successor is appointed and duly qualified.

Part of R. S. § 790, U. S. Comp. Stat. 1901, p. 609.

§ 644. Duties of marshal in general.

It shall be the duty of the marshal of each district to attend the district and circuits courts when sitting therein, and to execute, throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.

R. S. § 787, U. S. Comp. Stat. 1901, p. 608.

The authority of marshals to execute process of the Federal courts is derived from the Federal law.² They are, however, merely ministerial officers and cannot judge whether such process shall be issued,³ but are justified in acting if the process is regular and legal on its face.⁴ In making an arrest they may use all necessary force and summon assistance if required.⁵ On the execution of an attachment the responsibility rests with them and they are liable to an injured party for neglect or improper performance.⁶ Property seized by them must be kept free from injury.⁷ While a subpoena for a witness⁸ or a notice to a party may be served by a private person,⁹ original process must be served by the marshal¹⁰ or his

¹⁸Deficiency appropriation act Mar. 3, 1899, c. 427, 30 Stat. 1214.

¹⁹Post, § 643.

²⁰United States v. Strobach, 48 Fed. 902.

²United States v. Fullhart, 47 Fed. 802.

³Levy Ct. v. Ringgold, 5 Pet. 454, 8 L. ed. 188.

⁴United States v. Harris, Fed. Cas. No. 15,313.

⁵United States v. Fullhart, 47 Fed. 802.

⁶Broderick v. Brown, 68 Fed. 346.

⁷Burke v. The Brig Rich, 1 Cliff. 509, Fed. Cas. No. 2,162.

⁸Gordon v. Scott, Fed. Cas. No. 5,620, 2 N. B. R. 86.

⁹Schwabacher v. Reilly, 2 Dill. 127, Fed. Cas. No. 12,501.

¹⁰Schwabacher v. Reilly, 2 Dill. 127, Fed. Cas. No. 12,501.

deputy.¹¹ A marshal is liable for false imprisonment for the arrest of a person not named or described in the warrant.¹² He is liable also for attaching property of a person not named in the writ,¹³ for the delivery of attached property to the wrong person,¹⁴ and for the death of a prisoner whom he knowingly instructed to the care of an unfit deputy.¹⁵ If he receives bank notes in satisfaction of execution he is liable to the judgment creditor in lawful money.¹⁶ He cannot, however, be held for the escape of prisoners regularly committed to jail.¹⁷ The equity rules provide for service of process by the marshal.

§ 645. Duty to provide court rooms.

There are occasional provisions of law making it the duty of the marshal for a district to provide court rooms for the occupancy of the court and its officers. Thus the act creating the circuit court of appeals made it the duty of the marshals of the several districts where that court is held to provide court rooms with the approval of the Attorney General, and pay incidental expenses, either in public buildings of the United States where possible, or if not, then by leasing rooms elsewhere.¹⁹ So also another act of the same date relating to the northern judicial district of Georgia, required the marshal to provide suitable rooms for the occupancy of the circuit and district courts and their officers.²⁰

Author's section.

§ 646. Duty to execute awards of foreign consuls.

The marshals of the United States shall serve all such process [to carry into effect awards or decrees of foreign consuls], and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners [i. e. district and circuit courts and circuit court commissioners].

Part of R. S. § 728, U. S. Comp. Stat. 1901, p. 584.

§ 647. — returns to Treasury on executions for money due United States.

Every marshal shall, within thirty days before the commencement

¹¹See *United States v. Tinkler*, 3 Blatchf. 425, Fed. Cas. No. 16,526.

¹²*West v. Cabell*, 153 U. S. 85, 38 L. ed. 643, 14 Sup. Ct. Rep. 752.

¹³*Lammon v. Feusier*, 111 U. S. 18, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; *Wise v. Jefferis*, 51 Fed. 641, 2 C. C. A. 432.

¹⁴*Bernard v. Bowe*, 41 Fed. 31.

¹⁵*Asher v. Cabell*, 50 Fed. 818.

¹⁶*Givin v. Breedlove*, 2 How. 34, 11 L. ed. 170.

¹⁷*United States v. Hudson*, 1 Hask. 527, Fed. Cas. No. 15,412; *Randolph v. Donaldson*, 9 Cranch, 76, 3 L. ed. 662.

¹⁹See § 9, act Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 552.

²⁰Act Mar. 3, 1891, c. 566, § 41, 26 Stat. 1110, U. S. Comp. Stat. 1901, p. 339.

of each term of the circuit and district courts in his district, make returns to the Solicitor of the Treasury of the proceedings had upon all writs of execution, or other process which have been placed in his hands for the collection of moneys adjudged and decreed to the United States in said courts, respectively.

R. S. § 791, U. S. Comp. Stat. 1901, p. 610.

§ 648. — returns to Postoffice Department on executions in post-office cases.

Every marshal to whom any execution upon a judgment in any suit for moneys due on account of the Postoffice Department has been directed, shall make returns to the sixth auditor, at such times as he may direct, of the proceedings which have taken place upon the said process of execution.

R. S. § 792, U. S. Comp. Stat. 1901, p. 610.

The duty of the marshal in executing attachments in postal cases is provided in another section.² The sixth auditor above mentioned is designated auditor for the Postoffice Department by an act of 1894.³

§ 649. — returns to Department of Justice on executions in post-office cases.

The United States marshal to whom [execution on a judgment in government suit for postoffice moneys] . . . is directed shall make returns of the proceedings thereon to the Department of Justice at such times as it may direct.

Part of R. S. § 775, U. S. Comp. Stat. 1901, p. 604.

§ 650. Duty as to places of confinement of prisoners.

In a State where the use of jails, penitentiaries, or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such State, under direction of the judge of the district, may hire, or otherwise procure, within the limits of such State, a convenient place to serve as a temporary jail.

R. S. § 5537, U. S. Comp. Stat. 1901, p. 3719.

R. S. § 5546 and an act of 1891⁴ deal with the duties of a marshal in the transportation of prisoners to the penitentiary.

²Post, § 1401.

⁴Act Mar. 3, 1891, c. 529, § 5, 26

³§ 3, act July 1, 1894, U. S. Comp. Stat. 839, U. S. Comp. Stat. 1901, Stat. 1901, p. 154.

p. 3726.

§ 651. Duty to make other provision for safekeeping prisoners.

The marshal shall make such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law.

R. S. § 5538, U. S. Comp. Stat. 1901, p. 3719.

§ 652. — to prosecute for violations of law as to transport of animals.

It shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations [of the law requiring animals in transport to be fed, watered, unloaded, etc.,] which come to their notice or knowledge.

Part of R. S. § 4389, U. S. Comp. Stat. 1901, p. 2997.

§ 653. Duty in deportation of Chinese.

Such order of deportation [i. e. of a Chinese laborer] shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail.

Part of § 2, act Nov. 3, 1893, c. 14, 28 Stat. 18, U. S. Comp. Stat. 1901, p. 1323.

§ 654. Duty to deliver offender's body for dissection.

The marshal who executes such judgment [of death upon conviction of murder, accompanied by an order for the delivery of the offender's body to a surgeon for dissection] shall deliver the body, after execution, to such surgeon as the court may direct.

Part of R. S. § 5340, U. S. Comp. Stat. 1901, p. 3628.

§ 655. Duty of marshal in removing alien enemies.

When an alien enemy is required by the President, or by order of any court, judge or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor, and to execute such order in person, or by his deputy, or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of

the President, or of the court, judge or justice ordering the same, as the case may be.

R. S. § 4070, U. S. Comp. Stat. 1901, p. 2763.

§ 656. — to seize piratical vessels.

The collectors . . . surveyors . . . and the marshals of the several judicial districts within the United States, shall seize any vessel or boat built, purchased, fitted out, or held as mentioned in section 4297 [regarding seizure of piratical vessels] which may be found within their respective ports or districts, and to cause the same to be proceeded against and disposed of as provided by that section.

R. S. § 4299, U. S. Comp. Stat. 1901, p. 2952.

This section was enacted in 1861.⁷

§ 657. Miscellaneous duties imposed on marshals.

In addition to the statutory provisions already set forth, other enactments prescribe various duties to be performed by marshals. Thus the law governing the militia called into actual service of the United States requires the marshal to levy fines imposed by court martial, or commit the offenders to jail in default thereof; and to pay over the fines to the Treasury.⁸ The enactments subsequent to the Civil War for the protection of civil rights, especially required marshals and their deputies to institute proceedings against every person violating such laws and cause their arrest and to obey and execute all warrants or other process in that behalf.⁹ A section of the Revised Statutes respecting seizure of American vessels unlawfully importing coolies requires any such vessel to be delivered over to the marshal of the district.¹⁰ The section providing for the summary distress warrants against revenue collectors in default imposed duties in the levy thereof and sale thereunder, upon the marshal.¹¹ So also the marshal is required to obliterate tax-paid stamps on liquor forfeited to the government.¹² The law as to proceedings in prize causes imposes a variety of duties upon the mar-

⁷Act Aug. 5, 1861, c. 18, § 3, 12 Stat. 315. 336, U. S. Comp. Stat. 1901, pp. 1260, 1264, 1265, 3713.

⁸R. S. §§ 1659, 1660, U. S. Comp. Stat. 1901, p. 1130.

⁹See R. S. §§ 1982, 1985, 5517, also act Mar. 1, 1875, c. 114, § 3, 18 Stat.

2163, U. S. Comp. Stat. 1901, p. 1284.

¹⁰Post §§ 2419, 2420, 2085.

¹²R. S. § 3334, U. S. Comp. Stat. 1901, p. 2183.

shal, which are not set forth at length here,¹³ as well as a duty to pay any witness fees allowed.¹⁴ The marshal in the District of Columbia is required to post the names of servants for foreign public ministers in an accessible place.¹⁵ Other duties imposed will be found among the cross references in a preceding section.¹⁶

§ 658. Treasury Department rules as to suits by United States for moneys.

The Solicitor of the Treasury shall establish such regulations, not inconsistent with law, . . . with the approbation of the Attorney General, for the observance of district attorneys and marshals respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers, and the prompt collection of all revenues and debts due and accruing to the United States. But this section does not apply to suits for taxes, forfeitures or penalties arising under the internal revenue laws.

R. S. § 377, U. S. Comp. Stat. 1901, p. 212.

By R. S. § 3215¹⁸ the commissioner of internal revenue has similar power to prescribe rules in suits under internal revenue laws to which the United States are parties.

§ 659. Custody of goods seized under revenue laws.

Any goods, wares, merchandise, articles or objects which may be seized, under the provisions of section thirty-four hundred and fifty-three [Revised Statutes], by any collector or deputy collector, may, at the option of the collector, be delivered to the marshal of the district, and remain in the care and custody and under the control of said marshal, until he shall obtain possession by process of law.

Part of R. S. § 3458, U. S. Comp. Stat. 1901, p. 2281.

§ 660. Powers of marshals in executing laws.

The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

R. S. § 788, U. S. Comp. Stat. 1901, p. 608.

¹³See R. S. §§ 4623, 4628, 4629.

¹⁴See post, § 738.

¹⁵See R. S. §§ 4065, 4066, U. S. Comp. Stat. 1901, p. 2761.

¹⁶Ante, § 613.

¹⁸U. S. Comp. Stat. 1901, p. 2084.

Under the above provision a marshal in executing Federal laws has the power of a sheriff in executing State laws.¹ Thus he or his deputy may make an arrest without warrant² or arrest a person with liquor in his possession,³ or appoint a person to perform special service,⁴ where the sheriff of the particular State would have such power. So also he has the same power to keep the peace of the United States that a sheriff has to keep the peace of the State.⁵ The section apparently confers an additional right in the manner of appointment and qualification of a deputy marshal, and such officer may act without taking oath, where none is required of the deputy sheriff.⁶ It should not be construed, however, as restricting the power of the marshal to that of the sheriff. So, since under the Federal law a marshal may make a deputation for the service of writs, the power of the sheriff in that respect is immaterial.⁷ The section refers only to the district in which the marshal is appointed,⁸ and gives him no authority to act outside it.⁹ Thus, when found in another district he may be held for carrying concealed weapons, although privileged to do so in his own district.⁹ The section does not apply to policemen.¹⁰ The removal of a prisoner by the marshal from a county jail to the place of trial without due process, while unsafe practice, is not censurable if the practice of the State sheriff.¹¹

§ 661. Other powers of marshals.

By R. S. §§ 3990, 3991¹² the marshal or his deputy is empowered to seize, detain and forfeit letters carried contrary to law. The bankruptcy law confers certain powers as to custody of bankrupt property.¹⁴ The marshal is empowered in certain cases to stay a warrant of arrest in proceedings in rem in admiralty.¹⁵

Author's section.

§ 662. Forbidden to accept gifts, etc., to compromise revenue suits.

Every district attorney or marshal who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift or otherwise, any sum of money or other property of value for the

¹Ex parte Ringgold, 3 Cr. C. C. 86, Fed. Cas. No. 11,841.

²In re Acker, 66 Fed. 290. See also United States v. Fuelhart, 106 Fed. 914.

³Carico v. Wilmore, 51 Fed. 196.

⁴Hyman v. Chales, 12 Fed. 855.

⁵In re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

⁶Puleston v. United States, 85 Fed. 577.

⁷The Tug Gorgas, 10 Ben. 460, Fed. Cas. No. 4,585.

⁸In re Anderson, 94 Fed. 487.

⁹Walker v. Lea, 47 Fed. 649.

¹⁰Bad Elk v. United States, 177 U. S. 535, 44 L. ed. 877, 20 Sup. Ct. Rep. 729.

¹¹United States v. Harden, 10 Fed. 809.

¹²U. S. Comp. Stat. 1901, p. 2715.

¹⁴See port § 2200, et seq.

¹⁵Post, § 122.

compromise, adjustment or settlement of any charge or complaint for any violation or alleged violation of any provision of the internal revenue laws, except as expressly authorized by law to do so, shall be held to be guilty of a misdemeanor, and shall be fined in double the sum or value of the money or property received or demanded and be imprisoned for not less than one nor more than ten years.

R. S. § 3170, U. S. Comp. Stat. 1901, p. 2063.

§ 663. Unserved process surrendered by retiring marshal or deputy.

Hereafter all unserved process remaining in the hands of a United States marshal or his deputies, when the marshal ceases to be such, shall be immediately delivered to the succeeding marshal upon request; and when a deputy United States marshal resigns or is removed he shall, upon request, deliver to the United States marshal for the district all process remaining in his hands.

Act Mar. 3, 1899, c. 427, 30 Stat. 1237, U. S. Comp. Stat. 1901, p. 609.

CHAPTER 18.

COMMISSIONERS AND OTHER JUDICIAL OFFICERS.

- § 671. Appointment and duties of United States Commissioners—circuit commissioners abolished.
- § 672. —seal of commissioners.
- § 673. Persons disqualified to act as commissioners.
- § 674. Are governed by previous law applicable to circuit commissioners.
- § 675. Increase in number of commissioners, for purpose of civil rights cases.
- § 676. Powers of commissioners to administer oaths.
- § 677. Territorial court commissioners.
- § 678. Powers of Territorial commissioners.
- § 679. Commissioners to administer oaths to appraisers.
- § 680. Power of Supreme Court to appoint a reporter.
- § 681. Duties of Supreme Court reporter—reports.
- § 682. Reporter's salary and price of reports.
- § 683. Marshal's assistants and messengers of Supreme Court.
- § 684. Bailiff and messenger of Court of Claims.
- § 685. —their salaries.
- § 686. Criers, bailiffs and messenger of Court of Claims.
- § 687. Circuit and district court criers—jury attendants.
- § 688. —when deemed in actual attendance,—not employed in vacation.
- § 689. Court stenographers.
- § 690. Masters in chancery.
- § 691. Referees and trustees in bankruptcy.

§ 671. Appointment and duties of United States Commissioners—circuit commissioners abolished.

The terms . . . of all commissioners of the circuit courts . . . shall expire on the 30th day of June, 1897; and such office shall on that day cease to exist. . . . It shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States commissioners, at such places in the district as may be designated by the district court, which United States commissioners shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts. The appointment of such United States

commissioners shall be entered of record in the district courts, and notice thereof at once given by the clerk to the Attorney General. That such United States commissioners shall hold their offices, respectively, for the term of four years, but they shall be at any time subject to removal by the district court; and no person shall at any time be a clerk or deputy clerk of the United States court and a United States commissioner without the approval of the Attorney General.

Part of § 19 act May 28, 1896, c. 252, 29 Stat. 184, U. S. Comp. Stat. 1901, p. 499.

[a] In general.

By § 24 of the same act the foregoing provision was declared inapplicable to Alaska and Indian Territory.¹ Other provisions of the act require them to keep records² and empower them to issue search warrants and warrants of arrest in internal revenue cases.³ The fees of commissioners are treated of in the chapter on fees.⁴ Provisions respecting the rendering and approval of commissioners' accounts,⁵ the taking of depositions *de bene esse*;⁶ their power to hold to security for the peace;⁷ to issue warrants of arrest, apprehend fugitives from justice, and to imprison or admit to bail;⁸ and their powers and duties in Chinese exclusion cases¹⁰ are given elsewhere. By R. S. § 1778¹¹ circuit court commissioners are given the same power as justices of the peace in the taking of oaths and acknowledgments. They may also take final proofs in timber culture entries.¹² By R. S. § 728 U. S. Comp. Stat. 1901, p. 584, they are given certain powers in the execution of awards of foreign consuls.

[b] Commissioners in Yellowstone Park.

The act for the government of the Yellowstone Park provides for the appointment by the circuit court in the Wyoming district, of a commissioner resident of the Yellowstone Park, and with certain criminal jurisdiction therein.¹³ In addition to the fees allowed by law to commissioners, the appointee in the Park was entitled to a salary of \$1,000 annually by that act, afterwards increased to \$1,500.¹⁴

§ 672. — seal of commissioners.

Each United States commissioner shall provide himself with an

¹Other provisions were subsequently made applicable to Indian Territory, but not this one. See act Feb. 19, 1897, c. 265, 29 Stat. 597.

²Ante, § 395.

³Post, § 1542.

⁴Post, § 723.

⁵Ante, § 449.

⁶Post § 1762.

⁷Post, § 1593.

⁹Post, § 1537.

¹⁰Post, § 2407.

¹¹U. S. Comp. Stat. 1901, p. 1211.

¹²Act Mar. 4, 1896, c. 40, 29 Stat. 43, U. S. Comp. Stat. 1901, p. 1537.

¹³See § 5, act May 7, 1894, c. 72, 28 Stat. 74, U. S. Comp. Stat. 1901, p. 1563.

¹⁴Act Apr. 17, 1900, c. 192, § 1, 31 Stat. 133.

official impression seal, to be prescribed by the Attorney General, which said seal shall be affixed to each jurat or certificate of the official acts of said commissioner, but no increase of fees shall be allowed by reason thereof.

Act June 28, 1906, c. 3573, 34 Stat. 546.

§ 673. Persons disqualified to act as commissioners.

No marshal or deputy marshal, attorney or assistant attorney of any district, jury commissioner, clerk of marshal, no bailiff, crier, juror, janitor of any government building, nor any civil or military employee of the government, except as in this act provided, and no clerk or employee of any United States justice or judge, shall have, hold or exercise the duties of the United States commissioner.

Part of § 20 act May 28, 1896, c. 252, 29 Stat. 184, U. S. Comp. Stat. 1901, p. 501.

The section also forbids such officers acting as receivers.¹⁵ United States clerks and their deputies may act as commissioners, but only with the approval of the attorney-general.¹⁶

§ 674. Are governed by previous laws applicable to circuit commissioners.

All acts and parts of acts applicable to commissioners of the circuit courts, except as to appointment and fees, shall be applicable to United States commissioners appointed under this act.

Part of § 19, act May 28, 1896, c. 252, 29 Stat. 184, U. S. Comp. Stat. 1901, p. 499.

The powers and duties of United States commissioners are found in the earlier provisions concerning circuit court commissioners,¹⁷ the above act conferring no power except authority to administer oaths.¹⁸ Their powers are stricti juris, and there is no provision conferring on them authority to punish for contempt.¹⁹ The Supreme Court has made the following summary of the powers and duties of the circuit court commissioners: "To issue warrants for offenses against the United States; to cause the offenders to be arrested and imprisoned or bailed for trial, and to order the removal of offenders to other districts (Rev. Stat. § 1014); to hold to security of the peace and for good behavior (§ 727); to carry into effect the award or arbitration or decree of any consul of any foreign nation; to sit as judge or arbitrator in such differences as may arise between the

¹⁵See post, § 1123.

¹⁶See ante, § 671.

¹⁷In re Perkins, 100 Fed. 953.

¹⁸Post, § 676.

¹⁹In re Perkins, 100 Fed. 954; United States v. Beavers, 125 Fed. 778.

captains and crews of any vessels belonging to the nations whose interests are committed to its charge; and to enforce obedience by imprisonment until such award, arbitration or decree is complied with (§ 728); to take bail and affidavits in civil cases (§ 945); to discharge poor convicts imprisoned for nonpayment of fines (§ 1042); to take oaths and acknowledgments (§ 1778); to institute prosecutions under the laws relating to crimes against the elective franchise, and civil rights of citizens, and to appoint persons to execute warrants thereunder (§§ 1982 to 1985); to issue search warrants authorizing internal revenue officers to search premises where a fraud upon the revenue has been committed (§ 3462); to issue warrants for deserting foreign seamen (§ 5280); to summon masters of vessels to appear before him and show cause why process should not issue against such vessel (§ 4546); to issue warrants for and examine persons charged with being fugitives from justice (§§ 5271 and 5272), and to take testimony and proof of debt in bankruptcy proceedings (§§ 5003 and 5076).²⁰ In considering circuit court commissioners the courts have held that while exercising judicial functions¹ they were not judges within the constitutional sense,² and had no fixed tenure of office being removable at the court's legal discretion.³ A United States commissioner is held to be a judge within the meaning of the sixth section of the Chinese exclusion act of 1892,⁴ and an order of deportation of a Chinese may be made by him.⁵ The proceedings when begun before the commissioner in such cases are independent of any court and hence a district court has no power to issue a *dedimus potestatem* to take testimony.⁶

§ 675. Increase in number of commissioners, for purpose of civil rights cases.

The circuit courts of the United States and the district courts of the Territories, from time to time, shall increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in the preceding section [i. e., against civil rights], and such commissioners are authorized and required to exercise all the powers and duties conferred on them herein with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States.

R. S. § 1983, U. S. Comp. Stat. 1901, p. 1264.

²⁰United States v. Allred, 155 U. S. pp. 594-595, 39 L. ed. 274, 15 Sup. Ct. Rep. 231. See also statement by Justice Field, United States v. Schumann, 2 Abb. U. S. 523, 7 Sawy. 239, Fed. Cas. No. 16,235, and note under U. S. v. Hom Hing, 48 Fed. 638-640.

¹United States v. Jones, 134 U. S. 486, 33 L. ed. 1008, 10 Sup. Ct. Rep. 615.

²Todd v. United States, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

³In re Commissioners, 65 Fed. 314.

⁴In re Wong Fock, 81 Fed. 558.

⁵In re Tsu Mee, 81 Fed. 562.

⁶United States v. Hom Hing, 48 Fed. 635.

This provision is made applicable to United States commissioners under the act of 1896 by a proviso of that act already stated.⁷ By R. S. § 1982 commissioners and other officers are specially charged with the duty of enforcing the civil rights laws. This provision does not authorize the appointment of commissioners, such authorization already existing,⁸ it merely directs an increase in the number.⁹

§ 676. Powers of commissioners to administer oaths.

United States commissioners . . . are hereby authorized to administer oaths.

Part of § 19 act May 28, 1896, c. 252, 29 Stat. 184, U. S. Comp. Stat. 1901, p. 499.

By R. S. § 945 the power to take affidavits was conferred upon circuit court commissioners.¹⁰

§ 677. Territorial court commissioners.

The chief justice of the court exercising Federal jurisdiction in the Territories shall have power to appoint commissioners in the several judicial districts, to be known when appointed as United States court commissioners. . . . No commissioner shall be appointed who resides within thirty miles of any local land office, nor shall any commissioner be appointed who resides within thirty miles of any other commissioner.

§§ 1 and 3 of act Mar. 2, 1895, c. 174, 28 Stat. 744, U. S. Comp. Stat. 1901, p. 1397.

The powers of these officers are stated in the next section. They are not the same as the commissioners authorized by the act of 1896, who are also appointed in the Territories except Alaska.

§ 678. Powers of Territorial commissioners.

Said commissioners [provided in the preceding section] shall have power, and it shall be their duty on application by proper person, to administer the oaths in preliminary affidavits and final proofs required under the homestead, pre-emption, timber culture, and desert-land laws in their respective districts, in like manner as provided for in reference to United States circuit court commissioners, in the act of May 26, 1890. Twenty-sixth Statutes at Large, page one hundred and twenty-one.

§ 2, act Mar. 2, 1895, c. 174, 28 Stat. 744, U. S. Comp. Stat. 1901, p. 1398.

⁷Ante, § 674.

⁸R. S. § 627.

⁹In re Upchurch, 38 Fed. 26.

¹⁰See post, § 1555, and cases there cited.

§ 679. Commissioners to administer oaths to appraisers.

Any district judge may appoint commissioners, before whom appraisers of vessels, or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court.

R. S. § 570, U. S. Comp. Stat. 1901, p. 463.

This provision was enacted in 1794.¹² The appointment of appraisers mentioned herein is authorized by R. S. § 938.¹³

§ 680. Power of Supreme Court to appoint a reporter.

The Supreme Court shall have power to appoint . . . a reporter of its decisions.

Part of R. S. § 677, U. S. Comp. Stat. 1901, p. 559.

The section also empowers the court to appoint a clerk¹⁴ and a marshal.¹⁵

§ 681. Duties of Supreme Court reporter—reports.

The reporter shall cause the decisions of the Supreme Court made during his office to be printed and published within eight months after they are made; and within the same time shall deliver three hundred copies of the volumes of said reports to the Secretary of the Interior. And he shall, in any year, when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver, in like manner and time, three hundred copies.

R. S. § 681, U. S. Comp. Stat. 1901, p. 560.

By an act of 1902¹⁶ the publishers of the official edition of the Supreme Court reports are further required to deliver to the Secretary of the Interior one hundred and four copies of each volume since volume 183; as well as to deliver the seventy-six additional copies which an act of 1889¹⁷ required the reporter to deliver, and twenty-five of them are required to be deposited in the Supreme Court library. Provision is made for a permanent appropriation to pay the reporter for the copies of the second volume above mentioned.¹⁸

¹²Act June 9, 1794, c. 64, § 1, 1 32 Stat. 631, U. S. Comp. Stat. 1903, Stat. 395. p. 92.

¹³U. S. Comp. Stat. 1901, p. 690.

¹⁴Ante, § 559.

¹⁵Ante, § 614.

¹⁶Act July 1, 1902, c. 1355, § 3. 1901, p. 2470.

¹⁷Act Feb. 12, 1889, c. 135, § 2, 25 Stat. 661, U. S. Comp. Stat. 1901, p. 562.

¹⁸R. S. § 3689, U. S. Comp. Stat.

§ 682. Reporter's salary and price of reports.

The reporter of the decisions of the Supreme Court of the United States shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of twelve hundred dollars when, by direction of the court, he causes to be printed and published, in any year, a second volume. Said reporter shall be annually entitled to clerk-hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars. . . . The volumes of the decisions which said court shall hereafter pronounce shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and the number of volumes now required to be delivered to the Secretary of the Interior shall be furnished by the reporter without any charge therefor.

Part of § 1 act Aug. 5, 1882, c. 389, 22 Stat. 254, U. S. Comp. Stat. 1901, p. 561.

This provision supersedes R. S. § 682 so far as the latter provision relates to the salary of the reporter and the price per volume of reports. That section, however, also contains a provision as to the time when the salary shall be paid which is apparently still operative and is as follows: . . . "Said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published and delivered within the time and in the manner prescribed by law."²⁰

§ 683. Marshal's assistants and messengers of Supreme Court.

With the approval of the Chief Justice he [i. e., the marshal of the Supreme Court] may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade-

Part of R. S. § 680, U. S. Comp. Stat. 1901, p. 560.

The section specifies also the salary which the marshal shall receive and prescribes his duties.²

§ 684. Bailiff and messenger of Court of Claims.

The said Court [of Claims] shall appoint . . . a bailiff and a messenger. . . . The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.

R. S. § 1053, U. S. Comp. Stat. 1901, p. 730.

The section also provides for a clerk.³

²⁰U. S. Comp. Stat. 1901, p. 560.

³Ante, § 562.

²Ante, § 615.

§ 685. — their salaries.

The salary of the . . . bailiff [of the Court of Claims shall be] fifteen hundred dollars a year, and of the messenger eight hundred and forty dollars a year, payable quarterly from the treasury.

R. S. § 1054, U. S. Comp. Stat. 1901, p. 730.

The section prescribes also the salary of the clerk and his assistant.⁴

§ 686. Criers, bailiffs, and messenger of Circuit Court of Appeals.

The marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney General of the United States and with his approval . . . pay all incidental expenses of said court, including criers, bailiffs and messengers. . . . The . . . criers . . . bailiffs and messengers [of the circuit court of appeals] shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.

Part of § 9 act Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 552.

The statute confers no authority to appoint such officers other than is to be implied from the foregoing. Clerks are also mentioned in the section and the provision as to them is considered elsewhere.⁵

§ 687. Circuit and district court criers—jury attendants.

R. S. § 715⁶ provides that, "the circuit and district courts may appoint criers for their courts, to be allowed the sum of two dollars per day, and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and when both courts are in session at the same time, only for attendance on one court." By an act of 1905, however, it is provided that after the passage of that act "the per diem pay of all persons employed in any court of the United States under sec-

⁴Ante, § 562.

⁵Ante, § 577½

⁶U. S. Comp. Stat. 1901, p. 579.

tion seven hundred and fifteen of the Revised Statutes, now fixed by law at two dollars a day, shall be three dollars a day."⁷

Author's section.

Bailiffs and criers appointed under R. S. § 715, though not constitutional officers, are officers of the court.⁸ They are entitled to their per diems on days to which the court was adjourned by order of the judge, although the court is not actually opened.⁹ The appointment of six bailiffs by the district judge holding both courts is not unauthorized by R. S. § 715,¹⁰ and service of subpoenas by bailiffs, being allowed by the law of the particular State, is permissible.¹¹

§ 688. — when deemed in actual attendance,—not employed in vacation.

All persons employed under section seven hundred and fifteen of the Revised Statutes¹² shall be deemed to be in actual attendance when they attend upon the order of the court: Provided . . . no such person shall be employed during vacation.

Proviso of appropriation act June 30, 1906, c. 3914, 34 Stat. 755.

This provision is repeated in the appropriation acts from year to year.¹³

§ 689. Court stenographers.

As yet there is no Federal law¹⁴ requiring official court stenographers in the Federal courts, although recommendations upon the subject have been made to Congress.¹⁵

Author's section.

§ 690. Masters in chancery.

The circuit courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the circuit judge for the districts concurring in the appointment), and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed any master in chancery for his services in any particular case shall be fixed by the circuit court,

⁷Act Mar. 3, 1905, c. 1487, 33 Stat. 1259.

⁸United States v. McCabe, 129 Fed. 708, 64 C. C. A. 236.

⁹Idem. See post, § 688.

¹⁰United States v. Swift, 139 Fed. 225, 71 C. C. A. 351.

¹¹Swift v. United States, 128 Fed. 763.

¹²Ante, § 687.

¹³See United States v. Swift, 139 Fed. 228, 71 C. C. A. 351.

¹⁴See Report of Commissioners on Revision of laws respecting jurisdiction of courts, etc., p. 22, 205.

in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Supreme Court Equity Rule No. 82, amended April 16, 1894.¹⁴

No clerk of the district or circuit court or deputy shall be appointed as receiver or master in chancery, unless special reasons exist therefor which are to be assigned in the order of appointment.¹⁵ But failure to assign such reasons is not reversible error.¹⁶ The appointment and compensation of masters is considered at length elsewhere.¹⁷

§ 691. Referees and trustees in bankruptcy.

The officers of referee and trustee [in bankruptcy] are hereby created.

§ 33 of act July 1, 1898, c. 541, 30 Stat. 555, U. S. Comp. Stat. 1901, p. 3435.

The trustee is scarcely a judicial officer, but is chosen by the parties for the particular case. Provisions respecting trustees are contained in the chapters on bankruptcy.²⁰ Those chapters also contain, further provisions as to referees, including appointment and removals, qualifications, oath of office and number of referees.¹

¹⁴152 U. S. 709.

¹⁵Post, § 1123.

¹⁶Briggs v. Neal, 120 Fed. 227,
56 C. C. A. 572.

¹⁷Post, §§ 10, 69.

²⁰Post, §§ 2245, et seq.

¹Post, §§ 236 et seq.

CHAPTER 19.

FEES.

- § 704. Cross references and matters not treated herein.
- § 705. Fees to be taxed in United States courts.
- § 706. Clerk's fees.
- § 707. Statute authorizing Supreme Court clerk's fees.
- § 708. Supreme Court clerk's fees.
- § 709. Statute authorizing circuit court of appeals' fees.
- § 710. Fees in circuit court of appeals.
- § 711. Circuit and district clerk's fees for admission to practice.
- § 712. Marshal's fees.
- § 713. Fees of marshal of Supreme Court.
- § 714. Marshal's allowance for mileage and execution of writs of arrest, etc.
- § 715. No clerks or marshals fees for arrest of persons under recognizance.
- § 716. Fees of attorneys, solicitors and proctors.
- § 717. Percentage of recovery for district attorneys in revenue cases in lieu of fees.
- § 718. When no district attorneys fee on bonds.
- § 719. Allowance to district attorney for defense of revenue officers.
- § 720. Double district attorney and marshal fees in Oregon and Nevada.
- § 721. No allowance to attorney, clerk, or marshal for rule days, nor double allowance when both courts sit at same time.
- § 722. Attorneys, clerks and marshal's fees under civil rights law.
- § 723. Fees of United States commissioners.
- § 724. —in cases under Chinese exclusion laws.
- § 725. Witness fees.
- § 726. Witness fees before Interstate Commerce Commission.
- § 727. Witness fees for depositions in District of Columbia.
- § 728. —fees and mileage under letters rogatory from foreign country.
- § 729. No officer of court to have witness fees.
- § 730. Expenses allowed clerks, etc. as witnesses.
- § 731. Compensation of seamen sent home as witnesses.
- § 732. Fees of grand and petit jurors.
- § 733. Per diem compensation of jurors.
- § 734. Jurors and witnesses mileage in Pacific States.
- § 735. Printer's fees.
- § 736. —meaning of term "folio."
- § 737. Fees of appraisers on execution sale.

- § 738. Jurors and witnesses paid by marshal where United States are parties.
- § 739. Payment of fees of commissioners on Court of Claims deposition.
- § 740. Payment of fees in suits on postmaster's bonds.
- § 741. —of witnesses for indigent defendants in criminal cases.
- § 742. Payment of fees and costs in extradition proceedings.
- § 743. Payment of witness fees in prize causes.
- § 744. —of clerks, commissioners, etc., where United States are liable therefor.
- § 745. Fees of marshals and district attorneys to be covered, into Treasury.
- § 746. No fees for arrest and prosecutions under revenue laws unless from defendants.
- § 747. When informer liable for fees incurred in prosecution.
- § 748. Penalty for accepting compensation for services other than that provided.
- § 749. Purchase of claims for fees, etc., prohibited.
- § 750. Fees, how recovered.
- § 751. Attachment for fees in Supreme Court.
- § 752. Clerk's fees in naturalization proceedings.
- § 753. —duty to account for one half.
- § 754. —deposit for witness fees—retention by clerk—additional assistance.

§ 704. Cross references and matters not treated herein.

The fees of other than judicial officers, such as land, revenue, pension, consular officers, etc., are not within the scope of this work. Neither are the fees for pension and other proceedings of a legal nature before the departments; nor referees' and witnesses' fees in appraisements of compensation for rights of way over Indian reservations. This chapter deals with the fees of judicial officers for their various duties as an element of taxable costs. The rules and procedure for the taxation of costs are treated elsewhere.¹ It is not primarily concerned with the compensation of judicial officers, and the provisions of law fixing compensation by way of salary or a proportion of fees earned and the expense allowances of particular officers, will be found in preceding chapters. Elsewhere also will be found provisions as to fees in bankruptcy;² permitting poor persons to sue without paying fees;³ regulating the bringing of suits for fees in the Court of Claims.⁴ There is a spe-

¹Post, §§ 1822 et seq.

referees and trustees §§ 2214, 2242,

²As to order of payment of fees in bankruptcy post, § 2221; marshals fees § 2222; compensation of clerks.

2251.

³Post, § 1823.

⁴Ante, § 231.

cial provision for fees of the clerk in the western district of Arkansas upon certifying the record in cases transferred for trial.⁵

Author's section.

§ 705. Fees to be taxed in United States courts.

The following⁶ and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors and printers in the several States and Territories, except in cases otherwise expressly provided by law.^{[a]-[b]} But nothing herein shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.^[c]

R. S. § 823, U. S. Comp. Stat. 1901, p. 632.

[a] Effect of act of 1896.

By the act of 1896 district attorneys and marshals are paid a fixed salary instead of fees and emoluments.⁷ The act, however, provides that such fees are to be charged and collected as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury of the United States.⁸ By a proviso in § 24 of the act, the part of it above mentioned does not apply to the southern district of New York and the District of Columbia, and by a later act fees are not allowed any district attorney except in the District of Columbia.⁹

[b] Scope and intent of section.

Prior to an act of 1853¹⁰ from which the above provision was taken the taxation of fees and costs between parties in civil suits conformed to the practice of the particular state.¹¹ The present practice is the same except so far as in terms restricted by this and following sections,¹² since by R. S. § 914, the practice of the Federal courts shall conform as near as may be to that of the State courts.¹³ So the fee bill is intended to

⁵Ante, § 410.[a] [b]

⁶See post, §§ 706, 715, 717, 720, 723.

⁷Ante, §§ 509, 633.

⁸Post, § 745.

⁹Ante, § 509. [d]

¹⁰Act Feb. 26, 1853, 10 Stat. 161.

¹¹The Baltimore, 8 Wall. 390, 391,

19 L. ed. 463; Primrose v. Feuno, 113 Fed. 376. See also Jerman v. Stewart, 12 Fed. 274.

¹²O'Neil v. Kansas City, etc. R. Co. 31 Fed. 663; Primrose v. Feuno, 113 Fed. 376; Shreve v. Cheeseman. 69 Fed. 785, 16 C. C. A. 413; Nichols v. Brunswick, 3 Cliff. 88, Fed. Cas. No. 10,239; United States v. Treadwell, 15 Fed. 532; Jordan v. Agawam, etc. Co. 3 Cliff. 239, Fed. Cas. No. 7,516.

¹³See post, § 900.

regulate only those fees and costs which are strictly chargeable as between different parties and not those fees of counsel and other expenses as between attorney and client.¹⁴ Nor is it intended to regulate the power of a court of equity to tax counsel fees out of a fund in court,¹⁵ nor the costs of printing the record in an equity case under a rule of court.¹⁶ Expenses and disbursements if necessary and proper are allowable,¹⁷ are as stenographers charges,¹⁸ where the judge directs that the testimony be taken down.¹⁹

[c] Attorney fees.

The object of the last portion of the above section is to make it clear that Congress did not prohibit attorneys representing individuals from charging reasonable compensation in addition to taxable fees. But to prevent the application of the rule to the United States the words "other than the government" were inserted.²⁰ Attorneys fees have been taxed in favor of a complainant in equity who sues to protect a joint fund in the hands of the court.¹

§ 706. Clerk's fees.

For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a writ of venire, or a summons or subpoena for witness, one dollar. For issuing a writ of summons, or subpoena, twenty-five cents. For filing and entering every declaration, plea, or other paper, ten cents.^{[a]-[b]} For administering an oath or affirmation, except to a juror, ten cents. For taking an acknowledgment, twenty-five cents.^[c] For taking and certifying depositions to file, twenty cents for each folio of one hundred words. For a copy of such deposition furnished to a party on request, ten cents a folio. For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio, fifteen cents. For a copy of any entry or record, or of any paper on file, for each folio, ten cents.^[d] For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined

¹⁴Internal, etc. *Fund v. Greenough*, 105 U. S. 535, 26 L. ed. 1160.

¹⁵Idem; see also *Ex parte Jaffray*, 1 Low. 321, Fed. Cas. No. 7,170

¹⁶*Jordan v. Agawam*, etc. Co. 3 Cliff. 239, Fed. Cas. No. 7,516.

¹⁷*Dennis v. Eddy*, 12 Blatchf. 198, Fed. Cas. No. 3,793; *Hussey v. Bradley*, 5 Blatchf. 212, Fed. Cas. No. 6,946a and see *The Branfoot*, 52 Fed. 395, 3 C. C. A. 155.

¹⁸See *Indianapolis, etc. Co., v. Strawboard Co.* 65 Fed. 534.

¹⁹*The E. Luckenbach*, 19 Fed. 847.

²⁰*United States v. Johnson*, 173 U. S. 373, 43 L. ed. 735, 19 Sup. Ct. Rep. 427.

¹*Tousleis v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Cuyler v. Atlantic*, etc. R. Co. 132 Fed. 570 and cases cited.

and testimony given, three dollars. For making docketts and indexes, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars. For making docketts and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar. For making docketts and taxing costs, in cases removed by writ of error or appeal, one dollar.^[e] For affixing the seal of the court to any instrument, when required, twenty cents.^[f] For every search for any particular mortgage, judgment, or other lien, fifteen cents. For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.^[g] For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid.^[h] For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court while actually in session.^[i] All books in the offices of the clerks of the circuit and district courts, containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor.

R. S. § 828, U. S. Comp. Stat. 1901, p. 635.

[a] In general—compensation for extra services.

By a proceeding section the amount which a clerk of the circuit and district court may retain for his personal compensation over and above his expenses, is limited to three thousand five hundred dollars a year.⁴ The salaries and compensation of clerks of the circuit court of appeals, Court of Claims, and Supreme Court are also set forth in preceding sections.⁵ The above provision applies only to ordinary litigation in common law equity and admiralty cases, having no application to naturalization⁶ and habeas corpus proceedings.⁷ It applies to suits brought by the government as well as by individuals, and the government is liable for fees thereunder.⁸

⁴Ante, § 579.

⁵Ante, §§ 577, 578, 576.

⁶United States v. Hill, 120 U. S. 181, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; United States v. McMillan, 165 U. S. 506, 41 L. ed. 809, 17 Sup. Ct. Rep. 395; Hill v. United States, 40

Fed. 441. For naturalization fee see post §§ 752-755.

⁷In re Mov Chee Kee, 33 Fed. 379, 13 Sawy. 121.

⁸See United States v. Wolters, 51 Fed. 896.

The clerk may demand payment of his costs as they are earned without waiting for the final determination of the suit,⁹ and in revenue suits where the government is successful they may retain their fees out of the money collected as in other cases.¹⁰ Where one person was both clerk and commissioner, it was held that he might receive compensation for both,¹¹ although since the establishment of U. S. Commissioners a clerk cannot be such a commissioner without the consent of the Attorney General.¹² Money collected by the clerk is the property of the government subject only to the payment of his compensation and office expenses.¹³

A Federal court may allow extra compensation to the clerk for services beyond those required by law¹⁴ and an order of the court for the performance of such services is sufficient authority.¹⁵ Thus clerks may charge where the court orders copies of mittimus writs,¹⁶ or separate reports of witness fees due,¹⁷ or the filing of affidavits for indigent defendants.¹⁸ The clerk may charge for entering court orders,¹⁹ as, an order appointing an attorney to defend a poor prisoner.²⁰ It is held that an additional fee for a "combination docket" should not be allowed, although ordered by the court and of great convenience.¹

[b] Issuing of process, summons, etc. and filing of papers.

The clerk is entitled under this section to fees for issuing a commission to supervisors of election,⁴ or to new commissioners appointed by the court.⁵ He is entitled also to a fee for issuing a praecipe, which is in the nature of a summons, to a jury commissioner;⁶ and to fees on each of several capias writs issued for the arrest of several defendants jointly indicted for conspiracy.⁷ He is entitled to a fee for filing a marshal's account with vouchers attached but not to a separate fee for each voucher.⁸ Certificates of discharge of witnesses need not be filed and he cannot charge

⁹Cavender v. Cavender, 10 Fed. 828.

¹⁰United States v. Cigars, 2 Fed. 494.

¹¹United States v. Erwin, 147 U. S. 685, 37 L. ed. 331, 13 Sup. Ct. Rep. 443.

¹²Ante, § 672.

¹³United States v. Mason, 129 Fed. 742, 64 C. C. A. 270.

¹⁴The Advance, 60 Fed. 422; Erwin v. United States, 37 Fed. 470.

¹⁵United States v. Van Duzen, 140 U. S. 176, 35 L. ed. 399, 11 Sup. Ct. Rep. 758. See also United States v. Allred, 155 U. S. 591, 39 L. ed. 274, 15 Sup. Ct. Rep. 232; United States v. McCaudless, 147 U. S. 692, 37 L. ed. 334, 13 Sup. Ct. Rep. 465.

¹⁶Clough v. United States, 55 Fed. 926.

¹⁷Fuller v. United States, 58 Fed. 331.

¹⁸Butler v. United States, 87 Fed. 667.

¹⁹United States v. Converse, 63 Fed. 424, 11 C. C. A. 274.

²⁰Goodrich v. United States, 42 Fed. 393.

¹United States v. Marsh, 112 Fed. 929, 50 C. C. A. 621.

⁴Clough v. United States, 55 Fed. 921.

⁵Marsh v. United States, 88 Fed. 879.

⁶Idem.

⁷Clough v. United States, 55 Fed. 921.

⁸United States v. Jones, 147 U. S. 672, 37 L. ed. 325, 13 Sup. Ct. Rep. 437; United States v. Converse, 63 Fed. 423, 11 C. C. A. 274.

for them.⁹ His right to charge for copies of court's orders is unaffected by the fact that they were large in number and therefore printed.¹⁰

Charges for filing praecipes¹¹ and receipts of revenue collectors for fines paid by violators of revenue laws¹² are within the meaning of clause three of this section, as are also reports of accounts of marshals, clerks, and commissioners¹³ and dockets and other papers of out-going circuit court commissioners under act of 1896¹⁴ and receipts given by attorneys for papers withdrawn from the clerk's office.¹⁵ A clerk is also entitled to charge for filing and marking depositories and exhibits in a criminal case.¹⁶ The clerk is not required to fasten together all the papers sent up by a commissioner but may file them as received and charge therefor.¹⁷

[c] Oaths, affirmations, acknowledgments.

The clerk is entitled to a fee of ten cents for administering the oath to witnesses respecting their mileage and attendance,¹ to grand and petit jurors when they prove their attendance before him,² and to bailiffs;³ and for administering oaths to accounts of marshals and deputy marshals.⁴ The docket fee of three dollars does not include compensation for swearing witnesses, and the clerk is entitled to his fee therefor.⁵ He is, however, not entitled to fees for swearing juries⁶ nor for administering oaths to answers of defendants in scire facias cases;⁷ nor is he entitled to charge the government for taking oaths and executing bonds of judicial officers;⁸ nor to charge fees to those summoned as jurors to truly answer questions concerning their qualifications such persons being within the meaning the word "juror" as used in the fourth paragraph of the above

⁹United States v. Taylor, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; United States v. Converse, 63 Fed. 423, 11 C. C. A. 274. But see, United States v. Van Duzee, 52 Fed. 930, 3 C. C. A. 361; Goodrich v. United States, 47 Fed. 267.

¹⁰Cudahy Packing Co. v. McGuire, 135 Fed. 891.

¹¹United States v. Van Duzee, 140 U. S. 169, 35 L. ed. 399, 11 Sup. Ct. Rep. 758.

¹²United States v. Van Duzee, 52 Fed. 930, 3 C. C. A. 361.

¹³Idem.

¹⁴United States v. Marsh, 112 Fed. 929, 50 C. C. A. 621.

¹⁵Gillum v. Stewart, 112 Fed. 30.

¹⁶Marvin v. United States, 114 Fed. 225.

¹⁷United States v. Van Duzee, 140 U. S. 169, 35 L. ed. 399, 11 Sup. Ct. Rep. 758.

¹United States v. Taylor, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479.

²Van Duzee v. United States, 48 Fed. 643, Affirmed in United States v. Van Duzee, 52 Fed. 930, 3 C. C. A. 361.

³Davis v. United States, 45 Fed. 162.

⁴Marsh v. United States, 88 Fed. 879; Butler v. United States, 87 Fed. 655.

⁵United States v. Van Duzee, 52 Fed. 930, 3 C. C. A. 361.

⁶United States v. Dundy, 76 Fed. 357, 22 C. C. A. 221.

⁷Fuller v. United States, 58 Fed. 329.

⁸United States v. Van Duzee, 140 U. S. 171, 35 L. ed. 399, 11 Sup. Ct. Rep. 758.

provision.⁹ The charge for an oath does not include a charge for a jurat and both may be taxed.¹⁰

The clerk is entitled to fifteen cents for making out the accounts of jurors and witnesses in addition to ten cents for swearing the witness or juror and fifteen cents for the jurat.¹¹

A clerk is entitled to fees for taking acknowledgments of sureties on recognizances.¹² He can, however, charge only one fee for taking an acknowledgment of a defendant in a criminal case and his sureties, unless it was necessary to take them separately.¹³

[d]—Entries and records.

Clerks are entitled to fees for entering a recognizance taken in open court¹⁴ or entering a record of the names of jurors and their residences where such is the practice of the court,¹⁵ or for entering orders approving marshal's account,¹⁶ or orders for trial and for recording verdicts in criminal cases.¹⁷ An original entry distinct from all others though less than a folio, is to be charged as a full folio.¹⁸ The approval by the clerk of a recognizance, by the certificate of approval on the face or back of the bond, is an entry for which a folio fee of fifteen cents is chargeable.¹

The clerk is entitled to fees for services actually and necessarily performed in making up a criminal record, where the practice of a particular State or district requires such record to be made.² In the absence of rule proceedings before a commissioner form no part of the record,³ nor do affidavits, warrants, subpoenas or capiases, except the one on which the arrest was made.⁴ But bonds taken after indictment, captious of terms and days upon which journal entries are made are properly allowed, and the comptroller cannot limit the clerk to a certain number of folios.⁵ The clerk is not entitled to a separate fee for entering the oral appearances

⁹United States v. Marsh, 106 Fed. 474, 45 C. C. A. 436. But see Clough v. United States, 55 Fed. 921.

¹⁰The Schooner Merwin, 10 Ben. 403, Fed. Cas. No. 4,893.

¹¹United States v. Morgan, 66 Fed. 279, 13 C. C. A. 435.

¹²Goodrich v. United States, 47 Fed. 267; United States v. Goodrich, 54 Fed. 21, 4 C. C. A. 160.

¹³United States v. Taylor, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479. See also, United States v. King, 147 U. S. 684, 37 L. ed. 328, 13 Sup. Ct. Rep. 439.

¹⁴United States v. Payne, 147 U. S. 687, 37 L. ed. 332, 13 Sup. Ct. Rep. 442.

¹⁷United States v. Kurtz, 164 U. S. 49, 41 L. ed. 346, 17 Sup. Ct. Rep. 15.

¹⁸United States v. Jones, 147 U. S. 672, 37 L. ed. 325, 13 Sup. Ct. Rep. 437.

¹⁹United States v. Van Duzee, 140 U. S. 199, 35 L. ed. 402, 11 Sup. Ct. Rep. 941.

²⁰Cavender v. Cavender, 10 Fed. 828.

¹United States v. Van Duzee, 52 Fed. 934, 3 C. C. A. 361.

²United States v. Taylor, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; United States v. Van Duzee, 140 U. S. 199, 35 L. ed. 402, 11 Sup. Ct. Rep. 941.

³United States v. Taylor, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439.

⁴United States v. Taylor, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479.

⁵Idem.

of attorneys in criminal cases, this being included in the docket fee.⁶ But where under order of the court, each order, motion, and proceeding is entered in a paragraph separate from the others, the clerk may charge for each although they may relate to the same case.⁷ He is entitled to a fee of fifteen cents per folio for making up the record on writ of error.⁸

[e] Docket fees.

A docket fee of three dollars claimed under clause ten of the above section allowing such fee "where issue is joined and testimony given, is allowable although the record fails to show that testimony was given at the" trial or argument.¹⁰ A scire facies on a recognizance is a "cause" within the meaning of the section,¹¹ as is also a proceeding against witnesses for contempt.¹² But a proceeding for the removal of a prisoner from one district to another is not.¹³ Criminal cases should not be docketed until the grand jury or district attorney have taken some affirmative action,¹⁴ hence the clerk's right to a fee does not attach where the grand jury have ignored the indictment¹⁵ nor does the provision of the above section which allows fees for making dockets, etc., in a case which is "dismissed or discontinued" entitled the clerk to a fee in cases sent up by a commissioner where the grand jury fails to find an indictment.¹⁶ His right to a fee "where issue is joined" attaches when such issue is in fact joined, and is not lost by a subsequent withdrawal of the plea constituting the issue.¹⁷ The docket fee of one dollar under the above provision in a case which is dismissed or discontinued applies only to dismissal or discontinuance before issue joined.¹⁸

[f] Seals.

If a copy of a clerk's official record is required to be duly authenticated, the clerk's seal should be affixed and he is entitled to his fees therefor.¹ Hence under a rule of court he is entitled to fees for attaching his seal to copies of the indictment furnished to the defendant on demand,² or to copies of mittimus writs to be delivered to the jailer.³ But charges for placing seals on copies of orders directing payment of witnesses or jurors,

⁶Marvin v. United States, 44 Fed. U. S. 169, 35 L. ed. 399, 11 Sup. Ct. 405. Rep. 758.

⁷Marsh v. United States, 88 Fed. ¹⁵United States v. Payne, 147 U. S. 879. 687, 37 L. ed. 332, 13 Sup. Ct. Rep. 442; United States v. McCandless, 147 U. S. 692, 37 L. ed. 334, 13 Sup. Ct. Rep. 465.

⁸Thornton v. Insurance Co. 125 Fed. 250. See also Mohrstadt v. Insurance Co. 145 Fed. 751. ¹⁶United States v. Van Duzee, 140 U. S. 169, 35 L. ed. 399, 11 Sup. Ct. Rep. 758.

¹⁰United States v. Payne, 147 U. S. 687, 37 L. ed. 332, 13 Sup. Ct. Rep. 442. ¹⁷United States v. Kurtz, 164 U. S. 49, 41 L. ed. 346, 17 Sup. Ct. Rep. 15.

¹¹Idem. ¹⁸Idem.

¹²Erwin v. United States, 37 Fed. 470. And see, Taylor v. United States, 45 Fed. 531; Goodrich v. United States, 42 Fed. 392. ¹Marsh v. United States, 88 Fed. 879.

¹³United States v. Jones, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439. ²United States v. Van Duzee, 52 Fed. 930, 3 C. C. A. 361.

¹⁴United States v. Van Duzee, 140 ³Idem.

or approving the accounts of judicial officers will not be allowed unless the Treasury Department requires such authentication.⁴ Nor will charges be allowed for seals on copies of orders on the marshal to procure meals for the jury,⁵ or on commissions of supervisors of elections,⁶ or on a certificate of search unless required by law or by the practice of the department.⁷ Generally where there has been no express waiver the clerk may charge twenty cents for affixing his seal to affidavits taken before him.⁸

[g] Searches.

Records in the clerk's office are open to inspection by the public and he can charge for searching the records only when he is required to make the search himself.¹⁰ For such search he is entitled to a fee of fifteen cents.¹¹ For his statement to the Attorney General of judgments, etc., for the preceding year he is not entitled to the regular fee for searches but receives compensation at fifteen cents per folio.¹² Compensation for searching for petitions in bankruptcy is not expressly provided for in this section. Fifteen cents for each name searched against has been held a reasonable compensation.¹³

[h] Commissions on money deposited.

The clause of the above section allowing the clerk a commission "for receiving, keeping and paying out money in pursuance of any statute or order of the court" applies only to money which passes through his hands,¹⁴ either actually or constructively.¹⁵ Hence the clerk is not entitled to a commission under a decree for salvage, the claims being paid without sale¹⁶ or under a foreclosure sale by a special master who under court order himself pays the proceeds to the mortgagee;¹⁷ or on moneys of a receivership deposited and paid out by the receiver under orders of the court;¹⁸ or on moneys in the hands of an assignee in bankruptcy.¹⁹ A judgment is an order of the court within the meaning of the clause, and the clerk is entitled to his commission on money received by him under such judgment.²⁰ It is held that he is entitled to commission on money collected by a marshal under executions, whether deposited to the credit of

⁴United States v. Jones, 147 U. S. 672, 37 L. ed. 325, 13 Sup. Ct. Rep. 437; United States v. Van Duzee, 140 U. S. 174, 35 L. ed. 399, 11 Sup. Ct. Rep. 758.

⁵Marsh v. United States, 88 Fed. 879.

⁶Clough v. United States, 55 Fed. 921.

⁷In re Woodbury, 7 Fed. 705.

⁸Marsh v. United States, 88 Fed. 879.

¹⁰In re Chambers, 44 Fed. 786.

¹¹In re Woodbury, 7 Fed. 705.

¹²Marvin v. United States, 44 Fed. 405.

¹³In re Vermeule, 10 Ben. 1, Fed. Cas. No. 16,916.

¹⁴Johnson v. Southern, etc. Ass'n. 95 Fed. 922; Easton v. Houston, etc. Ry. 44 Fed. 721; Upton v. Tribblecock, 4 Dill. 232, Fed. Cas. No. 5,541 note; In re Goodrich, 4 Dill. 230, Fed. Cas. No. 5,541.

¹⁵Leech v. Kay, 4 Fed. 72.

¹⁶Smith v. The Morgan City, 39 Fed. 572.

¹⁷Northwestern Ins. Co. v. Quinn, 69 Fed. 462; Michigan Central v. Harsha, 134 Fed. 217, 67 C. C. A. 145.

¹⁸Farmers Loan, etc. Co. v. Dart, 91 Fed. 451, 33 C. C. 572.

¹⁹Leech v. Kay, 4 Fed. 72.

²⁰Blake v. Hawkins, 19 Fed. 204.

the court by the marshal or by the clerk.¹ Railroad bonds deposited in court are not "money" and the clerk is not entitled to commission thereon.² The clerk must also be deemed to have authority to receive money paid into court by a private suitor in a pending case, with the sanction of the court.³

[i] **Per diem compensation.**

The allowance of five dollars a day to the clerk "for his attendance in the court while actually in session" entitles him to the fee not only when the judge is present in person but when under his written order the court is adjourned by the marshal or clerk.⁴ He is entitled to his fee whether any business is transacted or not.⁵ He is entitled to his fees also for days between regular terms on which he is required to attend and does attend.⁶

§ 707. Statute authorizing Supreme Court clerk's fees.

The Supreme Court is hereby authorized and empowered to prepare the tables of fees to be charged by the clerk thereof, and until the same is thus prepared the fees therein charged for recording or copying any paper or record shall not exceed fourteen cents per folio.

From appropriation act Mar. 3, 1883, c. 143, § 1, 22 Stat. 631, U. S. Comp. Stat. 1901, p. 650.

§ 708. Supreme Court clerk's fees.

In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted: For docketing a case and filing and indorsing the transcript of the record, five dollars. For entering an appearance, twenty-five cents. For entering a continuance, twenty-five cents. For filing a motion, order or other paper, twenty-five cents. For entering any rule, or for making or copying any record or other paper, twenty-cents per folio of each one hundred words. For transferring each case to a subsequent docket and indexing the same, one dollar. For entering a judgment or decree, one dollar. For every search of the records of the court, one dollar. For a certificate and seal, two dollars. For receiving, keeping and paying money in pursuance of any statute or order of court, two per cent on the amount so received, kept and paid. For an admission to the bar and certificate

¹Fagan v. Cullen, 28 Fed. 843. S. 669, 37 L. ed. 324, 13 Sup. Ct.

²Michigan Central R. Co. v. Harsha, 134 Fed. 217, 67 C. C. A. 145. ⁵Goodrich v. United States, 35 Fed. Rep. 425.

³Howard v. United States, 184 U. 193. And see Erwin v. United States, S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 37 Fed. 470.

⁴United States v. Pitman, 147 U. 655. ⁶Butler v. United States, 87 Fed. 543.

under seal, ten dollars. For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library and the parties or their counsel, fifteen cents per folio. For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing. For issuing a writ of error and accompanying papers, five dollars. For a mandate or other process, five dollars. For filing briefs, five dollars for each party appearing. For every copy of an opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

§ 7 of Supreme Court rule 24, promulgated Mar. 28, 1887.⁸

By a provision of § 9 of Supreme Court rule 10, it is provided that, "The fees of the clerk under rule 24, section 7 shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof." Supreme Court rule 38^{8½} declares that "the provisions of rule 24 of this court in regard to fees shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act" [i. e. the act of 1891 creating the circuit court of appeals]. This was probably superseded by an order made in 1898.^{8¾}

§ 709. Statute authorizing circuit court of appeals' fees.

The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this act: Provided, that the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect to the costs and fees in the Supreme Court. Each circuit court of appeals shall, within three months after the fixing and establishing costs and fees as aforesaid, transmit such table to the Chief Justice of the United States, and within one year thereof the Supreme Court of the United States shall revise said table, making the same, so far as may seem just and reasonable, uniform throughout the United

⁸120 U. S. 785.

^{8½}Promulgated May 11, 1891.
See 139 U. S. 707.

^{8¾}See post, § 710.

States. The table of fees, when so revised, shall thereupon be in force in each circuit.

Part of § 2 act Mar. 3 1891, c. 517, 26 Stat. 826, amended Feb. 19, 1897, c. 263, 29 Stat. 536, U. S. Comp. Stat. 1901, p. 547.

Prior to the amendment of 1897 the act made the costs and fees in the Supreme Court the costs and fees in the circuit court of appeals.

§ 710. Fees in circuit court of appeals.

Ordered in pursuance of the Act of Congress of February 19, 1897,⁹ that the following table of fees and costs in the circuit court of appeals be, and the same is hereby established to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record.....	\$5.00
Entering an appearance25
Transferring a case to the printed calendar.....	1.00
Entering a continuance25
Filing a motion, order or other paper25
Entering any rule or making or copying any record or other paper, for each one hundred words20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper.....	1.00
Receiving, keeping and paying money, in pursuance of any statute or order of the Court, one per cent on the amount so received, kept and paid.	
Preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index.....	.25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)20
Issuing a writ of error and accompanying papers or a mandate or other process	5.00
Filing briefs for each party appearing	5.00

⁹Ante, § 709.

Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed \$5.00 in the whole for any copy) 1.00
 Attorney's docket fee 20.00

Supreme Court table of fees established by order of Jan. 10, 1898, as amended Feb. 28, 1898.¹⁰

The amendment above mentioned raised the fee for preparing the record for the printer, from fifteen cents to twenty-five cents. A similar provision will be found in the ninth paragraph of rule 23 of the circuit court of appeals for the ninth circuit. Irrelevant evidence carried into the record by a successful party may be taxed against him.¹¹ Following the Supreme Court practice an attorney's docket fee may be taxed where costs are given.¹²

The above order probably superseded the provisions of Rule 38 quoted above,¹³ so far as affecting fees in the circuit court of appeals.

§ 711. Circuit and district clerk's fees for admission to practice.

No amount in excess of one dollar shall be received from any attorney in connection with his admission to practice in a circuit or district court.

Part of § 1 act June 28, 1902, c. 1301, 32 Stat. 476, U. S. Comp. Stat. 1905, p. 160.

This is a proviso to the section requiring a semi-annual accounting by circuit and district court clerks as to fees and expenses.¹⁴

§ 712. Marshal's fees.

For service of any warrant, attachment, summons, capias, or other writ, except execution, venire or a summons or subpoena for a witness, two dollars for each person on whom service is made. For the keeping of personal property attached on mesne process, such compensation as the court, on petition setting forth the facts under oath, may allow. For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each. In States where, by the laws thereof, jurors are drawn by lot, by constables or other officers of corporate places, the marshal shall receive, for each jury, two dollars for the use of the officers employed in drawing and summoning the jurors and returning each venire, and two dollars for his own services in

¹⁰169 U. S. 740.

¹¹Ecaubert, v. Appleton, 67 Fed. 22, 13 C. C. A. 284.
⁹²⁵, 15 C. C. A. 73.

¹²Shilliti Co. v. McClung, 66 Fed.

¹³See ante, § 708, note.

¹⁴Ante, § 589.

distributing the venires. But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars. For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars. For serving a writ of subpoena on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness. For serving a writ of possession, partition, execution, or any final process, the same mileage as is allowed for the service of any other writ, and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off or otherwise according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States, respectively, in which the service is rendered. For each bail bond, fifty cents. For summoning appraisers, fifty cents each. For executing a deed prepared by a party or his attorney, one dollar. For drawing and executing a deed, five dollars. For copies of writs or papers furnished at the request of any party, ten cents a folio. For every proclamation in admiralty, thirty cents. For serving an attachment in rem or a libel in admiralty, two dollars. For the necessary expenses of keeping boats, vessels or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents a day. When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars: Provided, that, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof. For sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying over the money, two and one half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars. For disbursing money to jurors and witnesses, and for other expenses, two per centum. For expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day in addition to his compensation for services

and travel. For every commitment or discharge of a prisoner, fifty cents. For transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard; except in the case provided for in the next paragraph. For transporting criminals convicted of a crime in any district or Territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or Territory designated by the Attorney General, the reasonable actual expense of transportation of the criminals, the marshal, and the guards, and the necessary subsistence and hire. For attending the circuit and district courts, when both are in session, or either of them when only one is in session and for bringing in and committing prisoners and witnesses during the term, five dollars a day. For attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, two dollars a day; and for each deputy not exceeding two, necessarily attending, two dollars a day. For traveling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only. For travel, in going only, to serve any process, warrant, attachment or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit. In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court.^{[a]-[e]}

R. S. § 829, U. S. Comp. Stat. 1901, pp. 636-638.

[a] Effect of act of 1896 and cross references.

This section, so far as it operated to establish the compensation of marshals, was superseded everywhere except in the southern district of New York and the District of Columbia, by an act of 1896. That act still required that the fees be collected except from the United States,

but directed that the marshal turn them over to the clerk to be by him covered into the Treasury. It prohibited the collection of fees by the marshal, from the United States, except in the case of field deputies under certain restrictions.¹³ The act of 1896 and various other provisions from time to time have regulated and defined the allowances to marshals and expenses and disbursements of one kind and another that might be charged on their accounts and be entitled to approval upon the auditing of those accounts. These are elsewhere considered.¹⁹ An act of 1879²⁰ changed the mode of drawing Federal jurors, and made the provision of R. S. § 829, *supra*, fixing fees where jurors are drawn according to certain local rules, inoperative.

[b] Service of process, etc.

It is the marshals duty to execute process of the court, even if superfluous⁶ and such duty is unaffected by the opinion of the comptroller that it is unnecessary.⁷ He may charge fees therefore in advance,⁸ but cannot charge for unofficial acts.⁹ He may charge a two dollar fee for serving a summons under the above section, and a reasonable compensation for serving the complaint.¹⁰ He may charge mileage also at the rate of six cents per mile but when two papers are served on the same party he cannot charge separately for each.¹¹

[c] Execution fees.

A marshal is entitled to his fees on an irregular execution. Under New York Cases, however, he is not entitled to poundage, but the court may make allowance for his trouble and expense in caring for the property.¹² An inventory for the sale of property need not be prepared by him but must be paid for at the expense of the party desiring it.¹³ There is no authorization under the section for the employment of an auctioneer to sell property under admiralty process or decree.¹⁴ Under the laws of the State of Washington a marshal who has offered or sold property under execution is entitled not only to fees for levying, but also to percentages on money paid into his hands.¹ On an execution against the person in New York, it is held that the marshal is entitled to poundage on the whole amount.²

¹Post, 745, and ante, § 621.

¹⁹Post, § 714, ante, 637, 638, 640, 641.

²⁰See post, § 1703.

⁶Puleston v. United States 88 Fed. 970; Lovering v. United States, 117 Fed. 565.

⁷Harmon v. United States, 43 Fed. 560.

⁸Duy v. Knowlton, 14 Fed. 107.

⁹Donahower v. United States, 77 Fed. 153.

¹⁰Swancoat v. Remsen, 76 Fed.

950.

¹¹Idem.

¹²Amato v. Jacobus, 58 Fed. 855, 7 C. C. A. 545.

¹³The Trial, 1 Blatchf. & H. 94, Fed. Cas. No. 14,170.

¹⁴The John E. Mulford, 18 Fed. 455.

¹Dexter, etc. Co. v. Sayward, 78 Fed. 275.

²United States v. Haas, 5 Fed. 29.

[d] Admiralty services.

The marshal is entitled only to actual expenses in ship keeping³ which must be established to the satisfaction of the court⁴ and which must not exceed two dollars and fifty cents per day⁵ except in extraordinary circumstances.⁶ This does not include wharfage,⁷ or reasonable dockage fees,⁸ which may be charged against the vessels. He has no right to insure the vessel without consent of the owners,⁹ nor to direct repairs beyond what are necessary to her preservation¹⁰ where such repairs are necessary the marshal is entitled to reimbursement from the proceeds of the sale.¹¹ Where the vessel is held under several processes, the proper rule is to equally divide the per diem custody fee.¹²

[e] In Bankruptcy.

Where in a bankruptcy case he serves the petition and affidavits, and the order to show cause, together, under a rule of court, he is entitled to a reasonable compensation for the service of the petition and affidavit as well as for the order.¹⁵

§ 713. Fees of marshal of Supreme Court.

The marshal of the Supreme Court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons, or subpoena for a witness, one dollar for each person on whom such services may be made. His fees for all other services shall be the same as are herein allowed to other marshals; but he shall pay into the treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the Attorney General.

R. S. § 832, U. S. Comp. Stat. 1901, p. 641.

The compensation and salary of the Supreme Court marshal are set forth in an earlier section.¹⁷

³See *The Vandercook*, 77 Fed. 865.

⁴*The Free Trader*, Brown, Adm. 72, Fed. Cas. No. 5,091.

⁵*The Steamship Circassian*, 6 Ben. 512, Fed. Cas. No. 2,725.

⁶*The Captain John*, 41 Fed. 147.

⁷*The Merwin*, 10 Ben. 403, Fed. Cas. 4,893.

⁸*The Novelty*, 9 Ben. 195, Fed. Cas. No. 10,368.

⁹*Rurke v. Rich*, 1 Cliff. 509, Fed. Cas. No. 2,162.

¹⁰*The Sultana*, Brown, 35, Fed. Cas. No. 13,603.

¹¹*In re The Allegheny*, 85 Fed. 463.

¹²*The Circassian*, 6 Ben. 512, Fed. Cas. No. 2,725. And see *The John Walls*, 1 Sprague, 178, Fed. Cas. No. 7,432.

¹⁵*In re Damon*, 104 Fed. 775. See also *In re Burnell*, 7 Biss. 275, Fed. Cas. No. 2,171.

¹⁷*Ante*, § 615.

§ 714. Marshal's allowance for mileage and execution of writs of arrest, etc.

The sundry civil appropriation act of 1894 provided that "Hereafter no marshal or deputy marshal [shall] be allowed more than one mileage for each mile actually and necessarily traveled, irrespective of the number of writs he may execute in making such travel; nor shall any marshal or deputy marshal be allowed any additional mileage incident to the execution or return of any writ of arrest, commitment or removal other than the ten cents a mile now allowed by law for each deputy, prisoner, and guard; and no mileage shall be allowed upon any writ not executed or when the travel was without cost to marshal or deputy."¹⁵ A later act of 1896 provided that only actual necessary traveling expenses and necessary actual expenses in transporting prisoners,¹⁶ might be allowed in serving process, etc., and transporting prisoners, and to that extent superseded the earlier provision. In the appropriation act of 1900 the last clause of the provision of 1894 is repeated with a modification as follows: "No mileage shall be allowed upon any writ not executed nor when the travel is without cost to marshal or office deputy."¹⁷

Author's section.

Field deputies are still on a fee basis.¹⁸

§ 715. No clerks or marshals fees for arrest of persons under recognizance.

Hereafter no part of the appropriations made for the payment of fees for United States marshal or clerks shall be used to pay the fees of United States marshals or clerks upon any writ or bench warrant for the arrest of any person or persons who may be indicted by any United States grand jury, or against whom an information may be filed, where such person or persons is or are under a recognizance taken by or before any United States commissioner.

¹⁵Act Aug. 18, 1894, c. 301, 28 Stat. 416, U. S. Comp. Stat. 1901, p. 639.

¹⁶Ante, § 638.

¹⁷Act June 6, 1900, c. 791, 31 Stat. 639.

¹⁸Ante, § 621. For cases concerning mileage of marshals prior to act of 1896, see *Donahower v. United States*, 85 Fed. 545, 29 C. C. A. 339; *Puleston v. United States*, 88 Fed. 770; *United States v. Dill*, 86 Fed. 79, 29 C. C. A. 586; *Nixon v. United States*, 82 Fed. 23; *Hitch v. United States*, 66 Fed. 937; *United States v. Harmon*, 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327; *United States v. Fletcher*, 147 U. S. 664, 37 L. ed. 322, 13 Sup. Ct. Rep. 434; *Campbell v. United States*, 65 Fed. 777, 13 C. C. A. 128.

or other officer authorized by law to take such recognizance, requiring the appearance of such person or persons before the court in which such indictment is found or information is filed, and when such recognizance has not been forfeited or said defendant is not in default, unless the court in which such indictment or information is pending, orders a warrant to issue.

From appropriation act of Mar. 3, 1887, c. 362, 24 Stat. 541, U. S. Comp. Stat. 1901, p. 640.

Similarly R. S. § 1030, provides that no fee be charged for bringing a person in custody into court.¹⁹ The charging of fees against the United States except in certain districts was done away with by the act of 1896.²⁰

§ 716. Fees of attorneys, solicitors and proctors.

On a trial before a jury, in civil or criminal causes or before referees,^{[a]-[b]} or on a final hearing in equity or admiralty,^[c] a docket fee of twenty dollars: Provided, that in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without jury, ten dollars. In cases at law, when the cause is discontinued, five dollars. For scire facias, and other proceedings, on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents.^[d] For services rendered in cases removed from a district to a circuit court by writ of error or appeal, five dollars. For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed. For each day of his necessary attendance in a court of the United States, on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term. For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning. When an indictment for crime is tried before a jury and conviction is had, the district attorney may be allowed, in addition

¹⁹See post, § 1584.

²⁰Post, § 745.

to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.

R. S. § 824, U. S. Comp. Stat. 1901, p. 632.

[a] In general.

R. S. § 838¹ contains certain provision for fees for district attorneys in revenue suits. The application of this and the three following sections to the compensation of district attorneys is superseded except in the District of Columbia,² since by an act of 1896, such officers now receive salaries in lieu of fees.³ That act, however, expressly provides that the fees of such officers shall be collected as far as possible, except as against the United States, and covered into the United States Treasury.⁴ Where several suits are brought instead of a joint action the district attorney is limited to one bill of costs.⁵

Prior to an act of 1853 from which the above provision was taken, the state practice was followed in the taxing of costs,⁶ and the object of this provision was to secure a uniformity in such taxation.⁷ It does not prevent attorneys, solicitors and proctors from making a reasonable charge in addition.⁸

[b] Docket fee on trial before jury or referee.

A docket fee is to be taxed upon a final trial before a jury.¹² It is taxable where a verdict is reached¹³ and three docket fees have been allowed in the same suit where there have been three verdicts,¹⁴ but it cannot be taxed where the jury disagrees,¹⁵ or is waived by the parties.¹⁶ An action at law referred by consent to a special master is a trial before a referee within the meaning of the provision.¹⁷ But an informal reference to a collector to adjust amount of recovery of excess duties is not.¹⁸

¹See ante, § 542.

²Ante, § 509 [d]

³Ante, § 633.

⁴Post § 745; for decisions respecting district attorneys fees prior to act of 1896, see *Bashaw v. United States*, 47 Fed. 40; *Stanton v. United States*, 37 Fed. 252; *United States v. Perry*, 50 Fed. 745, 1 C. C. A. 648; *United States v. Colman*, 76 Fed. 214, 22 C. C. A. 135; *United States v. Jones*, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615; *United States v. Smith*, 158 U. S. 346, 39 L. ed. 1011, 15 Sup. Ct. Rep. 846; *Sill v. United States*, 87 Fed. 699, 31 C. C. A. 200; *United States v. Stanton*, 70 Fed. 890, 17 C. C. A. 475; *Van Hoorebiker v. United States*, 46 Fed. 458.

⁵Post, § 1836.

⁶*Primrose v. Fenno*, 113 Fed. 376.

⁷*Celluloid Mfg. Co. v. Chandler*, 27 Fed. 12.

⁸*The Baltimore*, 8 Wall. 392, 19 L. ed. 463.

¹²*Williams v. Morrison*, 32 Fed. 682.

¹³*Wooster v. Handy*, 23 Fed. 49.

¹⁴*Schmieder v. Barney*, 7 Fed. 451.

¹⁵*Strafer v. Carr*, 6 Fed. 466; *Huntress v. Epsom*, 15 Fed. 732; *Cleaver v. Traders Ins. Co.* 40 Fed. 863.

¹⁶*Jones v. Schell*, 8 Blatchf. 79, Fed. Cas. No. 7,493.

¹⁷*St. Matthews, etc. Bank v. Fidelity, etc. Co.* 105 Fed. 161.

¹⁸*Field v. Schell*, 4 Blatchf. 437, Fed. Cas. No. 4,771.

"Referee" does not include masters in chancery.¹⁹ A docket fee cannot be taxed in favor of a person appearing in his own behalf.²⁰ It is the individual property of the attorney or proctor.²¹ The practice on allowance of docket fees on remand of removed causes to state court, is not uniform. In the seventh circuit, they are disallowed under the uniform practice,²² in the western district of Michigan the full fee has been allowed,¹ while in South Carolina and in the eastern district of Washington a ten dollar fee has been allowed as for a judgment rendered without a jury.²

[c] —on final hearing in equity or admiralty.

A final hearing within the meaning of the provision is a submission of a case for determination upon its merits, or the submission of some question the disposition of which finally ends the case.⁴ The sustaining of a demurrer and the dismissal of the bill is a final hearing on which a docket fee may be taxed,⁵ as is also a final decree on an order pro confesso.⁶ A docket fee may be charged in a libel of intervention where the parties stipulate for a decree in favor of the intervenors;⁷ but it has been refused an intervenor whose claim has been allowed against a receiver in a suit.⁸ There apparently must be something more than a mere formal action of the court, to entitle a party to a docket fee.⁹ None may be charged where the defendant pays into court the amount of the claim in a suit for salvage,¹⁰ nor on a proceeding before a commissioner on reference.¹¹ No docket fee is taxable where the suit is voluntarily discontinued by the plaintiff;¹² as upon a consent stipulation before decision;¹⁴ or where issue has been joined on demurrer only, no evidence having been taken;¹⁵ or after overruling of demurrer but before replication filed;¹⁶ or after issue joined but before taking of proof,¹⁷ or where a decree is final only as to an interlocutory motion.¹⁸ But the docket fee may be taxed where the plaintiff discontinues after the court has substantially decided the merits of the case, either by an opinion expressed at the hearing on the

¹⁹See *Central Trust Co. v. Wash.*, etc. R. Co. 32 Fed. 685.

²⁰*Gorse v. Parker*, 36 Fed. 840.

²¹*The Mount Eden*, 87 Fed. 483; *Aiken v. Smith*, 57 Fed. 423, 6 C. C. A. 414.

²²*Smith v. Western*, etc. Tel. Co. 81 Fed. 242.

¹*Josslyn v. Phillips*, 27 Fed. 481.

²*Riser v. Southern Ry.* 116 Fed. 1014; *Pellett v. Great Northern Ry.* 105 Fed. 195.

⁴See *Wooster v. Handy*, 23 Fed. 56; *Coy v. Perkins*, 13 Fed. 112; *The Mount Eden*, 87 Fed. 483.

⁵*Price v. Coleman*, 22 Fed. 694; *McLean v. Clark*, 23 Fed. 861.

⁶*Andrews v. Cole*, 20 Fed. 410.

⁷*The H. C. Grady*, 87 Fed. 483.

⁸*Missouri, etc. Ry. v. Texas*, etc. Ry. 38 Fed. 775.

⁹*Merritt, etc. Co. v. Catskill, etc. Co.* 112 Fed. 442; *Kaempfer v. Taylor*, 78 Fed. 795.

¹⁰*Merritt, etc. Co. v. Catskill, etc. Co.* 112 Fed. 442.

¹¹*The Mount Eden*, 87 Fed. 483.

¹²*Yale Lock, etc. Co. v. Colvin*, 14 Fed. 269; *Luxfer, etc. Co. v. Elkins*, 99 Fed. 29; *Ryan v. Gould*, 32 Fed. 754; but see *Goodyear v. Sawyer*, 17 Fed. 2.

¹⁴*De Roux v. Girard*, 92 Fed. 948; *Cahn v. Qung Lung*, 28 Fed. 396.

¹⁵*Coy v. Perkins*, 13 Fed. 111.

¹⁶*Mercartney v. Crittenden*, 24 Fed. 401.

¹⁷*Consolidated, etc. Co. v. American, etc. Co.* 24 Fed. 658.

¹⁸*Peck, etc. Co. v. Fray*, 92 Fed.

merits,¹⁹ or on a previous interlocutory decree,²⁰ or where the court on the hearing of a provisional injunction, has expressed views unfavorable to complainant.²¹ It has been taxed on a motion by defendant to dismiss, for want of prosecution, upon the death of plaintiff.¹ Where there has been a final hearing and a rehearing in an equity case two docket fees have been allowed.³ Docket fees are allowed also by the Supreme Court to the prevailing party on appeal, and this practice has been followed by the circuit court of appeals.⁴

[d] Taking of depositions.

The deposition must be taken in a cause and admitted in evidence, to entitle an attorney to his fee under this section.⁸ It is immaterial before what officer it is taken.⁹ Thus, he is entitled where evidence is taken by a master, referee, or examiner, by courts order, and used at a trial before the court.¹⁰ But oral testimony given before a master, in a case tried by him, although taken by a stenographer and returned with his report is not a deposition.¹¹ The deposition must have been admitted in evidence.¹² Hence when a case is dismissed without a hearing¹³ or ordered discontinued,¹⁴ or verdict is directed on opening statement of the attorney,¹⁵ deposition fees cannot be allowed; nor can they be allowed where the party conducts his own litigation.¹⁶ Since the depositions must be "taken" as well as "admitted in evidence" in the cause, it would seem that fees cannot be taxed therefor when used in another suit,¹⁷ especially where the party seeking to tax them has incurred no expense.¹⁸ But where a deposition is entitled in each case and the witness sworn in each, it has been held taxable in each.¹⁹

Depositions to be taxable, must have been taken for use in final proceedings.²⁰ Those taken by an intervener to support his claim against a receiver,² or taken for use on motion for a preliminary injunction,³ or for a collateral proceeding for contempt,⁴ or for use in distribution of an ad-

¹⁹The Bay City, 3 Fed. 47.

²⁰Goodyear, etc. Co. v. Osgood, Fed. Cas. No. 5,594.

²¹Carter v. Sweet, 84 Fed. 17.

¹Partee v. Thomas, 27 Fed. 433.

³American, etc. Co. v. Sheldon, 28 Fed. 217. See also Wooster v. Handy, 23 Fed. 49.

⁴Shillito Co. v. McClung, 66 Fed. 22, 13 C. C. A. 284.

⁸Indianapolis Water Co. v. Straw-Board Co. 65 Fed. 535.

⁹Ferguson v. Dent, 46 Fed. 88.

¹⁰St. Matthews, etc. Bank v. Fidelity, etc. Co. 105 Fed. 162; The Sallie P. Linderman, 22 Fed. 557.

¹¹St. Matthew, etc. Bank v. Fidelity Co. 105 Fed. 161.

¹²Barnardin v. Northall, 83 Fed. 241.

¹³Cahn v. Qung Lung, 28 Fed. 396.

¹⁴Kaempfer v. Taylor, 78 Fed. 705.

¹⁵Cahn v. Monroe, 29 Fed. 675.

¹⁶Gorse v. Parker, 36 Fed. 640.

¹⁷Wooster v. Handy, 23 Fed. 49;

American, etc. Boring Co. v. Sheldon, 28 Fed. 217; Cary v. Lovell Mfg. Co. 39 Fed. 163. But see contra *Jer-*
man v. Stewart, 12 Fed. 271.

¹⁸Winegar v. Cahn, 29 Fed. 676.

¹⁹Wooster v. Handy, 23 Fed. 49. See also, *Archer v. Hartford Ins. Co.* 31 Fed. 660.

²⁰Stimpson v. Brooks, 3 Blatchf. 456, Fed. Cas. No. 13,454.

²See Ferguson v. Dent, 46 Fed. 93.

³Central Trust Co. v. Wabash, etc. Ry. 32 Fed. 684.

⁴Spill v. Celluloid Mfg. Co. 28 Fed. 870.

miralty fund,⁵ have been held nontaxable. But depositions taken for hearing on a preliminary injunction not used except upon final hearing have been held taxable.⁶ When taken separately each is taxable, although returned to court in one enclosure.⁷ Informalities in the taking may be waived.⁸

§ 717. Percentage of recovery for district attorneys in revenue cases in lieu of fees.

There shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding.

R. S. § 825, U. S. Comp. Stat. 1901, p. 634.

In 1896 Congress inaugurated the practice of paying salaries to district attorneys in lieu of fees and forbidding the charging of fees against the United States, except in the District of Columbia and the southern district of New York.¹⁰ In 1905 fees in addition to salary were everywhere forbidden to district attorneys except in the District of Columbia.¹¹ Hence the above section can only apply now to the District of Columbia.

§ 718. When no district attorneys fee on bonds.

No fee shall accrue to any district attorney on any bond left with him for collection, or in a suit commenced on any bond for the renewal of which provision is made by law, unless the party neglects to apply for such renewal for more than twenty days after the maturity of the bond.

R. S. § 826, U. S. Comp. Stat. 1901, p. 634.

The provision is now apparently applicable only in the District of Columbia.¹²

§ 719. Allowance to district attorney for defense of revenue officers.

When a district attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him,

⁵Dalzell v. The Daniel Kaine, 31 Fed. 747.

⁶Indianapolis Water Co. v. American, etc. Co. 65 Fed. 534.

⁷Broyles v. Buck, 37 Fed. 137.

⁸Indianapolis Water Co. v. American, etc. Co. 65 Fed. 534.

¹⁰See post, § 745.

¹¹Ante, § 509 [d]. This provision was presumably directed against the office in the southern district of New York.

¹²Ante, § 717, note.

or for the recovery of any money received by him and paid into the Treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury.

R. S. § 827, U. S. Comp. Stat. 1901, p. 634.

District attorneys are now on a salary basis except in the District of Columbia.¹³

§ 720. Double district attorney and marshal fees in Oregon and Nevada.

The district attorneys and marshals for the districts of Oregon and Nevada shall be entitled to receive, for the like services, double the fees hereinbefore provided; but neither of them shall be allowed to retain of such fees any sum exceeding the aggregate compensation of such officer as hereinbefore provided.

R. S. § 837, U. S. Comp. Stat. 1901, p. 644.

Marshals and district attorneys in the districts mentioned are now on a salary basis,¹⁴ hence the section no longer applies to their compensation, although it would seem still to fix the fees there taxable to litigants

§ 721. No allowance to attorney, clerk, or marshal for rule days, nor double allowance when both courts sit at same time.

No per diem or other allowance shall be made to any district attorney, clerk of circuit court, clerk of a district court, marshal or deputy marshal, for attendance at rule days of a circuit or district court; and when the circuit and district courts sit at the same time no greater per diem or other allowance shall be made to any such officer than for an attendance on one court.

R. S. § 831, U. S. Comp. Stat. 1902, p. 640.

Clerks per diem fees are set forth in a previous section.¹⁶ District attorneys and marshals are now paid salaries,¹⁷ except in the District of Columbia.¹³ The section does not prohibit a per diem charge both by the clerk and his deputy where the former attends court in one place and the latter in another, at the same time.¹⁹

¹³Ante, § 717, note.

¹⁴Ante, §§ 633, 509.

¹⁶Ante, § 706.

¹⁷Ante, §§ 633, 509.

¹⁸Ante, § 717 note.

¹⁹United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439.

§ 722. Attorneys, clerks and marshal's fees under civil rights law.

The district attorneys, marshals, their deputies, and the clerks of the courts of the United States and territorial courts shall be paid for their services, in cases under the foregoing provisions [i. e., under the civil rights law], the same fees as are allowed to them for like services in other cases. . . .

Part of R. S. § 1986, U. S. Comp. Stat. 1901, p. 1265.

Clerks fees are set forth in previous sections.¹ District attorneys and marshals are now paid salaries,² though the fees previously provided are still required to be collected except in the case of the United States.³ The omitted part of the section prescribed a fee of ten dollars to commissioners for services in civil rights cases, but it may be regarded as superseded by the following section.

§ 723. Fees of United States commissioners.

Each United States commissioner shall be entitled to the following named fees, and none other: drawing a complaint, with oath and jurat to same, fifty cents; copy of complaint, with certificate to same, thirty cents; issuing warrant of arrest, seventy-five cents; issuing a commitment and making copy of same, one dollar; entering a return, fifteen cents; issuing subpoena or subpoenas in any one case, with five cents for each necessary witness in addition to the first, twenty-five cents; drawing a bond of defendant and sureties, taking acknowledgment of same and justification of sureties, seventy-five cents; for administering an oath (except to witness as to attendance and travel), ten cents; recognizance of all witnesses in a case, when the defendant or defendants are held for court, fifty cents; transcripts of proceedings, when required by order of court and transmission of original papers to court, sixty cents; copy of warrant of arrest, with certificate to same, when defendant is held for court, and the original papers are not sent to court, forty cents; order in duplicate to pay all witnesses in a case: For first witness, thirty cents, and for each additional witness, five cents, and for oath to each witness as to attendance and travel, five cents; for hearing and deciding on criminal charges and reducing the testimony to writing when required by law or order of court, five dollars a day for the time necessarily employed; Pro-

¹Ante, §§ 706, 708, 710.

³Ante, § 712 [a]; post, § 745.

²Ante §§ 509, 633.

vided, that not more than one per diem shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional per diem may be especially approved and allowed by the court: Provided, further, that not more than one per diem shall be allowed for any one day: Provided, further, that no per diem shall be allowed for taking a bond or recognizance and passing on the sufficiency of the bond or recognizance and the sureties thereon when the bond or recognizance was taken after the defendant had been committed to prison upon a final commitment, or has given bond or been recognized for his appearance at court, or when the defendant has been arrested on a *capias* or bench warrant, or was in custody under any process or order of a court of record. For the examination and certificate in cases of application for discharge of poor convicts imprisoned for nonpayment of fine or fine and costs, and all services connected therewith, three dollars; for attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day; for taking and certifying depositions to file in civil cases, ten cents for each folio; for each copy of the same furnished to a party on request, ten cents for each folio; for issuing any warrant under the tenth article of the treaty of August 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any parties charged with any crime or offense set forth in said article, two dollars; for issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the the King of the French, concluded at Washington, November 9, 1843, two dollars; for hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed.

Part of § 21, act May 28, 1896, c. 252, 29 Stat. 184, U. S. Comp. Stat. 1901, pp. 652, 653.

This section supersedes the provision of the extradition act of 1882 as to commissioners fees,⁵ also the general provisions of R. S. § 847, and part of R. S. § 1986.⁶ It supersedes also the provision of an act of 1886,⁷ prescribing compensation for issuing warrants etc., which superseded a clause

⁵See § 2, act Aug. 3, 1882, c. 378, 22 Stat. 215.

⁷Act Aug 4, 1886, c. 903, 24 Stat. 274.

⁶See ante, § 722, note.

of R. S. § 847. By § 24 of the act from which this section is taken, it does not apply to Alaska,⁸ nor does it apply to the Indian Territory.⁹ The general provisions as to commissioners, their appointment and duties, etc. have already been considered.¹⁰ Gratuitous services are not to be implied in the case of a Federal officer receiving compensation on a fee basis,¹¹ and the construction of a general statute prescribing compensation should be in his favor.¹² The old fee bill as prescribed in R. S. § 847, remained in force until July 1, 1897, when United States commissioners were appointed.¹³ Some of the leading cases construing that section will be found in the foot note.¹⁴

§ 724. — in cases under Chinese exclusion laws.

A United States commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese exclusion laws.

§ 2 of act Mar. 3, 1901, c. 845, 31 Stat. 1093, U. S. Comp. Stat. 1901, p.1328.

§ 725. Witness fees.

For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of. When a

⁸Act May 28, 1896, c. 252, § 24, 29 Stat. 186.

⁹Act Feb. 19, 1897, c. 265, § 1, 29 Stat. 577.

¹⁰Ante, § 672, et seq.

¹¹Poinier v United States, 40 Fed. 141.

¹²United States v Morse, 3 Story, 87, Fed. Cas. No. 15,820.

¹³M'Gourin v. United States, 102 Fed 559.

¹⁴Complaints and affidavits, Rand v. United States, 48 Fed. 357; McDermott v. United States, 40 Fed 217; United States v. Ewing, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743; subpoenas, McKinstry v. United States, 34 Fed. 211; Jones v. United States, 39 Fed. 410; Oaths and acknowledgments, United States v. Allred, 155 U. S. 591, 39 L. ed. 273, 15 Sup. Ct. Rep. 231; In re Gourdin, 45 Fed. 842; Clough v. United States, 55 Fed. 921; United States v. Ewin, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743; United States v. Barber, 140 U. S. 164, 35 L. ed. 396, 11 Sup. Ct. Rep. 749; mittimus writs, Clough v. United States, 47 Fed. 791; Heyward v. United States, 37 Fed. 764; Marvin v. United States, 44 Fed. 405; recognizances, Hallett v. United States, 63 Fed. 817; per diems, United States v. Rand, 53 Fed. 348, 3 C. A. 556; McGourin v. United States, 102 Fed. 553; United States v. Ewing, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743.

witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.

R. S. § 848, U. S. Comp. Stat. 1901, p. 654.

This provision was enacted in 1853.¹⁶ The extradition act of 1882 contains provision for payment by United States of fees of indigent defendant.¹⁷ By an act of 1892, increased mileage is allowed witnesses in certain states.¹⁸ A witness is entitled to fees and mileage although the attendance is voluntary, if in good faith,¹⁹ nor is it necessary that he be called and sworn.²⁰ A witness in a civil suit cannot be compelled by subpoena to attend court when living out of the district at a distance exceeding one hundred miles from the place of trial,¹ and the authorities are at variance as to whether full mileage of such a witness, living at a greater distance is taxable on his voluntary attendance. In the first circuit full mileage is taxed,² and the same rule is followed in the District of Columbia.³ In the second circuit mileage is taxable in such a case only up to one hundred miles,⁴ and the same rule is followed in the ninth circuit,⁵ and in the circuit courts in Tennessee,⁶ South Carolina,⁷ Wisconsin,⁸ Iowa,⁹ and Arkansas.¹⁰ The fact that depositions may be taken in such a case has been the reason assigned for the latter rule.¹¹ Whether taxable or not however, a voluntary witness is entitled to hold the party at whose instance he comes, to mileage, whatever the distance traveled, and to fees,¹² in the absence of other agreement.¹³ Where under an agreement with a witness, a party secures his services at less than the statutory amount, only the amount

¹⁶Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 167.

¹⁷See post, § 1744.

¹⁸Post, § 734, witness for payment of fees in prize cases and where United States is a party, see post, §§ 743, 738.

¹⁹Pinson v. Atchison, etc. R. R. 54 Fed. 464; United States v. Sanborn, 28 Fed. 299; Hanchett v. Humphrey, 93 Fed. 895; Eastman v. Sherry, 37 Fed. 845; Burrow v. Kansas, etc. R. Co. 54 Fed. 278; Sloss, etc. Co. v. South Carolina, etc. R. Co. 75 Fed. 106. See however, Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13,221; Haines v. McLaughlin, 29 Fed. 70; Lillinethall v. Railway Co. 61 Fed. 622.

²⁰Clark v. American, etc. Co. 25 Fed. 641.

¹Post, § 1742.

²Prouty v. Draper, 2 Story, 199, Fed. Cas. No. 11,447; Whipple v. Cumberland, etc. Co. 3 Story, 84, Fed. Cas. No. 17,515; Hathaway v. Roach, 2 W. & M. 63, Fed. Cas. No.

6,213; United States v. Sanborn, 28 Fed. 299.

³Washington, etc. R. R. v. Car Co. 5 App. Cas. 528.

⁴Beckwith v. Easton, 4 Ben. 358; Fed. Cas. No. 1,212; Buffalo Ins. Co. v. Providence, etc. Co. 29 Fed. 237; The Syracuse 36 Fed. 830.

⁵Hanchett v. Humphrey, 93 Fed. 895.

⁶Burrow v. Kansas City R. Co. 54 Fed. 278.

⁷In re Williams, 37 Fed. 325.

⁸Eastman v. Sherry, 37 Fed. 844.

⁹Smith v. Chicago, etc. Ry. Co. 38 Fed. 321.

¹⁰Griggsby v. Louisiana, etc. Co. 123 Fed. 751.

¹¹See Hanchett v. Humphrey, 93 Fed. 895.

¹²Smith v. Chicago, etc. R. Co. 38 Fed. 321.

¹³See Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 11,447; Burrow v. Kansas City, etc. R. Co. 54 Fed. 284.

agreed upon can be taxed.¹⁴ The claim of the witness to fees is enforceable only against the party for whom the services were rendered, and is not a debt due directly from the losing party.¹⁵ Extra compensation for expert witnesses cannot be allowed or taxed,¹⁶ nor fees for the time used in going to and returning from court,¹⁷ but a witness is entitled to fees in each suit when between different parties.¹⁸ Where unnecessary witnesses are called in an equity case, fees and costs for the examination of only a reasonable number will be allowed.¹⁹

§ 726. Witness fees before Interstate Commerce Commission.

Witnesses summoned before the [Interstate Commerce] Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Part of § 18, act Feb. 4, 1887, c. 104, 24 Stat. 386, U. S. Comp. Stat. 1901, p. 3168.

§ 727. Witness fees for depositions in District of Columbia.

Every witness appearing and testifying under the said provisions [for taking depositions, etc.] relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.

R. S. § 874, U. S. Comp. Stat. 1901, p. 666.

§ 728. — fees and mileage under letters rogatory from foreign country.

Every witness who shall so appear and testify [i. e., in depositions to be used in suits for the recovery of money or property, depending in court of foreign country in which the government of such country is interested]¹ shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.

R. S. § 4074, U. S. Comp. Stat. 1901, p. 2764.

§ 729. No officer of court to have witness fees.

No officer of the United States courts, in any State or Territory,

¹⁴Burrow v. Kansas City, etc. R. Co. 54 Fed. 284.

¹⁵O'Neil v. Kansas City, etc. R. Co. 31 Fed. 663.

¹⁶In re Carolina, etc. Co. 96 Fed. 604.

¹⁷Carter v. Sweet, 84 Fed. 16.

¹⁸Wooster v. Handy, 23 Fed. 49; Archer v. Hartford Ins. Co. 31 Fed. 660; see also L. E. Waterman Co. v. Lockwood, 128 Fed. 174.

¹⁹Kane v. Luckman, 131 Fed. 609.

¹See R. S. §§ 4071-4073.

or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating.

R. S. § 849, U. S. Comp. Stat. 1901, p. 655.

A marshal's office clerk is not an officer of the court and is therefore entitled to fees under the section, but a deputy clerk of court is not so entitled. A deputy marshal, while an officer of the court, may be allowed witness fees, when not in actual attendance.³

§ 730. Expenses allowed clerks, etc., as witnesses.

When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary, shall in any case be allowed.

R. S. § 850, U. S. Comp. Stat. 1901, p. 655.

This provision was carried into the Revised Statutes from an act of 1853.⁵ Army officers and soldiers have been held to be within its provisions,⁶ as have also clerks of departments,⁷ and marshals clerks.⁸ A clerk appointed and paid by a postmaster is not.⁹ The expense account of a witness under this provision is audited by or under the direction of the court upon which he attends, and when the United States is successful it is taxable as costs.¹⁰

§ 731. Compensation of seamen sent home as witnesses.

There shall be paid to each seaman or other person who is sent to the United States from any foreign port, station, sea, or ocean, by any United States minister, charge d'affaires, consul, captain, or commander, to give testimony in any criminal case depending in any court of the United States, such compensation, exclusive of subsistence and transportation, as such court may adjudge to be proper, not exceeding one dollar for each day necessarily employed in such voyage, and in arriving at the place of examination or trial. In fixing such compensation, the court shall take into consideration the condition of said seaman or witness, and whether his voyage has been broken up, to his injury, by his being sent to the United

³Ex parte Burdell, 32 Fed. 681.

⁵Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 167, 168.

⁶16 Op. Atty. Gen. 113.

⁷21 Op. Atty. Gen. 263.

⁸Duval v. United States, 23 Ct. Cl. 102.

⁹In re Waller, 49 Fed. 271.

¹⁰United States v. Sanborn, 135 U. S. 285, 34 L. ed. 112, 10 Sup. Ct. Rep. 812.

States. When such seaman or person is transported in an armed vessel of the United States, no charge for subsistence or transportation shall be allowed. When he is transported in any other vessel, the compensation for his transportation and subsistence, nor exceeding in any case fifty cents a day, may be fixed by the court, and shall be paid to the captain of said vessel accordingly.

R. S. § 851, U. S. Comp. Stat. 1901, p. 655.

This provision was taken from an act of 1853.¹¹

§ 732. Fees of grand and petit jurors.

For actual attendance at any court or courts, and for the time necessarily occupied in going to and returning from the same, three dollars a day during such attendance. For the distance necessarily traveled from their residence in going to and returning from said court by the shortest practicable route, five cents a mile:

R. S. § 852, U. S. Comp. Stat. 1901, p. 656.

This section was enacted in 1870.¹³ By an act of 1879,¹⁴ the per diem compensation of jurors was changed to two dollars, but by a later enactment it was again placed at three dollars as in the above section.¹⁵ Provisions governing the qualifications, and drawing of jurors, etc., are set forth in a following chapter.¹⁶ Where the United States are parties jurors fees are paid by the marshal.¹⁷ Grand jurors are entitled to double mileage fees when summoned, discharged, and again summoned to court.¹⁸

§ 733. Per diem compensation of jurors.

On and after the passage of this act the per diem pay of each juror, grand and petit, in any court of the United States, shall be three dollars a day instead of two dollars a day, as now provided by law.

Act June 21, 1902, c. 1138, 32 Stat. 396, U. S. Comp. Stat. 1905, p. 162.

This provision rendered R. S. § 852²⁰ again operative.

§ 734. Jurors and witnesses mileage in Pacific states.

Jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho and Colorado, and in the Territories of New Mexico, Arizona

¹¹Act Aug. 26, 1853, c. 80, § 3, 10 Stat. 168.

¹³Act July 15, 1870, c. 298, § 1, 16 Stat. 363.

¹⁴Act June 30, 1879, c. 52, § 2, 21 Stat. 43.

¹⁵See post, § 733.

¹⁶Post, §§ 1701, et seq.

¹⁷Post, § 738.

¹⁸In re Grand Jurors' Mileage, 120 Fed. 307.

²⁰See ante, § 732.

and Utah, shall be entitled to and receive fifteen cents for each mile necessarily traveled over any stage line or by private conveyance, and five cents for each mile over any railway in going to and returning from said courts: Provided, that no constructive or double mileage fees shall be allowed by reason of any person being summoned both as witness and juror, or as witness in two or more cases pending in the same court and triable at the same term thereof.

Act Aug. 3, 1892, c. 361, 27 Stat. 347, U. S. Comp. Stat. 655.

This act supersedes an act of 1880 making a similar provision as to mileage of jurors and witnesses in Colorado.¹

§ 735. Printer's fees.

For publishing any notice or order required by law, or the lawful order of any court, department, bureau or other person, in any newspaper, except as mentioned in sections thirty-eight hundred and twenty-three, thirty-eight hundred and twenty-four, and thirty-eight hundred and twenty-five, title, "Public Printing, Advertisements and Public Documents," forty cents per folio for the first insertion, and twenty cents per folio for each subsequent insertion. The compensation herein provided shall include the furnishing of lawful evidence, under oath, of publication, to be made and furnished by the printer or publisher making such publication.

R. S. § 853, U. S. Comp. Stat. 1901, p. 656.

This and the following section are taken from an act of 1853.² The provisions of the Revised Statutes to which it refers provide for the selection of newspapers in which shall be published United States treaties and laws and also advertisements whose publication is ordered. There are largely superseded by later statutes.

§ 736. — meaning of term "folio."

The term folio, in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted except when the whole statute, notice or order contains less than fifty words.

R. S. § 854, U. S. Comp. Stat. 1901, p. 657.

¹Act June 16, 1880, c. 247, 21 Stat. 290.

²Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 168.

Under this section each separate or distinct order or separate proceeding may be counted separately as a folio, although containing less than fifty words.³

§ 737. Fees of appraisers on execution sale.

When such appraisers attend [i. e., the appraisers appointed for the State courts in States where an appraisal is prerequisite to execution sale attend on an execution sale in the Federal court] they shall be entitled to the like fees as in cases of appraisement under the laws of the State.

Part of R. S. § 993, U. S. Comp. Stat. 1901, p. 710.

§ 738. Jurors and witnesses paid by marshal where United States are parties.

In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts.

R. S. § 855, U. S. Comp. Stat. 1901, p. 657.

The order of the court under the above section is the voucher upon which the marshal relies.⁴ Except as above provided the courts have no authority to order the payment of witness' or jurors' fees.⁵

§ 739. Payment of fees of commissioners on Court of Claims deposition.

When testimony is taken for the claimant [in a case in the Court of Claims], the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the government, such fees, together with all postage incurred by the Assistant Attorney General, shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.

R. S. § 1085, U. S. Comp. Stat. 1901, p. 744.

§ 740. Payment of fees in suits on postmaster's bonds.

Hereafter all fees for United States attorneys, marshals, clerks of courts and special counsel necessarily employed in prosecuting

³Erwin v. United States, 37 Fed. 492.

⁴Van Duzee, 59 Fed. 440.

⁵State v. Felts, 133 Fed. 95.

civil suits instituted by the auditor for the Postoffice Department through the Solicitor of the Treasury against the sureties on the official bonds of late postmasters, as provided for by section two hundred and ninety-two, Revised Statutes of the United States, shall be paid from the appropriations for expenses of the United States courts.

From appropriation act Feb. 26, 1896, c. 33, 29 Stat. 25, U. S. Comp. Stat. 1901, p. 657.

The section of the Revised Statutes referred to above, provides that the auditor for the postoffice department shall superintend the collection of debts of that department.

§ 741. — of witnesses for indigent defendants in criminal cases.

Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States.

R. S. § 878, U. S. Comp. Stat. 1901, p. 668.

By an act of 1892 poor persons may sue without being liable for fees or costs.⁸ The summoning of witnesses under this section is in the discretion of the trial court, not reviewable on appeal.⁹ The section gives no right to summon witnesses before an indictment is found.¹⁰ While it does not cover charges for the transcript on writ of error, such charges have been allowed when ordered by the court.¹¹

§ 742. Payment of fees and costs in extradition proceedings.

All witnesses fees and costs of every nature in cases of ex-

⁸See post, § 1823.

¹⁰United States v. Stewart, 44 Fed.

⁹Goldsby v. United States, 160 U. 483.

S. 73, 40 L. ed. 343, 16 Sup. Ct. ¹¹United States v. Jones, 193 U. Rep. 216; Crumpton v. United S. 530, 48 L. ed. 777, 24 Sup. Ct. States, 138 U. S. 364, 34 L. ed. 958, Rep. 561.

¹¹Sup. Ct. Rep. 355.

tradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the government of the United States by the foreign government by whom the proceedings for extradition may have been instituted.

§ 4 of act Aug. 3, 1882, 22 Stat. 216, c. 378, U. S. Comp. Stat. 1901, p. 3595.

§ 743. Payment of witness fees in prize causes.

Whenever the court shall allow fees to any witness in a prize-cause, or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same shall be paid by the marshal, and shall be repaid to him from any money deposited to the order of the court in the cause; and any amount not so repaid the marshal shall be allowed as witness fees paid by him in cases in which the United States is a party.

R. S. § 4651, U. S. Comp. Stat. 1901, p. 3139.

This section was carried into the Revised Statutes from an act of 1864.¹³

§ 744. — of clerks, commissioners, etc., where United States are liable therefor.

The fees of district attorneys, clerks, marshals and commissioners, in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the Treasury.

R. S. § 856, U. S. Comp. Stat. 1901, p. 657.

The above section is taken from an act of 1853.¹⁴ By a later act of 1896, district attorneys and marshals are put on an exclusively salary basis, except in New York and the District of Columbia,¹⁵ but they are still to charge and collect fees, except as against the United States.¹⁶ The government is liable for the payment of services rendered by the clerk whether it succeeds in collecting costs from the defendant or not.¹⁷

¹³Act June 30, 1864, c. 174, § 25, the southern district of New York gets only a salary.

¹⁴Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 168.

¹⁶Post, 745.

¹⁷United States v. Wolters, 51 Fed.

¹⁵Ante, §§ 509, 633, post, § 745. 896.

Since 1905 the district attorney in

§ 745. Fees of marshals and district attorneys to be covered, into Treasury.

On and after the first day of July, 1896, all fees and emoluments authorized by law to be paid to United States district attorneys and United States marshals shall be charged as hertofore, and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury of the United States; and the said officers shall be paid for their official services, which, in the case of district attorneys, shall include services in the circuit court of appeals of their respective circuits wherever sitting, salaries and compensations hereinafter provided and not otherwise: Provided, that this section shall not be construed to require or authorize fees to be charged against or collected from the United States, except as provided by sections eleven and thirteen of this act relating to field deputies and their payments

§ 6 act of May 28, 1896, c. 252, 29 Stat. 179, U. S. Comp. Stat. 1901, p. 611.

By § 24 of the same act it is provided that none of the provisions of the above section "shall apply to the office of the United States district attorney and his assistants for the southern district of New York, or for the District of Columbia," or to the Territory of Alaska.¹⁸ By a later act the provision of the above section making the services of district attorney's include services in the circuit court of appeals, is made applicable to the district attorney for the southern district of New York.^{18½} By an act of 1905, the salary of the district attorney in the southern district of New York is fixed at \$10,000.¹⁹

§ 746. No fees for arrest and prosecutions under revenue laws unless from defendants.

Hereafter no part of any money appropriated to pay any fees to the United States commissioners, marshals or clerks shall be used for any warrant issued or arrest made, or other fees in prosecutions under the internal revenue laws, unless said fees have been taxed against and collected from the defendant, or unless the prosecution has been commenced upon a sworn complaint setting forth the facts constituting the offense and alleging them to be within the personal knowledge of the affiant, or upon a sworn complaint by a

¹⁸§ 24, act May 28, 1896, c. 252, 29 Stat. 186, U. S. Comp. Stat. 1901, [d] p. 618.

^{18½}Appropriation act June 6, 1900, 31 Stat. 304.

¹⁹Ante, § 512. See also § 509.

United States district attorney, collector or deputy collector of internal revenue or revenue agent, setting forth the facts upon information and belief, and approved either before or after such arrest by a circuit or district judge or the attorney of the United States in the district where the offense is alleged to have been committed or the indictment is found.

See appropriation acts, Mar. 3, 1893, c. 208, 27 Stat. 609; Aug. 18, 1894, c. 301, 28 Stat. 416, U. S. Comp. Stat. 1901, p. 641.

§ 747. When informer liable for fees incurred in prosecution.

If any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be alone liable to the clerk, marshal and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same; in which case the United States shall be responsible for such fees.

R. S. § 976, U. S. Comp. Stat. 1901, p. 704.

Prosecutions in the name of the United States for the use of the informer are within the meaning of the section.¹

§ 748. Penalty for accepting compensation for services other than that provided.

Any officer whose compensation is fixed by sections six to fifteen, inclusive, of this act who shall directly or indirectly demand, receive or accept any fee or compensation for the performance of any official service other than is herein provided, or shall wilfully fail or neglect to account for or pay over to the proper officer any fee received or collected by him shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment, at the discretion of the court, not exceeding five years, or by both such fine and imprisonment.

§ 18 act May 28, 1896, c. 252, 29 Stat. 183, U. S. Comp. Stat. 1901, p. 617.

¹United States v. The Steamboat Planter, Newb. Adm. 262, Fed. Cas. No. 16,054.

The officers whose compensations are fixed by the sections referred to, are district attorneys² and marshals³ assistant district attorneys,⁴ and marshals office and field deputies.⁵

§ 749. Purchase of claims for fees, etc., prohibited.

It shall hereafter be unlawful for any United States marshal or deputy marshal, or any clerk or deputy clerk of any court of the United States or of any Territory thereof, or any United States attorney or assistant attorney, or any United States judge, or United States commissioner, or other person holding any office, employment, or position of trust or profit under the government of the United States to purchase, at less than the full face value thereof, either directly or indirectly, any claim for fee, mileage, or expenses of any witness, juror, deputy marshal, or of any other officer of court whatsoever against the United States government.

§ 1 act Feb. 25, 1897, c. 316, 29 Stat. 595, U. S. Comp. Stat. 1901, p. 1213.

§ 750. Fees, how recovered.

The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the Treasury, shall be recovered in like manner as the fees of the officers of the States respectively for like services are recovered.

R. S. § 857, U. S. Comp. Stat. 1901, p. 658.

Fees other than those which are to be paid out of the treasury are those which are taxed and collected in suits and these are to be recovered as like fees are recovered by similar state officers.⁷ Thus a marshal may be reimbursed for expenditures in caring for a vessel without waiting for final decree.⁸ But a statute applying only to part of a state is not made applicable by this section.⁹ The section regulates only the mode of recovery, not the amount.¹⁰

§ 751. Attachment for fees in Supreme Court.

Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue

²Ante, § 510.

³Ante, § 634.

⁴Ante, § 515.

⁵Ante, §§ 620, 621.

⁷United States v. Cigars, 2 Fed. 161.

⁸The Allegheny, 85 Fed. 463.

⁹Aiken v. Smith, 57 Fed. 423, 6 C. A. 414.

¹⁰The Mary H. Brockway, 49 Fed.

against such parties or sureties, respectively, to compel payment of the said fees.

Section 8 of Supreme Court rule 10, as amended Mar. 28, 1887.

§ 752. Clerk's fees in naturalization proceedings.

The clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding: For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar. For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

First part of § 13 act June 29, 1906, c. 3592, 34 Stat. 600.

The provisions of the naturalization act respecting procedure are given elsewhere.¹

§ 753. — duty to account for one half.

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such Bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Commerce and Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the auditor for the State and other departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received.

Second part of § 13, act June 29, 1906, c. 3592, 34 Stat. 600.

§ 754. — deposit for witness fees—retention by clerk—additional assistance.

In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States,

¹Post, § 2380, et seq.

deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom he may request a subpoena, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said bureau as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance.

Part of § 13 act June 29, 1906, c. 3592, 34 Stat. 600, 601.

§ 755. Supreme Court clerks fees computed on folios of record as filed.

The fees of the clerk under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

Last clause of Supreme Court rule 10.

The table of fees above referred to is given in a preceding code section.³

³See ante, § 708.

PART II.
FEDERAL PROCEDURE.

CHAPTER 21.

GENERAL AND MISCELLANEOUS PROVISIONS.

- § 799. Source and scope of power to prescribe Federal procedure.
- § 800. The fundamental distinction between law and equity.
- § 801. General nature and scope of Federal Courts' power to make rules.
- § 802. —Supreme Courts' power to make equity and admiralty rules for lower courts.
- § 803. —to make bankruptcy rules.
- § 804. Power of circuit court of appeals to make rules.
- § 805. Power of circuit and district courts to make rules.
- § 806. Circuit courts' power to make rules in equity.
- § 807. Power to impose oaths and punish contempts.
- § 808. Contempt power of Court of Claims.
- § 809. Bankruptcy courts' power to punish for contempt.
- § 810. Contempts before bankruptcy referees.
- § 811. Contempt proceedings against defaulting garnishee.
- § 812. Contempt of order to appear before Commerce Commission.
- § 813. Formal defects of procedure disregarded—amendments permitted.
- § 814. Effect of death of party before final judgment—revivor.
- § 815. Death of one of several parties.
- § 816. No abatement by officer's death, expiration of term, etc.
- § 817. Non-joinder of, or failure to serve parties as ground of abatement.
- § 818. Dismissal or remand for want of jurisdiction or collusion therein.
- § 819. Either party may notice cause for trial.
- § 820. Priority in hearing of State cases.
- § 821. Deposit of moneys paid into court.
- § 822. Withdrawal of deposit—transfer to credit of United States.
- § 823. Consolidation of causes.
- § 824. Actions for mining claims governed by law of possession.
- § 825. Procedure upon arbitration award between carrier and its employees—filing award and exceptions.
- § 826. —judgment and appeal.

§ 799. Source and scope of power to prescribe Federal procedure.

Power to prescribe the procedure of Federal courts follows from the power of Congress to establish such courts.^[a] It permits the national government to provide for the practice, forms and modes of court proceedings from the institution of suit down to the enforcement and satisfaction of the judgments rendered.^[b] But this

power to prescribe procedure does not authorize any declaration of the substantive rules of law which shall be administered in the decision of causes in Federal courts.^[c]

Author's section.

[a] Origin of power to provide Federal procedure.

The clause of the Constitution enabling Congress to pass all laws necessary and proper to carry out its granted powers,¹ very clearly authorizes legislation which will enable the courts it is authorized to create, to exercise effectively the jurisdiction which the Federal Constitution confers.² As already shown this power is exclusive in the national government and not subject to state regulation or restraint.³

[b] Scope of power.

Since jurisdiction does not terminate with judgment, but continues until its enforcement or satisfaction thereafter,⁵ it follows that the power to prescribe procedure, includes power to make laws for carrying Federal judgments into execution.⁶ Hence the statute authorizing Federal courts to issue writs agreeable to the principles and usages of law, for the effective exercise of jurisdiction includes writs subsequent to judgment, such as execution⁷ and mandamus.⁸ It would seem equally clear that the power to enforce judgment and direct execution includes the power to designate the property subject to execution;⁹ and hence that Congress in the exercise of this power, may extend, or qualify, or abrogate the state scheme of exemptions from execution in so far as Federal judgments are concerned.¹⁰

Plainly the power to prescribe procedure is a broad one and of great importance. The vindication of rights is always deeply affected and often controlled by the laws of procedure established for their determination. Under this power Congress might legislate independently of the States and at utter variance with their practice, as to the admissibility of evidence or the competency of parties and others as witnesses; as to the form and effect of judgments and their lien; as to the form and effect of execution, the property on which it may be levied, the method of sale, or imprisonment of the debtor. These considerations serve to emphasize the wisdom of the legislation that

¹Cons. Art. 1, sec. 8, Cl. 18.

²Nayman v. Southard, 10 Wheat. 22, 6 L. ed. 258; Bank of U. S. v. Halstead, 10 Wheat. 54, 6 L. ed. 265.

³See ante, § 5.

⁵See ante, § 3 note[dd].

⁶Board of Comrs v. Aspinwall, 24 How. 376, 16 L. ed. 735; Wayman v. Southard, 10 Wheat, 22, 6 L. ed. 258; Bank of U. S. v. Halstead, 10 Wheat. 53, 6 L. ed. 265.

⁷Ibid.

⁸Knox Co. v. Aspinwall, 24 How. 384, 16 L. ed. 739.

⁹Bank of United States v. Halstead, 10 Wheat. 61, 6 L. ed. 267.

¹⁰See Fink v. O'Neil, 106 U. S. 279, 27 L. ed. 196, 1 Sup. Ct. Rep. 325. Under the legislation of Congress, however, the State scheme of exemptions applies in Federal court. See also Nichols v. Levy, 5 Wall. 433, 18 L. ed. 596; Spindle v. Shreve, 111 U. S. 542, 28 L. ed. 512, 4 Sup. Ct. Rep. 522; First Nat. Bank v. Glass, 79 Fed. 708, 25 C. C. A. 151; Thompson v. McConnell, 107 Fed. 36, 46 C. C. A. 124; Manufacturers' etc. Bank v. Bayless, 16 Fed. Case 664.

has been enacted. In common law causes the procedure in Federal courts is required to conform to the practice prevailing in the State where the court is sitting.¹¹ Rules as to evidence and competency of witnesses conform, with slight modifications, to the State laws.¹² The duration of the judgment, the property subject thereto, and the execution issued for the enforcement are all assimilated to the State laws in such behalf. It is only the equity and admiralty practice that are distinctively Federal; and the admiralty jurisdiction being exclusive provokes no conflict or embarrassment.

[c] Substantive law in Federal courts not derivable from power as to procedure.

The law administered in the decision of causes in Federal courts and by which rights are measured and adjudged, is to be distinguished from the rules and modes of procedure.¹⁴ It is plain that the substantive law to be administered cannot be provided by Congress under the power to prescribe modes of procedure. It cannot be contended, for instance, that the grant to Federal courts of jurisdiction over suits between citizens of different States, enables Congress to provide the rules of law which shall govern and determine such suits. To so hold would be to declare that Congress can trespass beyond the legislative powers granted to it, abrogate established rules of property in the States, and remove the obligation of its citizens to submit to the operation of its laws passed within the admitted scope of State powers. The scheme of distribution of legislative powers between the Federal and the State governments forbids any such extension of the powers of the Federal government.¹⁵ The judicial power of Federal courts is much broader than the legislative power of the Federal Congress;¹⁶ and in consequence the courts are frequently called upon to administer the State laws.¹⁷

§ 800. The fundamental distinction between law and equity.

In Federal practice the ancient distinction between common law and equity is fundamental and is consistently maintained. No practitioner can properly conduct a cause in the Federal courts without a clear understanding of this fact, for the distinction confronts him at the threshold of his proceedings and determines its entire course. It makes no difference that the State where a Federal court is sitting has modified or abolished the ancient distinction between law and equity. The modes of proceeding in Federal courts are independent of State control, and it is law and equity

¹¹See post, § 900.

¹²See post, §§ 1776, 1735.

¹⁴See *McClaskey v. Barr*, 48 Fed. 130.

¹⁵*Suydam v. Williamson*, 24 How. 433, 16 L. ed. 745.

¹⁶See *Beauregard v. New Orleans*, 18 How. 497, 15 L. ed. 469; *Brine v. Hartford Ins. Co.* 96 U. S. 634, 24 L. ed. 861; *Independent Dist. v. Beard*, 83 Fed. 16; ante, § 1.

¹⁷Ante, § 10.

that the Federal courts administer as the two were distinguished at the time of the Revolution.¹ If, by that test, a proceeding is properly at law, Congress has, it is true, provided for its conduct in the Federal court in much the same manner as in the courts of the State where it is brought.^[a] But if, by that test, it is properly equitable, then the State practice is to be ignored and the cause proceeds according to rules of equity procedure that are uniform in all Federal courts throughout the land.^[b] It is important to bear in mind that the distinction between law and equity is concerned with the mode of enforcing rights and not with their existence. The Federal government through legislation of Congress and rules adopted by the courts has full power to regulate the procedure or mode of enforcing rights in its courts.² But neither Congress nor the courts, under the guise of regulating procedure, can enlarge the legislative powers conferred by the Constitution or trench upon legislative powers reserved by the States. As to matters within the States' law making powers equitable rights are measured by the local laws in Federal courts as much as in State courts;³ and where a State, by enactments within its law making power, enlarges or changes equitable rights, the Federal courts while they may choose their own mode of doing so, are as much bound to administer such enlargement or change as are the tribunals of the State.^[b]

Author's section.

[a] Procedure in actions at law.

Subsequent chapters⁵ contain various provisions governing procedure in common law causes, but certain general principles may be noted here. The distinction between law and equity not only requires the bringing of an action at law on the law side of the court, but it forbids the pleading of equitable defenses therein.⁶ It forbids the joinder of legal and equitable causes of action in one complaint though permissible by the State practice;⁷ and an agreed statement of fact waiving questions of pleading cannot cure defects of this character.⁸ Similarly it forbids the pleading of

¹See ante, § 5[b]; post, § 935.

²See § 799.

³See ante, § 10[a].

⁵Post, § 900, et seq.

⁶Robinson v. Campbell, 3 Wheat. 212, 4 L. ed. 373; Bagnell v. Broderick, 13 Pet. 436, 10 L. ed. 235; Foster v. Mora, 98 U. S. 425, 25 L. ed. 191; Hurt v. Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Northern P. R. R. v. Paine, 119 U. S. 561, 30 L. ed.

513, 7 Sup. Ct. Rep. 323; Johnson v. Christian, 128 U. S. 374, 32 L. ed. 413, 9 Sup. Ct. Rep. 87; Mulqueen v. Schlichter Co. 108 Fed. 931; see also Schurmeier v. Conn. etc.; Ins. Co. 137 Fed. 42, 69 C. C. A. 22.

⁷Phelps v. Elliott, 26 Fed. 882; La Mothe v. National Co.; Potts v. Accident Ins. Co. 35 Fed. 567.

⁸Willard v. Wood, 135 U. S. 310, 34 L. ed. 213, 10 Sup. Ct. Rep. 831.

equitable defenses in an action at law.⁹ If by Federal standards an action should be in equity, a State statute permitting suit at law will not be followed.¹⁰ In most of the States the blending of law and equity procedure has resulted in forms and modes of pleading embodying both systems almost indistinguishably. Thus the modern counterclaim comprises both the recoupment permissible anciently at law and the cross bill of courts of equity. Hence, it is said, the counterclaim of the State practice is only permissible in the Federal court if under the facts it really represents the recoupment of the ancient common law.¹¹ When a State permits ejectment to be maintained upon a merely equitable title,¹² or permits an equitable title to be set up as a defense in ejectment, this practice cannot prevail in the Federal court, and one having an equitable title must there go into equity for due recognition or enforcement thereof.¹³ ●

[b] Federal equity procedure.

The equity procedure of the Federal Courts is very largely governed by the equity rules promulgated by the Supreme Court,¹⁴ and these are embodied in subsequent chapters.¹⁵ The equity practice is independent of, and unaffected by State laws as to procedure in the State courts.¹⁶ Hence a married woman must in equity sue by *prochein ami* in the Federal court even though the state law permits suit in her own name.¹⁷ Proceeding by an agreed case is not permissible in the Federal court on its equity side though sanctioned by State law.¹⁸ Conversely one having merely an equitable title must proceed in equity and cannot maintain the legal action of ejectment even though the State practice so permits.¹⁹ So where the State law forbids resort to an equitable remedy such as injunction, this will not deprive a suitor of that remedy in the Federal court if by Federal equity.

⁹*George v. Tait*, 102 U. S. 564, 570, 26 L. ed. 232; *Scott v. Armstrong*, 146 U. S. 512, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *Hill v. Northern P. Ry.* 113 Fed. 917, 51 C. C. A. 544; *Kosztelnik v. Bethlehem I. Co.* 91 Fed. 606; *Wilcox, etc. Co. v. Phenix Ins. Co.* 61 Fed. 199, *Vandervelden v. Chicago, etc. Ry.* 61 Fed. 57. See however, *Cheatham v. Edgefield Mfg. Co.* 131 Fed. 121, and cases cited, where facts setting up an equitable estoppel were allowed in a legal action of ejectment.

¹⁰*Sheffield F. Co. v. Witherow*, 149 U. S. 579, 37 L. ed. 853, 13 Sup. Ct. Rep. 936.

¹¹*Jewett Car Co. v. Kirkpatrick, etc. Co.* 107 Fed. 622; but see *Snyder v. Pharo*, 25 Fed. 398; *Church v. Spiegelburg*, 31 Fed. 601, 24 Blatchf. 540; *Herklotz v. Chase*, 32 Fed. 433; and see post, § 903 [d]; *Fenn v. Holme*, 21 How. 488, 16 L. ed. 201; *Sheirbourn v. DeCordova*, 24 How.

423, 16 L. ed. 741; *Hooper v. Scheimer*, 23 How. 235, 16 L. ed. 452.

¹²*Greer v. Mezes*, 24 How. 268, 16 L. ed. 661; *Doe v. Roe*, 31 Fed. 97; *Schofield v. Rhodes*, 82 Fed. 153, 27 C. C. A. 95; *Daniel v. Felt*, 100 Fed. 727.

¹³*Northern P. R. R. v. Paine*, 119 U. S. 562, 30 L. ed. 513, 7 Sup. Ct. Rep. 323.

¹⁴Post, § 935, et seq.

¹⁵Post, §§ 935, et seq.

¹⁶*Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; see ante, § 5[b].

¹⁷*Wills v. Pauly*, 51 Fed. 257.

¹⁸*Nickerson v. Atchison, etc. Ry.* 30 Fed. 85.

¹⁹*Gibson v. Chouteau*, 13 Wall. 102, 20 L. ed. 534; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344, 8 Sup. Ct. Rep. 429; *Redfield v. Parks*, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83.

standards he is entitled thereto.²⁰ All these are mere questions of the mode of procedure. Where the State law affects substantive rights and not mere modes of procedure, other considerations control. It has been repeatedly decided that an enlargement of equitable rights created by a State will be as fully respected and administered in the Federal as in the State courts.² Thus the modern action to quiet title is essentially equitable and akin to the equitable bill, maintainable by one in possession, to remove a cloud. If the State permit its statutory action to quiet title to be maintained by one out of possession, this enlargement of a right essentially equitable, will prevail in the Federal court in that State, which will accordingly entertain a bill in the absence of adequate remedy at law, by one out of possession.³ The essential nature of new statutory rights determines the jurisdiction as between law and equity.⁴ But if by Federal equity standards, there is an adequate remedy at law in the Federal court, the fact that a State gives a new equitable remedy will not justify the Federal court in enforcing it.⁵

§ 801. General nature and scope of Federal Courts' power to make rules.

Courts undoubtedly possess a certain inherent power to make rules not inconsistent with law, for the purpose of promoting the orderly administration of justice. The legislature, also, may authorize courts to make rules of practice without violating the constitutional principle which forbids them to delegate legislative powers to the courts; and in the case of the Federal courts a very large power in the making of rules to govern practice therein has been conferred by Congress.⁸ A legislative enumeration of the matters which courts are authorized to provide for by rule would seem to limit the power to make rules to such matters and exclude others.^{[a]-[b]}

Author's section.

[a] Power of Federal Courts to make rules.

The power of courts to make rules to promote the orderly administration of justice is inherent.⁹ There is no existing statute conferring authority upon the Supreme Court to make rules to govern practice therein, although there were provisions in early statutes conferring general authority on all

²⁰Taylor v. Louisville, etc. R. R. 88 Fed. 357, 31 C. C. A. 537.

²Ante, § 10 [aa].

³Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Wehrman v. Conklin, 155 U. S. 324, 39 L. ed. 172, 15 Sup. Ct. Rep. 132.

⁴Van Norden v. Morton, 99 U. S. 380, 25 L. ed. 453; Cummings v. National Bank, 101 U. S. 157, 25 L. ed. 905.

⁵Whitehead v. Shattuck, 138 U. S. 152, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Scott v. Neely, 140 U. S. 117, 35 L. ed. 362, 11 Sup. Ct. Rep. 716; Cates v. Allen, 149 U. S. 459, 37 L. ed. 808, 13 Sup. Ct. Rep. 885. See also, post, § 935, et seq.

⁸See post, § 802, 803, 804, 805.

⁹Duke v. Trippe, 6 Ga. 323; Crump v. People, 2 Colo. 319; see Washington, etc. Packet Co. v. Sickles, 19 Wall. 615, 22 L. ed. 203.

the Federal courts to make rules.¹⁰ These general provisions were not carried forward into the Revised Statutes.¹¹ Many matters pertaining to appellate practice in that tribunal however, have been regulated by rules of court from the beginning and their validity is not open to question.¹² The procedure in original suits in the Supreme Court where States are parties, has been left by Congress to the control of the court, and is regulated by court rules,¹³ at first adopted with hesitation and declared to be subject to the "interposition, alteration and control" of Congress.¹⁴ While rules do not have to be reduced to writing to be effective,¹⁵ yet as the Supreme Court rules are written, and accessible to all suitors,¹⁶ strict compliance therewith is insisted upon.¹⁷ The inferior Federal courts have frequently adopted State practice without formal rule.¹⁸ Valid rules have the force of law binding both upon the court and the parties and may not be disregarded by a trial court.¹⁹ Long practical construction of a rule is persuasive of the correctness of that construction.²⁰ A court may in its discretion dispense with the requirements of a rule¹ or relieve against injustice in its operation.² The power of Congress to direct the Federal courts to frame rules governing their practice, was sustained in several early cases.³ It also has power to alter rules adopted by or for any Federal courts, at any time.⁴ And a statute may abrogate a rule without an order of court to that effect.⁵

[b] Limitations upon power to make rules.

It is plain that courts have no power to make rules inconsistent with

¹⁰See act Sept. 24, 1789, § 17, 1 Stat. 83; act March 2, 1793, § 7, 1 Stat. 335.

¹¹Steam Stone Cutters Co. v. Jones, 13 Fed. 579, 21 Blatchf. 138; see Hudson v. Parker, 156 U. S. 281, 39 L. ed. 425, 15 Sup. Ct. Rep. 452.

¹²In re Chateaugay, etc. Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; Fishburn v. Railway Co. 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8; Hudson v. Parker, 156 U. S. 282, 39 L. ed. 425, 15 Sup. Ct. Rep. 452.

¹³Florida v. Georgia, 17 How. 478, 15 L. ed. 189; California v. Southern Pac. Co. 157 U. S. 248, 39 L. ed. 690, 15 Sup. Ct. Rep. 591.

¹⁴Grayson v. Virginia, 3 Dall. 320, 1 L. ed. 619.

¹⁵Fullerton v. Bank of U. S. 1 Pet. 613, 7 L. ed. 280; Duncan v. United States, 7 Pet. 451, 8 L. ed. 739.

¹⁶Richardson v. Green, 130 U. S. 112, 32 L. ed. 872, 9 Sup. Ct. Rep. 443.

¹⁷School Dist. v. Insurance Co. 101 U. S. 472, 25 L. ed. 868.

¹⁸See post, § 805. [c]

¹⁹Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 608, 43 L. ed. 1103, 19 Sup. Ct. Rep. 761; Seymour v. Phillips, 7 Biss. 460, Fed. Cas. No. 12,689.

²⁰Osborn v. United States, 131 U. S. CXXXVII., 23 L. ed. 871.

¹United States v. Breitling, 20 How. 252, 15 L. ed. 900; Russell v. McLellan, 3 Wood & M. 157, Fed. Cas. No. 12,158; Wallace v. Clark, 3 Wood. & M. 359, Fed. Cas. No. 17,098; Southern Pac. Co. v. Johnson, 69 Fed. 559, 16 C. C. A. 317.

²Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161.

³Wayman v. Southard, 10 Wheat. 48, 6 L. ed. 264; Bank of U. S. v. Halstead, 10 Wheat. 64, 6 L. ed. 268; Beers v. Houghton, 9 Pet. 359, 9 L. ed. 157.

⁴United States v. Union Pac. R. R. 98 U. S. 604, 25 L. ed. 143.

⁵Connecticut, etc. Ins. Co. v. Cushman, 108 U. S. 66, 27 L. ed. 648, 2 Sup. Ct. Rep. 236.

existing laws,⁷ nor to alter or impair their operation. The district court may not by rule declare that among admiralty claims of equal dignity, the first libelling shall be paid first.⁸ The Supreme Court would have no right to enlarge or restrict the jurisdiction conferred by law upon that court or any other.⁹ Competent evidence may not be excluded.¹⁰ The statutory right to plead to statute of limitations cannot be made to depend upon the pleasure or discretion of the court expressed in its rules.¹¹ Yet the time and manner of filing pleas in a cause may be regulated by rule;¹² and a regulation of the character of the process to be used in admiralty is not a regulation of the court's jurisdiction.¹³

§ 802. — Supreme Courts' power to make equity and admiralty rules for lower courts.

The Supreme court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district court.^{[a]-[b]}

R. S. § 917, U. S. Comp. Stat. 1901, p. 684.

[a] Scope and exercise of the power.

R. S. § 913¹⁵ also recognizes the power of the Supreme Court to control the forms and modes of proceeding in equity and admiralty. The above section of the revised statutes, is carried forward from an act of August, 1842.¹⁶ Prior to the law of August, 1842, there was a statute of 1792,¹⁷ upon which the Supreme Court expressly rested its authority to make the equity rules of 1822;¹⁸ and under which early statute it further promulgated the equity rules now in force. Curiously enough the equity rules were promulgated in March, 1842, only five months prior to the enactment of the very comprehensive provision of the act of August, 1842, which is now

⁷The Kentucky, 4 Blatchf. 448, Fed. Cas. No. 7,717; Gray v. Chicago, etc. R. R. 1 Woolw. 63, Fed. Cas. No. 5,713.

⁸Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343.

⁹Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161; Meyer v. Tupper, 1 Black, 526, 17 L. ed. 182; Hudson v. Parker, 156 U. S. 284, 39 L. ed. 426, 15 Sup. Ct. Rep. 450.

¹⁰Patterson v. Winn, 5 Pet. 233, 8 L. ed. 108.

¹¹Washington, etc. Co. v. Sickles, 19 Wall. 611, 22 L. ed. 203.

¹²Ibid.

¹³Meyer v. Tupper, 1 Black, 526, 17 L. ed. 183.

¹⁵See post, § 936.

¹⁶Act Aug. 23, 1842, § 6, 5 Stat. 518.

¹⁷See act May 8, 1792, c. 36, § 2.

¹⁸See 7 Wheat. 5, 5 L. ed. 375.

R. S. § 917, *supra*. The present admiralty rules are of date subsequent to the law of 1842, and hence were promulgated pursuant thereto. The equity and admiralty rules constitute a very complete code of equity and admiralty procedure and will be found herein, in the chapters treating those topics.¹⁹

The above provision authorizes the promulgation of rules of practice, but does not permit the Supreme Court to declare the rule of decision which the courts shall apply.²⁰ The validity of a few of the rules has been challenged, but all have been uniformly sustained.¹ The power conferred is not only to make rules, but to make them from time to time.² The rules so made are obligatory on the circuit court,³ and no practice in the circuit court inconsistent therewith is admissible to control them.⁴ But rules prescribed by the supreme court do not exclude other rules and usages of the circuit courts,⁵ though the latter have no power to make rules inconsistent with the rules prescribed by the supreme court;⁶ as, a rule adopting a State law as to the rights and obligations of parties to injunction bonds. Rules prescribed by the Supreme Court have the force and effect of statutory provisions.⁸ It is of course not competent for the courts to make rules to conflict with an act of Congress,⁹ as a rule making judgments or decrees for money a lien on land, or to displace any lien where the same is conferred by law.¹⁰ In New Jersey the circuit court has adopted the State equity rules when not in conflict with the Federal rules.¹¹

[b] History of Federal equity rules.

At the February, 1822, term, the Supreme Court adopted a set of "Rules of practice for the courts of equity of the United States," pursuant to the

¹⁹See post, §§ 935, et seq. §§ 1195, et seq.

²⁰The Selt, 3 Biss. 344, Fed. Cas. No. 12,649; Barron v. Locke, 7 Leg. Int. 203, Fed. Cas. No. 1,054.

¹In re Providence, etc. S. S. Co. 6 Ben. 124, Fed. Cas. No. 11,451, Admiralty rule as to limited liability; Pierpont v. Fowle, 2 Wood. & M. 23, Fed. Cas. No. 11,152, equity rule 32; Hodge v. Bemis, Fed. Cas. No. 6,557; Gardner v. Isaacson, Abb. Adm. 141, Fed. Cas. No. 5,230; The Bremena v. Card, 38 Fed. 144; Louisiana Ins. Co. v. Nickerson, 2 Low. 310, Fed. Cas. No. 8,539; all respecting admiralty rules on arrest and attachment.

²Meyer v. Tupper, 1 Black, 522, 17 L. ed. 180.

³Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161; Ex parte Whitney, 13 Pet. 404, 10 L. ed. 221.

⁴Bank v. White, 8 Pet. 262, 8 L. ed. 938.

⁵Van Hook v. Pendleton, 2 Blatchf. 85, Fed. Cas. No. 16,852.

⁶Story v. Livingston, 13 Pet. 359, 10 L. ed. 200; Gaines v. Relf, 15 Pet. 9, 10 L. ed. 642; Bein v. Heath, 12 How. 168, 13 L. ed. 940; Jenkins v. Greenwald, 1 Bond, 126, Fed. Cas. No. 7,270; see also post, § 805.

⁷Bien v. Heath, 12 How. 168, 13 L. ed. 940.

⁸The Delaware, Olcott, 240, Fed. Cas. No. 3,762; Scott v. The Young American, Newb. Adm. 107, Fed. Cas. No. 12,550; Russell v. The Asa R. Swift, Newb. Adm. 553, Fed. Cas. No. 12,144; Gaines v. Travis, Abb. Adm. 422, Fed. Cas. No. 5,180; The Illinois, 1 Brown Adm. 13, Fed. Cas. No. 7,003; Northwestern M. L. Co. v. Keith, 77 Fed. 374, 23 C. C. A. 196; American G. Co. v. National P. Co. 127 Fed. 349.

⁹Gray v. Chicago, I & N. R. Co. 1 Wool. 63, Fed. Cas. No. 5,173.

¹⁰Ward v. Chamberlain, 2 Black, 430, 17 L. ed. 319.

¹¹Meador v. Wild West Show, 132 Fed. 281.

authority conferred by an act of 1792.¹² There were thirty-three rules then adopted and they went into force July 1st, 1822.¹³ The present equity rules were promulgated in March, 1842, and in August of that same year the provision which is now R. S. § 917, *supra*, was enacted conferring very ample powers upon the courts to make such rules. As originally adopted there were ninety-two rules, the last merely providing "These rules shall take effect and be of force in all the circuit courts of the United States from and after the first day of August next; but they may be previously adopted by an circuit court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the rules of practice for the circuit courts in equity suits promulgated and prescribed by this court in March, 1822, shall henceforth cease and be of no further force and effect."¹⁴ Only three general equity rules have since been added.¹⁵ The present equity rules are many of them modeled closely after certain English orders in chancery drawn in 1841.¹⁶

§ 803. — to make bankruptcy rules.

All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

§ 30 of act July 1, 1898, c. 541, 30 Stat. 554, U. S. Comp. Stat. 1901, p. 3434.

General orders and forms in bankruptcy were adopted pursuant to the above authority, on Nov. 28, 1898 to take effect January 2, 1899. This section has not been deemed to exclude power in the district courts and the circuit courts of appeals to adopt further bankruptcy rules, and such have been adopted in some districts and circuits. The Supreme Courts orders and forms in bankruptcy will be found elsewhere.¹⁸

§ 804. Power of circuit court of appeals to make rules.

The [circuit] court [of appeals] shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

¹²Act May 8, 1792, c. 36, § 2, 1 Stat. —. Manual, p. 4. The rules are also to be found in 1 How. 1.

¹³See 7 Wheat. 5-8, 5 L. ed. 375-377.

¹⁴The rules were printed by Richard Peters in the appendix to 17 Pet. U. S. Rep. 61, which, however, is not part of the official set because Howard had then succeeded Peters as reporter and the matter in 17 Pet. is all contained in 1 How. See Lawy. Ref.

¹⁵Rule 92, Dec. term, 1863, post, § 1093, supplanting the original 92nd rule. Rule 93, Oct. term, 1878, post, § 2022. Rule 94, Oct. term, 1881, post, § 953.

¹⁶For reference to the sources from which the equity rules were drawn, see post, § 937[b].

¹⁸See title bankruptcy, post, §§ 2200, et seq. and see Index.

Part of § 2 act of Mar. 3, 1891, c. 517, 26 Stat. 827, § 2, cl. 2, U. S. Comp. Stat. 1901, p. 547.

A set of thirty-four rules was drawn up shortly after the passage of the act of 1891, for the courts in several circuits. These are the basis of existing rules in the several circuits, although they have been supplemented and amended in various ways in different circuits.²⁰

§ 805. Power of circuit and district courts to make rules.

The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section,² make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. [a]-[c]

R. S. § 918, U. S. Comp. Stat. 1901, p. 685.

[a] Related statutory provisions.

This section is carried forward from acts of 1793 and 1842.³ A statute creating two divisions in the western judicial district of Michigan, recognizes the power of the circuit and district court therein to regulate "by general rule the venue of transitory actions, either in law or in equity," and to change the same for cause.⁴ The circuit courts are expressly authorized to formulate rules governing appeals from the board of general appraisers.⁵ R. S. § 915 regarding attachment and other process in Federal courts provides that the circuit and district courts may "by general rules" adopt any changes that may be made in the local law on the subject.⁶ R. S. § 916⁷ confers a similar discretion in the matter of State executive laws. Both these provisions give the Federal court a discretion, and therefore a latitude in the making of rules, when the State changes its laws touching execution and attachment.⁸ So also R. S. § 914, with which the above provision must be construed,⁹ respecting Federal common law procedure in general, recognizes the power of the circuit and district courts to make rules by requiring conformity only "as near as may be," to the local State practice "any rule of court to the contrary notwithstanding."¹⁰ This

²⁰See Index.

²See ante, § 802.

³Act Mar. 2, 1793, c. 22, § 7, 1 Stat. 335; act Aug. 23, 1842, c. 188, § 6, 5 Stat. 518.

⁴See act June 19, 1878, c. 326, § 2, 20 Stat. 176, U. S. Comp. Stat. 1901, p. 572.

⁵Post, § 1447.

Fed. Proc.—45.

⁶See post, § 905.

⁷See post, § 925.

⁸See *Lancaster v. Keeler*, 123 U. S. 376, 31 L. ed. 238, 8 Sup. Ct. Rep. 197.

⁹*Importers, etc. Co. v. Lyons*, 134 Fed. 510.

¹⁰See post, § 900.

last provision, however, which was first enacted in 1872, restricts the power of making rules for common law causes which had previously been granted to the lower Federal courts except as respects attachment and executions, which are governed by R. S. §§ 915, 916. The early process acts pursued the policy of adopting the State procedure as existing at a given date, and permitted the Federal courts by rule to adopt later changes in the State practice if they saw fit.¹¹ The power to make rules was consequently broader.¹² The effect of R. S. § 914 is to make changes in State practice operative in the Federal courts forthwith, if at all, "any rule of court to the contrary notwithstanding."¹³ If the requirement as to conformity applies at all, it applies at once upon the adoption of the change in the State practice, a conflicting rule of court is abrogated ipso facto.¹⁴ This is not true as to change in the State law respecting attachment or execution.¹⁵

[b] Scope of power to make rules.

The extent to which Federal circuit and district courts can still make rules for their practice in common law causes, notwithstanding R. S. § 914, is not susceptible of precise statement.¹⁶ As to matters which are covered by specific State statutes or rules of the State courts, it depends upon the phrase "as near as may be," and merges itself in the broader question of the interpretation of R. S. § 914.¹⁷ If the subject matter of a State law or State rule of practice is such that it is not in force in Federal courts under the conformity clause, then the fact of its existence does not prevent the making of a Federal rule on the same subject, or abrogate one already made. Many cases deal with State provisions respecting practice that are or are not held in force in the Federal courts,¹⁸ but few have involved an existing and divergent Federal rule. In one case a State law changing and regulating the return time of process was held not to supersede the rules as to the time and place of return of process in the Federal court there sitting.¹⁹ Where the Federal court makes a rule notwithstanding an existing State law or State rule, the practitioner is justified in following such rule, because the adoption of the rule evinces an opinion that it is within the discretion conferred by "as near as may be." But every change in the local practice subsequent to a rule raises, anew, the question whether such change does not, under R. S. § 914, change the Federal practice and abrogate the rule.²⁰

¹¹See act May 19, 1828, c. 68, § 1, L. ed. 425, 15 Sup. Ct. Rep. 452; 4 Stat. 278. Osborne v. Detroit, 28 Fed. 385.

¹²See Mills v. Bank, 11 Wheat. 431, 6 L. ed. 512, sustaining a rule dispensing with proof of execution of a bond, not denied under oath; Pomeroy v. State Bank, 1 Wall. 592, 17 L. ed. 638, rule as to common law form of bill of exceptions. ¹⁴Republic Ins. Co. v. Williams, 3 Biss. 370, Fed. Cas. No. 11,707; see Morrison v. Bernards Twp. 35 Fed. 400.

¹³Rosenbach v. Dreyfuss, 2 Fed. 23; Ricard v. New Providence, 5 Fed. 433; Republic Ins. Co. v. Williams, 3 Biss. 370, Fed. Cas. No. 11,707; Hudson v. Parker, 156 U. S. 281, 39 L. ed. 625, 42 L. ed. 604, 18 Sup. Ct. Rep. 214. ¹⁵Lamaster v. Keeler, 123 U. S. 376, 31 L. ed. 238, 8 Sup. Ct. Rep. 247. ¹⁶See generally, Shepard v. Adams, 168 U. S. 625, 42 L. ed. 604, 18 Sup. Ct. Rep. 214. ¹⁷See post, § 900. ¹⁸Post, § 900. ¹⁹Ewing v. Burnham, 74 Fed. 384. ²⁰Republic Ins. Co. v. Williams, 3

As respects matters not covered by specific State statute or State rule, the Federal circuit and district courts undoubtedly have power to adopt rules of practice in common law causes not inconsistent with the Federal Constitution and laws. Congress did not intend "to place the courts of the United States in each State, in reference to their own practice and procedure, upon the footing merely of subordinate State courts, required to look from time to time to the Supreme Court of the State for authoritative rules for their guidance in those details."² They may adopt a rule for hearing issues of law within five days instead of at the next term, if there be no State statute to the contrary,³ and merely a State practice not based upon statute or written rule.⁴ They are not bound by the construction a State supreme court puts upon a law regarding practice.⁵ Nor are they bound by general State decisions upon questions of practice which are not in construction of specific statutes.⁶ They have power, in the absence of any State law, to make a rule respecting special appearance providing that the party agree to appear generally if the purpose of the special appearance is not sanctioned or allowed by the court.⁷ They may adopt a rule which includes and goes further than the State law as to mode of service of process.⁸ The details of the methods of doing the business of Federal courts is still under their control and may be governed by their rules.⁹ The power to require printed briefs has been upheld;¹⁰ and to dispense with proof of instruments in suit where execution not denied.¹¹ The power of the circuit courts to make rules in equity is considered elsewhere.¹² Power to make admiralty rules is derivable from R. S. § 918.¹³ Undoubtedly these must be consistent with the admiralty rules promulgated by the Supreme Court. Rules respecting the making up of the trial calendar;¹⁴ and for the collection and disposition of moneys¹⁵ have been upheld by *nisi prius* decisions.

Biss. 370. Fed. Cas. No. 11,707. Upon appeal the supreme court has assumed that a failure to change a rule after change in the State law was pursuant to the discretion conferred by "as near as may be." *Shepard v. Adams*, 168 U. S. 627, 42 L. ed. 602, 18 Sup. Ct. Rep. 214.

²*Erstein v. Rothschild*, 22 Fed. 61.

³But if there is a statute, it should be followed: *Rosenbach v. Dreyfuss*, 2 Fed. 23; *Republic Ins. Co. v. Williams*, 3 Biss. 370. Fed. Cas. No. 11,707; *Osborne v. Detroit*, 28 Fed. 385.

⁴*Erstein v. Rothschild*, 22 Fed. 61.

⁵See ante, § 10 []

⁶*Wall v. Chesapeake & O. Ry.* 95 Fed. 398, 95 C. C. A. 398; *Sanford v. Portsmouth*, 2 Flipp. 105, Fed. Cas. No. 12,315.

⁷*Mahr v. Union P. R. R.* 140 Fed. 925.

⁸*Lowry v. Story*, 31 Fed. 771.

⁹*Ewing v. Burnham*, 74 Fed. 384.

¹⁰*Neff v. Pennoyer*, 3 Sawy. 335, Fed. Cas. No. 10,184.

¹¹*Mills v. United States Bank*, 11 Wheat. 431, 6 L. ed. 512.

¹²Post, § 806.

¹³*Norton v. Rich*, 3 Mason, 443. Fed. Cas. No. 10,352; *The Epsilon*, 6 Ben. 378. Fed. Cas. No. 4,506; *The Alice Tainter*, 14 Blatchf. 225, Fed. Cas. No. 196.

¹⁴*Scott v. The Young American*. Newb. 107, Fed. Cas. No. 12,550; *Ward v. Chamberlain*, Fed. Cas. No. 17,152.

¹⁵*The Alice Tainter*, 14 Blatchf. 225, Fed. Cas. No. 196; *The Laurens*, 1 Abb. Adm. 508, Fed. Cas. No. 8,122.

[c] Rules need not be in writing.

The rules of the circuit and district courts have not always been formal or in writing.¹⁷ Uniform practice through a series of years, and judicial decision may constitute sufficient evidence of the existence of a rule.¹⁸

§ 805½. — to make rules in admiralty.

In all cases not provided for in the foregoing rules, [i. e. the general admiralty rules promulgated by the Supreme Court] the district and circuit courts are to regulate the practice of the said courts respectively in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

46th admiralty rule.

§ 806. Circuit courts' power to make rules in equity.

The circuit courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district concurring therein) may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

89th equity rule, as amended Apr. 16, 1894, 152 U. S. 710.

R. S. § 918¹ applies to equity cases as well as common law causes. In addition the equity rules promulgated by the Supreme Court contain the above delegation to the circuit courts of power to make further regulations. The power would seem to flow more logically from R. S. § 918, than from the above rule, as it is not perceived that the section authorizing the Supreme Court to make equity rules empowers them to delegate that function to the circuit courts. In any event the existence of power in the circuit courts to make rules in equity not inconsistent with any law of the United States or with any rule of the Supreme Court and subject to the right of the Supreme Court to supersede or alter the same at any time, cannot be questioned.² The scope of the circuit court's power to establish rules in equity is quite carefully examined by Blatchford, J., in a case sustaining the power to adopt the State attachment law

¹⁷Lowry v. Story, 31 Fed. 771.

¹⁸Fullerton v. Bank, 1 Pet. 604.
613, 7 L. ed. 280; Duncan v. United
States, 7 Pet. 435, 451, 8 L. ed. 739;
United States v. Douglass, 2 Blatchf.
214, Fed. Cas. No. 14,989; United
States v. Stevenson, 1 Abb. U. S. 495,
Fed. Cas. No. 16,395; Koning v.
Bayard, 2 Paine, 251, Fed. Cas. No.

7,924; Sellers v. Corwin, 5 Ohio, 398;
24 Am. Dec. 301; Wall v. Chesapeake
& O. Ry. 95 Fed. 403; Valorino v.
Thompson, 28 Fed. Cas. 867; Citizens
Bank v. Farwell, 56 Fed. 574, 6 C. C.
A. 24.

¹Ante, § 805.

²Steam S. C. Co. v. Jones, 13 Fed.
581, 21 Blatchf. 138.

to govern the issue of writ of sequestration as mesne process in equity.³ The circuit court cannot, however, make equity rules inconsistent with those of the Supreme Court;⁴ nor has it power to rescind the rules made by the Supreme Court.⁵ Yet it has power to relieve a party in a particular case against a requirement of the rules, as to time for pleading, that would work a hardship;⁶ and it may refuse to dismiss though complainant is technically in default under the equity rules.⁷

§ 807. Power to impose oaths and punish contempts.

The said courts [i. e. courts of the United States] shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority;^{[a]-[b]} provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice,^[c] the misbehavior of any of the officers of said courts in their official transaction,^[d] and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts.^{[e]-[i]}

R. S. § 725, U. S. Comp. Stat. 1901, p. 583.

[a] History of the statutory provision.

The original judiciary act invested the Federal courts with "power to punish by fine or imprisonment at the discretion of said courts, all contempts of authority in any cause or hearing before the same."¹⁰ An act of 1831¹¹ qualified the broad language of the original provision by declaring that "the power of the several courts of the United States to issue attachments and inflict summary punishments for contempt" should not extend to the cases mentioned in the foregoing proviso of R. S. § 725. R. S. § 725 is framed from these two enactments, though it will be noted that the word "summary" is omitted from the present law. It has been decided however, that the courts may still proceed summarily notwithstanding the omission.¹² The purpose of the qualification introduced by the act of 1831 has been said to be the prevention of punishment of newspaper criticism as

³Steam Stone C. Co. v. Jones, 13 Fed. 581, 21 Blatchf. 138.

⁴Bank of U. S. v. White, 8 Pet. 262, 269, 8 L. ed. 940, 941; Northwestern M. L. I. Co. v. Keith, 77 Fed. 375, 23 C. C. A. 196, and cases cited.

⁵Jenkins v. Greenwald, 1 Bond, 127, Fed. Cas. No. 7,270.

⁶Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161.

⁷Ryan v. Seaboard & R. R. Co. 89 Fed. 403; Electrolibration Co. v. Jackson, 52 Fed. 773.

¹⁰Act Sept. 24, 1789, c. 20, § 17. 1 Stat. 83.

¹¹Act March 2, 1831, c. 99, 4 Stat. 487.

¹²Eilenbecker v. Plymouth Co. 134 U. S. 37, 33 L. ed. 804, 10 Sup. Ct. Rep. 426; Ex parte Terry, 128

a contempt of court,¹³ pursuant to early decisions.¹⁴ The act of 1831 also made the offense of obstructing the administration of justice a crime against the United States and that provision is now R. S. § 5399. The statutory provisions respecting letters rogatory provide that "If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section forty hundred and seventy-one, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States."¹⁵ Other provisions for enforcing attendance and testimony of witnesses are contained in another chapter of this work.¹⁶

[b] Nature and limitations of Federal contempt power.

The Federal courts possess inherently a power to punish for contempt, just as do other courts.¹⁸ The above section, however, defines and limits the extent of the power exercisable by them.¹⁹ It has been doubted whether those limitations apply to the Supreme Court, since its powers are derived from the Constitution and not from Congress.²⁰ But they apply to the courts created by Congress and as much when sitting in equity, as at law.¹ Since it provides punishment by fine or imprisonment, the court has no power to punish in other manner, as, by disbarment;² although the same acts might constitute ground for disbarment proceedings.³ The fact that the act committed is also indictable, does not oust the right to punish it as a contempt if within the terms of R. S. § 725.⁴ The section should not be construed as extending the inherent contempt power of the courts to matters which do not constitute contempt, although possibly within its

U. S. 289, 32 L. ed. 405, 9 Sup. Ct. 14 Sawy. 267, 39 Fed. 857, 5 L.R.A. Rep. 77; Ex parte Savin, 131 U. S. 91.

267, 33 L. ed. 153, 9 Sup. Ct. Rep. 699; In re Neagle, 14 Sawy. 267, 39 Fed. 857, 5 L.R.A. 91.

¹³United States v. Anon. 21 Fed. Rep. 701; Kirk v. Milwaukee, etc. Co. 768; In re May, 2 Flip 562, 1 Fed. 26 Fed. 505; Hovey v. Elliott, 145 N. Y. 136, 39 N. E. 842, 39 L.R.A. 460;

¹⁴See Hollingsworth v. Duane, Wall. C. C. 77, Fed. Cas. No. 6,616; Bridges v. Sheldon, 18 Blatchf. 518, 7 Fed. 17.

Ex parte Poulson, Fed. Cas. No. 11, 350; Morse v. Montana Op. Co. 105 Fed. 337.

¹⁵R. S. § 40, 73, U. S. Comp. Stat. 1901, p. 2764.

¹⁶See generally, post, §§ 1742, et seq.

¹⁸United States v. Hudson, 7 Cranch, 32, 34, 3 L. ed. 260; In re

Nevitt, 117 Fed. 455, 54 C. A. 622; Ex parte Robinson, 19 Wall. 506, 22 L. ed. 205; United States v. New Bedford Bridge, 1 Wood. & M. 401, Fed. Cas. No. 15,867; In re Neagle, 750.

¹⁹Ex parte Robinson, 19 Wall. 506, 22 L. ed. 205; Savin, Petitioner, 131 U. S. 276, 33 L. ed. 153, 9 Sup. Ct. Rep. 701; Kirk v. Milwaukee, etc. Co. 26 Fed. 505; Hovey v. Elliott, 145 N. Y. 136, 39 N. E. 842, 39 L.R.A. 460; Bridges v. Sheldon, 18 Blatchf. 518, 7 Fed. 17.

²⁰Ex parte Robinson, 19 Wall. 506, 22 L. ed. 205.

¹Kirk v. Milwaukee, etc. Co. 26 Fed. 505.

²Ex parte Robinson, 19 Wall. 506, 22 L. ed. 205.

³United States v. Green, 85 Fed. 860.

⁴Ex parte Savin, 131 U. S. 275, 33 L. ed. 153, 9 Sup. Ct. Rep. 699; In re Brule, 71 Fed. 946; United States v. Terry, 14 Sawy. 427, 41 Fed. 773; Hillmon v. Mutual L. I. Co. 79 Fed. 750.

terms.⁵ Subordinate tribunals or officers such as commissioners have no power to punish for contempt,⁶ nor is there such a thing as contempt of an administrative body or officer in the absence of statute.⁷ A commissioner has no power to deny parties a right to be represented by counsel in advance of any judicial ascertainment of an alleged contempt.⁸ No other court than the one whose dignity is offended by the disobedience or misbehavior, has jurisdiction to punish a contempt.⁹ Hence a contempt prior to removal must be adjudged in the State court.¹⁰

[c] **Misbehaviour in courts presence or obstructing its functions.**

The Supreme Court has decided that the court while in session is present, within the meaning of this section, in every part of the place set apart for its use and the use of its officers, jurors and witnesses.¹² So that there may be contempts in the presence of the court in this sense which are not actually under the eye or within the view of the judge. Accordingly an attempt to bribe a witness from testifying, made in the hallway adjoining the court room and repeated in the witness room has been punished as contempt in the court's presence.¹³ Abusive language in the court room,¹⁴ or resisting removal from the court room by the marshal acting by the court's order,¹⁵ or committing an assault at the entrance,¹⁶ or misbehavior of a witness before a jury,¹⁷ all present plain cases of misbehavior in court. Misbehavior upon a piazza into which the windows of the court room open has also been held to be in the court's presence.¹⁸ Service of process in another cause upon a suitor attending a term of court, is contempt if in the actual or constructive presence of the court, but not otherwise.¹⁹

⁵Matter of Atlantic M. L. Ins. Co. 9 Ben. 337, Fed. Cas. No. 629.

⁶In re Perkins, 100 Fed. 950; Ex parte Perkins, 29 Fed. 905.

⁷Interstate Com. Comrs. v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 Sup. Ct. Rep. 1125; see In re Chadwick, 1 Low. 439, Fed. Cas. No. 2, 570; Matter of Meador, 1 Abb. 317, Fed. Cas. No. 9,375.

⁸Johnson v. Southern Bldg. Co. 99 Fed. 646.

⁹New Orleans v. New York M. Co. 20 Wall. 387, 22 L. ed. 354; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; In re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; In re Ellerbe, 4 McCrary, 449, 13 Fed. 530; Ex parte Broadley, 7 Wall. 364, 19 L. ed. 214; United States v. Green, 85 Fed. 859; In re Litchfield, 13 Fed. 863; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622.

¹⁰Kirk v. Milwaukee, D. C. Co. 26 Fed. 501; Voorhees v. Albright, 2 N. J. L. J. 57, Fed. Cas. No. 16,999.

¹²Ex parte Savin, 131 U. S. 277, 33

L. ed. 153, 9 Sup. Ct. Rep. 699; In re Brule, 71 Fed. 947.

¹³Ex parte Savin, 131 U. S. 276, 33 L. ed. 153, 9 Sup. Ct. Rep. 699; see In re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703.

¹⁴United States v. Emerson, 4 Cranch, C. C. 188, Fed. Cas. No. 15,050; United States v. Carter, 3 Cranch, C. C. 423, Fed. Cas. No. 14,740.

¹⁵In re Terry, 13 Sawy. 456, 36 Fed. 419.

¹⁶United States v. Emerson, 4 Cranch, 188, Fed. Cas. No. 15,050.

¹⁷United States v. Caton, 1 Cranch, C. C. 150, Fed. Cas. No. 14,758.

¹⁸United States v. Carter, 3 Cranch, 423, Fed. Cas. No. 14,740.

¹⁹Blight v. Fisher, Pet. C. C. 41, Fed. Cas. No. 1,542. In Bridges v. Sheldon, 7 Fed. 43, 46, service in a new case was made upon a suitor attending the taking of depositions before a court commissioner; and the court held it a contempt upon the theory that it was virtually dis-

There is some question whether misbehavior so near "as to obstruct the administration of justice" means merely physical disturbance in the vicinity, interrupting the quiet of the court while in session, and hindering the transaction of its business, or would include misbehavior tending to obstruct justice in a more figurative sense.² In the latter view it has been held a contempt to bribe a witness in a cause though the bribery was not in or near the court room³ and to assault a court commissioner upon the highway, for official acts;⁴ and perhaps contempt for a juror to talk about a case though the court has failed to admonish him not to;⁵ or to form an opinion after subpoena in order to disqualify himself.⁶ While another case has held that writing of letters by a State insurance commissioner respecting the fairness of litigation carried on by certain companies could not be deemed an obstruction of the administration of justice within this section;⁷ and another that publication of libelous or slanderous matter respecting the court or its proceedings is not contempt within this clause.⁸ The Supreme Court has declared that the bringing of a pretended and fictitious controversy before it for decision is a grave contempt of court.⁹ The fact that the misbehavior primarily involved merely a court examiner or commissioner,¹⁰ or the bailiff,¹¹ or the grand jury,¹² or a bankruptcy register or referee, ¹³ does not make it any the less a contempt of court.

[d] Official misbehavior of court officers.

The cases holding that attorneys may be punished by contempt proceedings for failure to pay over or account to clients for money received or collected,¹⁵ and for insulting an examiner with abusive language upon the street and attempting to control the testimony given,¹⁶ would seem to come within this clause. In other words attorneys are court officers.¹⁷ So

obedience of the order for taking the depositions, and not upon the theory of misbehavior in the court's presence. This question is to be distinguished from the question of privilege and the remedy by quashing the service: *Atchison v. Morris*, 11 Fed. 583, 11 Biss. 191; *Larned v. Griffin*, 12 Fed. 592; *Parker v. Hotchkiss*, 1 Wall. 269, Fed. Cas. No. 10,739.

²See *United States v. Anon*, 21 Fed. 769.

³*In re Brule*, 71 Fed. 948.

⁴*Ex parte McLeod*, 120 Fed. 130.

⁵*In re May*, 2 Flip. 562, 1 Fed. 737.

⁶*United States v. Devaughan*, 3 Cranch, C. C. 84, Fed. Cas. No. 14, 952.

⁷*Hillmon v. Mutual L. I. Co.* 79 Fed. 749.

⁸*Morse v. Montana O. P. Co.* 105 Fed. 337. See *supra*, note[a]. However, the court may exclude reporters from the courtroom: *United States*

v. Holmes, 1 Wall. Jr. 1, Fed. Cas. No. 15,383.

⁹*Lord v. Veazie*, 8 How. 254, 12 L. ed. 1070; *Cleveland v. Chamberlain*, 1 Black. 419, 17 L. ed. 93.

¹⁰*United States v. Anon*, 21 Fed. 770; *Ex parte McLeod*, 120 Fed. 141.

¹¹*Offutt v. Parrott*, 1 Cranch, C. C. 154, Fed. Cas. No. 10,453.

¹²*United States v. Caton*, 1 Cranch, C. C. 150, Fed. Cas. No. 14,758.

¹³*In re Allen*, 13 Blatchf. 271, Fed. Cas. No. 208; *In re Speyer*, 6 Nat. Bank Reg. 255, Fed. Cas. No. 13,239.

¹⁵*Jeffries v. Laurie*, 27 Fed. 199; *In re Paschal*, 10 Wall. 491, 19 L. ed. 992. But an order which in effect is a final judgment for money cannot be enforced by contempt: *In re Atlantic M. Ins. Co.* 17 Nat. Bank B. Reg. 368, Fed. Cas. No. 629.

¹⁶*United States v. Anon*, 21 Fed. 771.

¹⁷See *United States v. Anon*, 21

deputy marshals may be attached for failure to pay over moneys received where there is no disobedience of any specific order, but mere misbehavior.¹⁸ And grand jurors as court officers may be punished by contempt for misbehavior,¹⁹ such as discussing matters with persons outside the grand jury room.²⁰ It is also held that jailers may be punished for contempt, for inflicting cruel punishment;² and that a bank which is a court depository may be liable for contempt, though not its servants or agents.³ Resignation from office does not oust jurisdiction to proceed for a prior contempt.⁴

[e] Disobedience of or resistance to writ, process, order, etc.

These are the most frequent occasions for contempt proceedings. It is contempt for witnesses to disobey the subpoena summoning them to appear before a court,⁶ or before a master or commissioner,⁷ and it may be a contempt to refuse to answer proper questions.⁸ But failure to attend may be excused by showing sickness;⁹ and an interpreter or expert will not be committed except in case of necessity.¹⁰ Contempt proceedings will also lie under this section for disobedience by court officers and attorneys of orders to pay costs¹¹ or to pay over moneys collected.¹² Orders to a bankrupt to surrender up property may be enforced by contempt proceedings,¹³ and a bankrupt receiving money which should be paid to the assignee is guilty of contempt.¹⁴ But a stipulation though made in open court is not an order of court within R. S. § 725.¹⁵ The order disobeyed must be a valid one and want of jurisdiction will entitle a committed contemnor to release on habeas corpus.¹⁶ The sureties on a stipulation in admiralty cannot be compelled to pay by contempt proceedings;¹⁷ and any order for payment of money

Fed. 771, and cases cited; *Ex parte Davis*, 112 Fed. 139.

¹⁸*United States v. Mann*, 2 Brock. 9, Fed. Cas. No. 15,716; *Bagley v. Yates*, 3 McLean, 465, Fed. Cas. No. 725; *The Laurens*, Abb. Adm. 508, Fed. Cas. No. 8,122.

¹⁹*United States v. Kilpatrick*, 16 Fed. 765.

²⁰*In re Summerhayes*, 70 Fed. 769.

²*In re Birdsong*, 30 Fed. 599, 4 L.R.A. 628.

³*Southern Dev. Co. v. Houston*, etc. R. R. 27 Fed. 344.

⁴*The Laurens*, Abb. Adm. 508, Fed. Cas. No. 8,122.

⁶*Voss v. Luke*, 1 Cranch, C. C. 357, Fed. Cas. No. 17,014; *In re Ellerbe*, 4 McCrary, 449, 13 Fed. 530; *Carman v. Emerson*, 71 Fed. 264, 18 C. C.A. 38.

⁷*In re Spofford*, 62 Fed. 443; *In re Judson*, 3 Blatchf. 148, Fed. Cas. No. 7,563; see R. S. § 4073, quoted *supra* note [a].

⁸*Roberts v. Walley*, 14 Fed. 167; *United States v. Caton*, 1 Cranch. C. C. 150 Fed. Cas. No. 14,758; see *Clark v. Wilson*, 33 Fed. 331.

⁹*Ex parte Beebes*, 2 Wall. Jr. 127. Fed. Cas. No. 1,220.

¹⁰*In re Roelker*, 1 Sprague, 276. Fed. Cas. No. 11,995.

¹¹*Bogart v. Electrical S. Co.* 23 Blatchf. 552, 27 Fed. 722.

¹²*Matter of Pitman*, 1 Curt. 186. Fed. Cas. No. 11,184.

¹³*In re Purvine*, 96 Fed. 194, 37 C. C. A. 446; *Wayne K. Mills v. Nugent*, 104 Fed. 530; *In re Dresser*, 3 Nat. Bank Reg. 557, Fed. Cas. No. 4,077.

¹⁴*In re Hayden*, 7 Nat. Bank Reg. 192, Fed. Cas. No. 6,257.

¹⁵*Ex parte Buskirk*, 72 Fed. 14, 18 C. C. A. 410.

¹⁶*Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

¹⁷*The Blanche Page*, 16 Blatchf. 1, Fed. Cas. No. 1,524.

which amounts merely to a money judgment cannot be enforced by contempt proceedings in States where imprisonment for debt is abolished.¹⁸

[f]—injunction and mandamus orders and decrees.

Disobedience of an injunction order is punishable as contempt.¹ So also is disobedience of a mandamus.² A restraining order must be obeyed in its entirety until modified.³ It is no less a contempt that the disobedience was the result of negligence and not deliberate.⁴ It is necessary that the parties have actual notice or the circumstances be such as to charge them therewith;⁵ and if there is doubt upon that point the contempt proceedings should be dismissed.⁶ All persons having knowledge of the injunction order are bound by it and punishable for disobedience of it, though they are not parties to the suit;⁷ and were not served with copy thereof;⁸ and though a party is served as one of unknown defendants⁹ and persons who advise aid or assist in the acts of disobedience are equally in contempt.¹⁰ So it is a violation of an injunction against a partnership for the members individually to disobey in their capacity as servants of others.¹¹

Contempt proceedings for violating an injunction may be defeated by showing that the court was without jurisdiction to grant the injunction,¹² and the injunction was unwarranted by law;¹⁴ but not by showing mere error in the proceeding. Immateriality of the evidence is no defense for contempt proceedings on refusal to testify before a special examiner.¹⁵ If the order was not actually in existence its subsequent execution nunc pro tunc cannot make acts already committed punishable as contempt.¹⁶

¹⁸In re Atlantic Ins. Co. 17 Nat. Bank Reg. 368, Fed. Cas. No. 629. Contempt proceedings are allowable for attorney's failure to account: Jeffries v. Laurie, 27 Fed. 199.

¹In re North B. G. Co. 27 Fed. 795; United States v. Lancaster, 44 Fed. 885; In re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; United States v. Debs, 64 Fed. 764.

²In re Delgado, 140 U. S. 586, 35 L. ed. 579, 11 Sup. Ct. Rep. 874; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622; In re Copenhagen, 54 Fed. 660.

³Pokegama, etc. Co. v. Klamath, etc. Co. 86 Fed. 538; Ullman v. Ritter, 72 Fed. 1000.

⁴Indianapolis W. Co. v. American S. Co. 75 Fed. 972.

⁵Sickels v. Borden, 4 Blatchf. 14. Fed. Cas. No. 12,833.

⁶Whipple v. Hutchinson, 4 Blatchf. 190, Fed. Cas. No. 17,517.

⁷In re Reese, 107 Fed. 945, 47 C. C. A. 87.

⁸Ex parte Richards, 117 Fed. 658; 14,934.

Ex parte Lennon, 64 Fed. 320, 12 C. C. A. 134.

⁹United States v. Agler, 62 Fed. 824. But parties should be served: In re Cary, 10 Fed. 626.

¹⁰Bate R. Co. v. Gillett, 30 Fed. 683; Societe, etc. v. Western D. Co. 42 Fed. 96; United States v. Debs, 64 Fed. 738. But legal advice in good faith may not be contempt: In re Watts, 190 U. S. 1, 47 L. ed. 933. 23 Sup. Ct. Rep. 718.

¹¹Dadirrian v. Gullian, 79 Fed. 784.

¹²United States v. Debs, 64 Fed. 739; Elliott v. Peirsol, 1 Pet. 340, 7 L. ed. 170.

¹⁴Worden v. Searles, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814.

¹⁵Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 36 Sup. Ct. Rep. 358.

¹⁶Ex parte Buskirk, 72 Fed. 14, 18 C. C. A. 410; United States v. Day, 6 Am. L. Reg. 632, Fed. Cas. No. 14,934.

[g] —in receivership matters and affecting property in custody.

Interference with property in custody or the officers in control thereof is punishable as contempt.¹⁸ It is disobedience of the process under which it was taken.¹⁹ This rule is frequently asserted and enforced in receivership cases,²⁰ and especially in railroad receiverships.¹ The bringing of an action against a receiver without leave,² or the levying upon property in custody by process from another court, constitute contempt.³ Interference with the dominion of a bankruptcy court over the bankrupt estate by proceedings in a State court is a contempt.⁴ But where the custody is not actual but only constructive, it is not always a contempt for the owner to remove it.⁵

[h] Procedure—criminal nature of proceeding.

Different modes of procedure have been adopted for different species of contempt. From this viewpoint contempts have been divided by some authorities into those committed under the eye or within the view of the court,⁷ and those arising from acts committed elsewhere. Other authorities distinguish between contempts which have disturbed the peace or otherwise offended against the dignity of the court and those which have merely injured the rights of parties litigant, i. e., between civil or remedial and criminal or punitive contempts.⁸ The distinction between civil or remedial and criminal or punitive contempts, has most frequently been drawn in arguing the right to review, to a jury trial, and questions respecting punishment and pardon. Notwithstanding decisions elsewhere to the contrary⁹ the Supreme Court has uniformly declared that contempt proceedings are always criminal in character, at least for purposes of appeal.¹⁰ They are however *sui generis*,¹¹ and there is no right to a jury trial even

¹⁸In *re Higgins*, 27 Fed. 444.

¹⁹*Sabin v. Fogarty*, 70 Fed. 483.

²⁰*Wiswall v. Sampson*, 14 How. 65, 14 L. ed. 322; In *re Tyler*, 149 U. S. 181, 37 L. ed. 695, 13 Sup. Ct. Rep. 789; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379.

¹*Secor v. Toledo, etc. R. R.* 7 Biss. 513, Fed. Cas. No. 12,605; *United States v. Kane*, 23 Fed. 748; In *re Doolittle*, 23 Fed. 344; In *re Acker*, 66 Fed. 290, *King v. Ohio, etc. R. R.* 7 Biss. 529, Fed. Cas. No. 7,800; *Thomas v. Cincinnati, etc. R. R.* 62 Fed. 803.

²*Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975.

³In *re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Ex parte Huidekoper*, 55 Fed. 709.

⁴In *re Litchfield*, 13 Fed. 863; *Phelps v. Sellick*, 8 Nat. Bank Reg. 390, Fed. Cas. No. 11,079; In *re Steadman*, 8 Nat. Bank Reg. 319, Fed.

Cas. No. 13,330; In *re Tift*, 11 Fed. 463.

⁵*United States v. Seeley*, 27 Fed. Cas. No. 16,248a.

⁷*Ex parte Terry*, 128 U. S. 309, 32 L. ed. 410, 9 Sup. Ct. Rep. 77; see *Bessette v. Conkey Co.* 194 U. S. 329, 48 L. ed. 1002, 24 Sup. Ct. Rep. 665.

⁸See *United States v. Anonymous*, 21 Fed. 765; In *re Nevitt*, 117 Fed. 448, 54 C. C. A. 622.

⁹See *Boyd v. Glucklich*, 116 Fed. 142, 53 C. C. A. 451; *Indianapolis W. Co. v. American S. Co.* 75 Fed. 975; In *re Acker*, 66 Fed. 292.

¹⁰*Ex parte Kearney*, 7 Wheat. 42, 5 L. ed. 392; *New Orleans v. New York, etc. Co.* 20 Wall. 392, 22 L. ed. 357; *O'Neil v. United States*, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776; *Bessette v. Conkey*, 194 U. S. 335, 48 L. ed. 1005, 24 Sup. Ct. Rep. 665.

¹¹*O'Neal v. United States*, 190 U.

when arising in common law causes.¹² The classification of contempt into those committed under the eye of the court and those committed elsewhere has reference to the necessity for any hearing or inquiry into the fact before adjudging the contempt. If committed under the eye of the court it may punish without the formalities and inquiry proper in other cases;¹³ otherwise there must be some proceeding taken which will apprise the party of the charge against him and give him a reasonable opportunity for explanation, denial or other defense.¹⁴ The court has considerable latitude in its choice of a mode of procedure. Interrogatories and citation or information are not absolutely essential.¹⁵ A petition duly verified, or an affidavit, setting forth specifically the acts or omissions constituting the contempt¹⁶ and praying either for an attachment of the contemner, or rule upon him to show cause at a given time why he should not be punished for contempt, is proper mode of proceeding.¹⁷ So an information might be convenient and proper where the contempt was not by a party to a cause and was rather criminal than civil in its essential aspects.¹⁸ It is usual and proper to entitle a contempt proceeding arising out of disobedience by a party to a cause, of an order, writ or process therein, especially where merely civil and remedial in character, as in the principal suit.¹⁹ But where the contempt is not incidental to and does not arise out of proceedings or orders in a cause, and where it is by one not a party,²⁰ and especially where the criminal aspects of the act done are dominant, it is proper to entitle the proceeding in the name of the United States¹ upon the relation of petitioner, against the contemnor.² Where the contempt proceeding is merely civil and remedial the injured party is the proper complainant against the alleged contemnor.³ But where the act or omission has criminal aspects a party injured or the United State through its law officers may initiate the proceeding.⁴

S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776; *Bessette v. Conkey*, 194 U. S. 335, 48 L. ed. 1005, 24 Sup. Ct. Rep. 665.

¹²Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Ex parte Tillinghast, 4 Pet. 108, 7 L. ed. 798; *Eilenbecker v. Plymouth Co.* Dist. Ct. 134 U. S. 36, 33 L. ed. 803, 10 Sup. Ct. Rep. 426; *In re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

¹³Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Ex parte Savin, 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699.

¹⁴Ex parte Savin, 131 U. S. 278, 33 L. ed. 153, 154, 9 Sup. Ct. Rep. 699.

¹⁵See Ex parte Savin, 131 U. S. 278, 33 L. ed. 153, 154, 9 Sup. Ct. Rep. 699.

¹⁶*Parkhurst v. Kinsman*, 2 Blatchf. 76, Fed. Cas. No. 10,759.

¹⁷*American C. Co. v. Jacksonville*, etc. Ry. 52 Fed. 938.

¹⁸See *United States v. Debs*, 64 Fed. 725.

¹⁹*Fischer v. Hayes*, 19 Blatchf. 13, 6 Fed. 70.

²⁰*Erwin v. United States*, 37 Fed. 470, 2 L.R.A. 229; *Goodrich v. United States*, 42 Fed. 392.

¹*Fanshawe v. Tracy*, 4 Biss. 490, Fed. Cas. No. 4,643; *United States v. Wayne*, Wall. C. C. 134, Fed. Cas. No. 16,654; *Durant v. Washington Co.* 1 Woolw. 377, Fed. Cas. No. 4,191; *In re Ellerbe*, 4 McCrary, 449, 13 Fed. 530.

²*Fischer v. Hayes*, 19 Blatchf. 13, 6 Fed. 71.

³*Secor v. Singleton*, 35 Fed. 376.

⁴See *United States v. Debs*, 64 Fed. 725.

[i] —hearing, punishment and appeal.

The court is bound by no technical rules in the hearing of contempt proceedings. It may ascertain the facts in any fair mode of procedure,⁷ and without the intervention of a jury.⁸ Affidavits are admissible.⁹ In cases of criminal contempt it is the rule of common law courts, apparently prevailing in the Federal courts in common law causes,¹⁰ that the contemner's sworn answer denying the charge must be taken as true. In equity and bankruptcy this rule does not obtain;¹¹ though it is necessary to prove the accused's guilt clearly and to the satisfaction of the court.¹²

The court may punish by fine or imprisonment, but not by disbarment.¹³ In case of a corporation in contempt, the punishment may be inflicted either by way of fine on the corporation, or fine or imprisonment of the guilty agent.¹⁴ The court has power on inflicting a fine to order the defendant to stand committed until it is paid.¹⁵ It has been held that the court punishing a contempt may modify, suspend, or relieve against the penalty imposed;¹⁶ but there is a difference of opinion as to the power of the executive to grant relief under the pardoning power.¹⁶

It has been uniformly held that a judgment in contempt proceedings is not reviewable in the Supreme Court either by appeal or error,¹⁸ though appeal lies from a decision in habeas corpus in a contempt case.¹⁹ But there is a right of review in the circuit court of appeals, and when the contemnor is not a party to the suit in which the contempt occurs and the contempt judgment cannot be regarded as interlocutory to any other cause, it is a final reviewable judgment.²⁰ Error and not appeal is the proper mode of review.¹ The Supreme Court may, however, review by writ of error a circuit court's judgment for contempt, where questions arising under the Constitution are involved.²

⁷In re Savin, 131 U. S. 278, 33 L. ed. 153, 154, 9 Sup. Ct. Rep. 699.

⁸Supra, note[h].

⁹In re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563.

¹⁰Boyd v. Gucklich, 116 Fed. 141, 53 C. C. A. 451; In re May, 2 Flip. 562, 1 Fed. 743; United States v. Dodge, 2 Gall. 313, Fed. Cas. No. 14,975; matter of Pitman, 1 Curt. 186, Fed. Cas. No. 11,184.

¹¹Boyd v. Gucklich, 116 Fed. 141, 53 C. C. A. 451; See United States v. Anon, 21 Fed. 767, 768, discussing the authorities.

¹²United States v. Atchison, etc. R. R. 16 Fed. 853; In re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563; Sabin v. Fogarty, 70 Fed. 483.

¹³Supra, note [b].

¹⁴United States v. Memphis, etc. R. R. 6 Fed. 237.

¹⁵Fischer v. Hayes, 19 Blatchf. 13, 6 Fed. 72.

¹⁶See In re Mullee, 7 Blatchf. 23,

Fed. Cas. No. 9,911; In re Mason, 43 Fed. 515; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622.

¹⁸Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391; New Orleans v. New York, etc. Co. 20 Wall. 387, 22 L. ed. 354; Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Bessette v. W. B. Conkey Co. 194 U. S. 335, 48 L. ed. 1004, 24 Sup. Ct. Rep. 665.

¹⁹In re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; In re Savin, 131 U. S. 273, 33 L. ed. 152, 9 Sup. Ct. Rep. 699; Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391.

²⁰Bessette v. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665.

¹Ibid: Bessette v. Conkey, 133 Fed. 165, 66 C. C. A. 291.

²See Nelson v. United States, 201 U. S. 98, 50 L. ed. 674, 26 Sup. Ct. Rep. 358.

§ 808. Contempt power of Court of Claims.

The said court [i. e. the Court of Claims] . . . may punish for contempt in the manner prescribed by the common law.

Part of R. S. § 1070, U. S. Comp. Stat. 1901, p. 740.

§ 809. Bankruptcy courts' power to punish for contempt.

The courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory, and the District of Alaska . . . are hereby invested, within their respective territorial limits . . . with such jurisdiction at law or in equity as will enable them . . . to . . . ¹³ enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment . . . ¹⁶ punish persons for contempts committed before referees.

Part of § 2 act July 1, 1898, c. 541, 30 Stat. 545, 546, U. S. Comp. Stat. 1901, p. 3420.

§ 810. Contempts before bankruptcy referees.

A person shall not, in proceedings before a referee,¹ disobey or resist any lawful order, process or writ;² misbehavior during a hearing or so near the place thereof as to obstruct the same;³ neglect to produce, after having been ordered to do so, any pertinent document, or⁴ refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, that no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance, shall be first paid or tendered to him. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

§ 41 of act July, 1, 1898, c. 541, 30 Stat. 556, U. S. Comp. Stat. 1901, p. 3437.

This provision is declaratory in its nature and comprises merely the recognized subjects for the exercise of the contempt power.⁴ The punishment must be by the court and must not be left to the discretion of the referee.⁵ Contempt proceedings have been resorted to in enforcing orders to a bankrupt to surrender property,⁶ or similar orders directed to third persons.⁷

§ 811. Contempt proceeding against defaulting garnishee.

If any person summoned as garnishee, as aforesaid, [i. e. in a suit by the United States against a corporation] fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.

R. S. § 937, U. S. Comp. Stat. 1901, p. 690.

§ 812. Contempt of order to appear before Commerce Commission.

Any failure to obey such order of the court [i. e. an order issued by the circuit court requiring a refusing common carrier to appear before the Interstate Commerce Commission and produce books, etc.,] may be punished by such court as a contempt thereof.

Part of § 12, act Feb. 4, 1887, c. 104, 24 Stat. 383, as amended Mar. 2, 1889, and Feb. 10, 1891, U. S. Comp. Stat. 1901, p. 3162.

The refusal to answer the summons of the Commission is not a contempt because it is a mere subordinate administrative body; an order of court and disobedience thereto, are essential.⁹

§ 813. Formal defects of procedure disregarded—amendments permitted.

No summons, writ, declaration,^[e] return, process,^[a] judgment,^[u] or other proceedings^{[h]-[k]} in civil causes, in any court of the United States,^[e] shall be abated, arrested, quashed or reversed^{[m]-[n]} for any defect or want of form;^[bb] but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party de-

⁴Boyd v. Gucklich, 116 Fed. 135, 53 C. C. A. 451.

⁵Smith v. Belford, 106 Fed. 658, 45 C. C. A. 526.

⁶In re Purvine, 96 Fed. 194, 37 C. C. A. 446; In re Levin, 113 Fed. 498.

⁷Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

⁹Interstate Com. Com. v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 Sup. Ct. Rep. 1125.

murring specially sets down ^[c] together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time^[c] permit either of the parties to amend any defect in the process^[d] or pleadings,^{[e]-[f]} upon such conditions^[g] as it shall, in its discretion^[a] and by its rules, prescribe.^{[a]-[b]}

R. S. § 954, U. S. Comp. Stat. 1901, p. 696.

[a] History and general construction of provision.

The foregoing provision was originally section thirty-two of the judiciary act of 1789,¹² In 1872 a further enactment was passed, respecting the amendment of process in the circuit and district courts, and that provision is now R. S. § 948.¹³ R. S. § 954 is similar to the ancient English statute of Jeofails,¹⁴ and the Supreme Court has in some cases declared that it is no broader than that statute,¹⁵ although in others,¹⁶ and in the opinions of justices of that court sitting on circuit,¹⁷ there has been a disposition towards great liberality in its construction and application.¹⁸ Differences of opinion upon this point have resulted in part from the influence of the local state practice in individual cases, and in part from the verbal differences between the first and the last portions of the section. While the first declaration that defects of form shall not effect a dismissal or reversal applies to all the proceedings in a cause and to all stages thereof including appeal, the final clause permitting amendment of "process or pleadings" upon such conditions as the court shall prescribe, permits very broad powers of amendment,¹⁹ broader than were allowable under the English statute, but restricted to "process or pleadings," thus excluding verdict judgment and proceedings on appeal, and inferentially contemplating only amendments before judgment and by the trial court while the case is in fieri.²⁰ There is plainly a difference in the extent of the powers

¹²Act Sept. 24, 1789, c. 20, § 32, 1 Stat. 91.

¹³See post, § 840.

¹⁴32 Hen. VIII.

¹⁵Garland v. Davis, 4 How. 131, 11 L. ed. 907; Phillips, etc. Con. Co. v. Seymour, 91 U. S. 656, 23 L. ed. 344, 345.

¹⁶Murphy v. Stewart, 2 How. 263, 281, 11 L. ed. 261; Parks v. Turner, 12 How. 39, 13 L. ed. 883.

¹⁷See Smith v. Jackson, 1 Paine, 496, Fed. Cas. No. 13,065; Erstein v. Rothschild, 22 Fed. 61; see quotation from Miller. J. in McDonald v. Nebraska, 101 Fed. 177, 41 C. C. A. 278; Tobey v. Claffin, 3 Sum. 379, Fed. Cas. No. 14,066.

¹⁸See also In re Glass, 119 Fed. 444.

Dancel v. United S. M. Co. 120 Fed. 839; Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248; Smith v. Railway Co. 56 Fed. 458, 5 C. C. A. 557; McDonald v. Nebraska, 101 Fed. 177, 41 C. C. A. 278 and cases cited; Gregg v. Gier, 4 McLean, 208, Fed. Cas. No. 5,799.

¹⁹See Smith v. Allyn, 1 Paine, 453, Fed. Cas. No. 13,000; Comings v. The Ida Stockdale, 22 Pitt. L. J. 9, Fed. Cas. No. 3,052.

²⁰Comings v. The Ida Stockdale, 22 Pitt. L. J. 9, Fed. Cas. No. 3,052; Smith v. Jackson, 1 Paine, 486, Fed. Cas. No. 13,065; Smith v. Allyn, 1 Paine, 453, Fed. Cas. No. 13,000; but see Anon. 1 Gall. 22, Fed. Cas. No.

granted by this section to trial courts prior to judgment over "process and pleading," and those granted to appellate courts over the proceedings as a whole. The section applies in equity,¹ bankruptcy² and admiralty³ and to suits on forfeitures under the revenue laws,⁴ as well as in common law causes. It has also been held applicable to a contempt proceeding.⁵

[b] Applicability of State laws as to amendment.

In common law causes R. S. § 914⁸ adopting State forms and modes of procedure, must needs be considered upon the power of amendment, as well as R. S. § 954.⁹ Some cases have been held that R. S. § 914 in no way limits this section,¹⁰ and others that the state laws as to amendment are adopted for Federal common law causes by R. S. § 914.¹¹ It has also been held that a State law enlarging the right of amendment would be applied, but not one less liberal than the Federal enactments.¹² It would be difficult to justify an application of a State law in any case where R. S. § 954 or any other Federal statutes was mandatory.¹³ Nor can it be denied that the right of Federal courts to allow amendments exists by virtue of R. S. § 954, and is not dependent on State statutes.¹⁴ But where the section confers discretion or a power to make provision by rule, it would clearly be a proper exercise of that discretion to conform to and apply the local law.¹⁵ R. S. § 914 only conforms the Federal to the State practice "as near as may be" and itself confers a discretion upon Federal courts to decline to follow State provisions. Hence while it would generally be proper discretion to follow the State law as to amendments, it might sometimes be

¹*Dancel v. United S. M. Co.* 120 Fed. 839.

²*Infra*, note[e].

³*Reed v. Cowley*, 1 Nat. Bank R. 516, Fed. Cas. No. 11,644; *In re Glass*, 119 Fed. 509.

⁴*Infra*, note[e].

⁵*United States v. Distilled Spirits*, 1 Abb. 573, Fed. Cas. No. 15,943; *Friedenstein v. United States*, 125 U. S. 224, 31 L. ed. 736, 8 Sup. Ct. Rep. 838; *In re Chadwick*, 1 Low. 439, Fed. Cas. No. 2,570.

⁸*Post*, § 900.

⁹*Van Doren v. Pennsylvania R. R.* 93 Fed. 261, 35 C. C. A. 282.

¹⁰*Kent v. Bay S. G. Co.* 93 Fed. 887.

¹¹*Rosenbach v. Dreyfuss*, 1 Fed. 393; *Mack v. Porter*, 72 Fed. 243, 18 C. C. A. 527; *Chamberlain v. Mensing*, 51 Fed. 512. See *Atlantic, etc. R. R. v. Laird*, 164 U. S. 393, 41 L. ed. 488, 17 Sup. Ct. Rep. 120; *West v. Smith*, 101 U. S. 265, 266, 25 L. ed. 810; *Liverpool, etc. Co. v. Gunther*, 116 U. S. 113, 29 L. ed. 579, 6 Sup. Ct. Rep. 306; and *Henderson*

v. Louisville, etc. R. R. 123 U. S. 61, 31 L. ed. 92, 8 Sup. Ct. Rep. 60, where the Supreme Court applied the State law, though without considering the question; to same effect see *Nussbaum v. Northern Ins. Co.* 40 Fed. 337.

¹²*Norton v. Dover*, 14 Fed. 106.

¹³See *Dwight v. Merritt*, 18 Blatchf. 305, 4 Fed. 614.

¹⁴*Mexican C. R. R. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248; *Oliver v. Raymond*, 108 Fed. 727; *McDonald v. Nebraska*, 101 Fed. 171, 41 C. C. A. 278.

¹⁵*Elting v. Campbell*, 5 Blatchf. 183, Fed. Cas. No. 4,422; see also *Phillips Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Post v. Wise*, 101 Fed. 204; *Hodges v. Kimball*, 91 Fed. 845, 34 C. C. A. 103; *United States Bank v. Lyon Co.* 48 Fed. 632; *Norton v. Dover*, 14 Fed. 106; *Clark v. Sohler*, 1 Wood. & M. 368, Fed. Cas. No. 2,835; *Miller v. Gages*, 4 McLean, 436, Fed. Cas. No. 9,571; *Whitaker v.*

equally proper to decline to do so.¹⁶ Thus it is held that the question of amending the return of substituted service of process is one of the power of the court and State decisions are not binding.¹⁷

[bb] Defect of form defined.

In an early case at circuit Chief Justice Marshall in deciding an appeal in an action of debt to recover a statutory penalty, held that a declaration averring the offense against the "collector or one of them" was defective in form merely. He therefore held the defect cured on appeal by the statute of Jeofails. "The defect seems to me" he said "to be a defect of form whenever the defendant must, of necessity, be guilty of a breach of the law, and have incurred the penalty for which the suit is brought, if the allegation in the declaration be true. This seems to me to constitute the difference between form and substance."²⁰

[c] Special demurrer in Federal practice.

It has been said that this section confers the right to file a special demurrer in actions in the Federal court.¹ There is no direct adjudication of the Supreme Court upon that point.² Such demurrers though abolished in certain jurisdictions,³ are however, generally permissible in the practice of the various States.

[d] Defects and amendment of process.

R. S. § 948, enacted in 1872, also confers power on the circuit and district courts to amend all process "where the defect has not prejudiced and the amendment will not injure the party against whom such process issues."⁵ The process referred to in R. S. § 754 would seem under the rule of *noscitur a sociis*, to refer to process in civil causes only, but R. S. § 948 is not thus limited in its terms or context, so that power to amend process in criminal causes⁶ is derivable therefrom. These provisions have been said to confer an unconditional and positive power of amendment.⁷ Though generally recognized as extending only to defects or want of form.⁸ The United

Pope, 2 Woods, 463, Fed. Cas. No. 17,528; Henderson v. Louisville, etc. R. R. 123 U. S. 61, 31 L. ed. 92, 8 Sup. Ct. Rep. 60; Fitzpatrick v. Flanagan, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. Rep. 369 and Wolf v. Cook, 40 Fed. 432, following the State law as to various amendments.

¹⁶See Tobey v. Claffin, 3 Sumn. 379, Fed. Cas. No. 14,066; North, etc. Co. v. Burnham, 102 Fed. 669, 42 C. C. A. 584.

¹⁷King v. Davis, 137 Fed. 198.

²⁰Jacob v. United States, 1 Brock, 520, Fed. Cas. No. 7,157.

¹Cage v. Jeffries, Hempst. 409, Fed. Cas. No. 2,287; see instances of special demurrer: Lockington v. Smith,

Pet. C. C. 475, Fed. Cas. No. 8,448; Jackson v. Rundlet, 1 Wood. & M. 381, Fed. Cas. No. 7,145; Tyler v. Hand, 7 How. 582, 12 L. ed. 827; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 479.

²See Chidress v. Emory, 8 Wheat. 672, 5 L. ed. 712.

³See Graffin v. Jackson, 40 N. J. L. 443.

⁵Post, § 840.

⁶See Anon. 1 Gall. 22, Fed. Cas. No. 444, decided before R. S. § 948 was enacted.

⁷Erstein v. Rothschild, 22 Fed. 61.

⁸Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 614.

States courts have plenary power to allow amendments of process⁹ where there is anything to amend by.¹⁰ But if process is ineffectual, no amendment can be made which will render it effectual.¹¹ The power granted is a power to amend a defect in process, and a power to amend a want of form in process.¹² The decided cases show a variety of amendments that have been allowed. A writ may be amended by a proper indorsement of the cause of action¹³ or a correction of the title.¹⁴ A writ calling defendant by a wrong name may be amended by consent;¹⁵ as by striking out administrator and inserting executor;¹⁶ or by correcting the name of plaintiff;¹⁷ but leave to strike out the name of the wife may be refused.¹⁸ A summons may not be amended by the subsequent addition of the signature of the clerk, and seal of the court.¹⁹ The return day of process may be amended when erroneous. The court has discretion to permit an officer to amend his return with or without notice at any time,²⁰ as to both mesne and final process.¹ But a sheriff cannot amend his return on a summons after the cause has been removed to a Federal Court.² An execution may be made to conform to the judgment.³ A fieri facias may be amended by striking out the name of the deceased plaintiff.⁴ And longer time be given to a State than to other parties.⁵ A capias may be amended by inserting the christian name of the plaintiff;⁶ but not so as to alter the name of the plaintiff.⁷ The return to a writ of peremptory mandamus may be amended;⁸ even after the

⁹Eberly v. Moore, 24 How. 147, 16 L. ed. 612.

¹⁰Furniss v. Ellis, 2 Brock. 14, Fed. Cas. No. 5,162; Randolph v. Barrett, 16 Pet. 138, 10 L. ed. 914; Tayloe v. Wharfield, 2 Cranch C. C. 248, Fed. Cas. No. 13,772.

¹¹Chamberlin v. Bittersohn, 48 Fed. 42; Peaslee v. Haberstro, 15 Blatchf. 472, Fed. Cas. No. 10,884; Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 614; Brown v. Pond, 5 Fed. 31.

¹²Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 616.

¹³Miller v. Gages, 4 McLean, 436, Fed. Cas. No. 9,571.

¹⁴Furniss v. Ellis, 2 Brock. 15, Fed. Cas. No. 5,162; but see Albers v. Whitney, 1 Story, 310, Fed. Cas. No. 137.

¹⁵Elliott v. Holmes, 1 McLean, 466, Fed. Cas. No. 4,392.

¹⁶Randolph v. Barrett, 16 Pet. 138, 10 L. ed. 914.

¹⁷Georgetown v. Beatty, 1 Cranch C. C. 234, Fed. Cas. No. 5,344; Gulf, etc. R. R. v. James, 48 Fed. 148, 1 C. C. A. 53.

¹⁸Moore v. Carter, Hemp. 64, Fed. Cas. No. 9,782a.

¹⁹Dwight v. Merritt, 4 Fed. 614, S. C. 18 Blatchf. 306.

²⁰Norton v. Dover, 14 Fed. 106; Hampton v. Rouse, 15 Wall. 684, 21 L. ed. 250; Semmes v. Rouse, 91 U. S. 21, 23 L. ed. 193; Rickards v. Ladd, 6 Saw. 40, Fed. Cas. No. 11,804.

¹Phoenix Ins. Co. v. Wulf, 1 Fed. 775; Semmes v. United States, 91 U. S. 21, 23 L. ed. 193; French v. Edwards, 5 Saw. 266, Fed. Cas. No. 5,098.

²Hawkins v. Pierce, 79 Fed. 452.

³Murphy v. Lewis, Hemp. 17, Fed. Cas. No. 9,950a.

⁴Lane v. Beltzhoover, Taney, 110, Fed. Cas. No. 8,047.

⁵Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

⁶Birch v. Butler, 1 Cranch C. C. 319, Fed. Cas. No. 1,425.

⁷Comegyss v. Robb, 2 Cranch C. C. 141, Fed. Cas. No. 3,049.

⁸Supervisors v. Durant, 9 Wall. 736, 19 L. ed. 813.

return day;⁹ or after the marshal has ceased to hold office.¹⁰ The date on a summons has been changed where necessary to validate the writ;¹¹ and the ad damnum clause.¹² An affidavit for garnishment has been amended;¹³ and seal has been added to a State court's attachment after removal to the Federal court.¹⁴

[e] Amendments of plaintiff's pleadings in general.

The cases present numerous instances of amendments of the plaintiff's pleadings. If a declaration fails to allege the matter in controversy it may be amended;¹⁷ and the claim for damages may be increased.¹⁸ A party may amend his complaint so as to demand two-thirds instead of the entire property.¹⁹ Want of proper jurisdictional averments may be amended;²⁰ even after judgment or decree.¹ A declaration in ejectment may be amended by inserting a later date of the lease.² The date of the demise may be amended;³ and it may be extended after judgment, but not except on notice.⁴ Stating it under a new title will not be allowed.⁵ If judgment in ejectment is rendered after the lapse of the term stated in the demise, it may be amended by enlarging the term.⁶ In slander an amendment may be allowed changing the words charged.⁷ A libel or information at common law to enforce a forfeiture may be amended.⁸ So a petition in the court of claims may be amended.⁹ A pleading may be amended so as to bring the case within the exception to the statute of limitations;¹⁰ as that the fraud was not discovered until the time that

⁹*Linthicum v. Remington*, 5 Cranch C. C. 546, Fed. Cas. No. 8,377.

¹⁰*Cushing v. Laird*, 4 Ben. 70, Fed. Cas. No. 3,508.

¹¹*Gilbert v. South, C. & Co.* 113 Fed. 523.

¹²*Davis v. Kansas C. R. R.* 32 Fed. 863.

¹³*Booth v. Denike*, 65 Fed. 43.

¹⁴*Wolf v. Cook*, 40 Fed. 432.

¹⁷*Lanning v. Dolph*, 4 Wash. C. C. 624, Fed. Cas. No. 8,073.

¹⁸*Gregg v. Gier*, 4 McLean, 208, Fed. Cas. No. 5,799; *Good v. Martin*, 1 Colo. 406.

¹⁹*Van Zandt v. Argentine Min. etc.* Co. 2 McCrary, 159, 8 Fed. 725.

²⁰*In re Plymouth, etc.* Co. 135 Fed. 1000, 68 C. C. A. 434; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248; *Nevada Co. v. Farnsworth*, 89 Fed. 164; *Smith v. Jackson*, 1 Paine, 486, Fed. Cas. No. 13,065; *Maddox v. Thorn*, 60 Fed. 217, 8 C. C. A. 574.

¹*Mexican C. R. R. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610.

²*Walden v. Craig*, 9 Wheat. 576, 6 L. ed. 164; *Blackwell v. Patton*, 7 Cranch, 471, 3 L. ed. 408.

³*Blackwell v. Patton*, 7 Cranch, 471, 3 L. ed. 408; *Smith v. Vaughan*, 10 Pet. 367, 9 L. ed. 458; *McDaniel v. Wailes*, 4 Cranch C. C. 201, Fed. Cas. No. 8,746; see *Day v. Chism*, 10 Wheat. 449, 6 L. ed. 363.

⁴*Ledgerwood v. Pickett*, 1 McLean, 143, Fed. Cas. No. 8,175.

⁵*Gale v. Babcock*, 4 Wash. C. C. 199, Fed. Cas. No. 5,188.

⁶*Walden v. Craig*, 9 Wheat. 576, 6 L. ed. 164.

⁷*Dougherty v. Bentley*, 1 Cranch C. C. 219, Fed. Cas. No. 4,024.

⁸*United States v. Stevenson*, 6 Int. Rev. Rec. 221, Fed. Cas. No. 16,398; *United States v. Batchelder*, 9 Int. Rev. Rec. 98, Fed. Cas. No. 14,541; *United States v. Barrels*, 3 Int. Rev. Rec. 114, Fed. Cas. No. 16,502; *United States v. Whiskey*, 7 Phila. 603, Fed. Cas. No. 16,671; *United States v. One Hundred and Twenty-three Casks*, 1 Abb. U. S. 573, Fed. Cas. No. 15,943; *Anon.* 1 Gall. 22, Fed. Cas. No. 444.

⁹*Molina v. United States*, 6 Ct. of Cl. 269.

¹⁰*Piatt v. Vattier*, 9 Pet. 405, 9 L. ed. 173; *The Harmony*, 1 Gall. 123,

would remove the bar of the statute.¹¹ A plea of the statute of limitations can be amended only when shown necessary for the justice of the case.¹² Blanks may be filled in a declaration to avoid the statute of limitations on payment of costs.¹³ Leave to file a plea of the statute of limitations applied for out of time will be refused.¹⁴ Leave may be granted to verify pleadings as required by statute;¹⁵ but not on the trial to the surprise of the other party.¹⁶ Amendment is allowable which consists in adding a new count of a kindred cause of action;¹⁷ and when it is founded on the same transaction, and admits the same pleading, defense, and proof.¹⁸ A declaration may be amended so as to refer to the right statute.¹⁹ Plaintiff may be allowed to withdraw a replication, and file a denial or plea.²⁰ After demurrer sustained the plaintiff is not entitled as matter of right to amend his bill; it is within the discretion of the court to allow it; and the order denying the motion to amend is not reviewable if the record does not show what amendment was desired.¹ But plaintiff may show a subsequent capacity to sue after demurrer sustained.² A defective bill of particulars may be amended.³ It was a rule of the common law still asserted in many cases that plaintiff could not amend if there was nothing to amend by and that a complainant cannot abandon his case and make a new and different one by amendments;⁴ as by changing an action on the case into action in debt.⁵ But some late cases show great liberality in allowing amendments even although they change or add to the cause of action previously stated,⁶ and the court in its discretion has allowed an amendment of a merely inferential allegation of ground of recovery.⁷ An amendment

Fed. Cas. No. 6,081; *Tierman v. Woodruff*, 5 McLean, 135, Fed. Cas. No. 14,027.

¹¹*Wharton v. Lowrey*, 2 Dall. 364, 1 L. ed. 417.

¹²*Thompson v. Afflick*, 2 Cranch C. C. 46, Fed. Cas. No. 13,939.

¹³*Ferris v. Williams*, 1 Cranch C. C. 281, Fed. Cas. No. 4,749.

¹⁴*Reed v. Clark*, 3 McLean, 480, Fed. Cas. No. 11,643.

¹⁵*Loving v. Fairchild*, 1 McLean, 333, Fed. Cas. No. 8,556.

¹⁶*Benedict v. Maynard*, 6 McLean, 21, Fed. Cas. No. 1,296.

¹⁷*Tiernan v. Woodruff*, 5 McLean, 135, Fed. Cas. No. 14,027; *Bowen v. Needles Nat. Bank*, 79 Fed. 49.

¹⁸*Tiernan v. Woodruff*, 5 McLean, 135, Fed. Cas. No. 14,027; *United States v. Batchelder*, 9 Int. Rev. Rec. 98, Fed. Cas. No. 14,541.

¹⁹*Rosenbach v. Dreyfuss*, 1 Fed. 391.

²⁰*McGill v. Shehee*, 1 Cranch C. C. 49, Fed. Cas. No. 8,796.

¹*National Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815.

²*Swatzel v. Arnold*, 1 Woolw. 383, Fed. Cas. No. 13,682.

³*Pott v. Arthur*, 15 Blatchf. 314, Fed. Cas. No. 11,319; *Rickard v. Barney*, 32 Fed. 581; but see *Dieckerhoff v. Robertson*, 29 Fed. 781.

⁴*Fiedler v. Carpenter*, 2 Wood. & M. 211, Fed. Cas. No. 4,759; *Schofield v. Fitzhugh*, 1 Cranch C. C. 108, Fed. Cas. No. 12,474; *Sneed v. McCoull*, 12 How. 407, 13 L. ed. 1043; *Postmaster General v. Ridgway*, Gilp. 135, Fed. Cas. No. 11,313; *Shields v. Barrow*, 17 How. 144, 15 L. ed. 159; *Goodyear v. Bourn*, 3 Blatchf. 266, Fed. Cas. No. 5,561. But see *The Harmony*, 1 Gall. 123, Fed. Cas. No. 6,081.

⁵*Ten Broeck v. Pendleton*, 5 Cranch C. C. 464, Fed. Cas. No. 13,827; *Schofield v. Fitzhugh*, 1 Cranch C. C. 108, Fed. Cas. No. 12,474.

⁶*In re Glass*, 119 Fed. 509; *Oliver v. Raymond*, 108 Fed. 927.

⁷*Great N. Ry. v. Herron*, 136 Fed. 49, 68 C. C. A. 599.

has been refused, designed to bring in a defendant against whom the statute does not give jurisdiction.⁸

[f] Amendment of defendants pleadings.

A defendant may amend his plea;¹⁰ or withdraw a plea;¹¹ or file an additional plea;¹² or add an affidavit thereto;¹³ or he may withdraw his plea and demurrer.¹⁴ But upon the overruling of the demurrer the court may refuse to permit him to file an answer setting up a new cause of action.¹⁵ Defendant may file a plea in abatement;¹⁶ or an additional plea, and amend those already filed.¹⁷ New pleas should be allowed only where a good reason is shown for it, and on terms;¹⁸ but leave to file a special plea is allowed where it does not appear clearly bad;¹⁹ and an insufficient plea will be rejected.²⁰ It will not be allowed if it essentially changes the ground of the defense, unless for cogent reasons;¹ and where the case is called for trial, only when necessary for the justice of the case.² It cannot be allowed if judgment on demurrer has been affirmed on appeal.³ Defendant cannot amend his answer so as to deny a fact affirmatively passed upon and determined by the Supreme Court.⁴ The court will permit the withdrawal of a demurrer;⁵ but leave to amend a demurrer which does not go to the merits will be refused.⁶ An answer in a libel suit may sometimes be amended by inserting denials in respect of the amount of the damages.⁷ An amendment to the answer will not be allowed unless good cause and the use of diligence be shown.⁸ An admission cannot be with-

⁸Adams v. Heckscher, 80 Fed. 742.

¹⁰McGill v. Sheehee, 1 Cranch C. C. 49, Fed. Cas. No. 8,796.

¹¹Melburne v. Kearnes, 1 Cranch C. C. 77, Fed. Cas. No. 9,543; Gill v. Patten, 1 Cranch C. C. 114, Fed. Cas. No. 5,427; Short v. Wilkinson, 2 Cranch C. C. 22, Fed. Cas. No. 12,810.

¹²Semmes v. O'Neale, 1 Cranch C. C. 246, Fed. Cas. No. 12,654; Teasdale v. Jordan, 2 Hayw. 281, Fed. Cas. No. 13,814.

¹³Loving v. Fairchild, 1 McLean 333, Fed. Cas. No. 8,556.

¹⁴Deakins v. Lee, 1 Cranch C. C. 442, Fed. Cas. No. 3,697; Krouse v. Sprogell, 1 Cranch C. C. 78, Fed. Cas. No. 7,940; Alricks v. Slater, 1 Cranch C. C. 72, Fed. Cas. No. 259.

¹⁵Baltimore & O. R. R. Co. v. Camp, 81 Fed. 807, 26 C. C. A. 626.

¹⁶Eberly v. Moore, 24 How. 147 16 L. ed. 612.

¹⁷Polard v. Dwight, 4 Cranch, 421, 2 L. ed. 666; Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. ed. 200; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; Day v. Chism, 10 Wheat. 449, 6 L. ed. 363.

¹⁸Childs v. Lenig, 1 Wall. Jr. 305, Fed. Cas. No. 2,680.

¹⁹Gill v. Patten, 1 Cranch C. C. 114, Fed. Cas. No. 5,427.

²⁰Kerr v. Force, 3 Cranch C. C. 8, Fed. Cas. No. 7,730.

¹Smith v. Babcock, 2 Wood. & M. 246, Fed. Cas. No. 13,009; Morehead v. Jones, 3 Wall. Jr. 306, Fed. Cas. No. 9,791.

²Bullock v. Van Pelt, Bald. 463, Fed. Cas. No. 2,131; Bastable v. Wilson, 1 Cranch C. C. 124, Fed. Cas. No. 1,097; Allen v. Magruder, 3 Cranch C. C. 6, Fed. Cas. No. 230; Childs v. Lenig, 1 Wall. Jr. 305, Fed. Cas. No. 2,680.

³Hodgson v. Marine Ins. Co. 1 Cranch C. C. 569, Fed. Cas. No. 6,566.

⁴Walker v. Brown, 86 Fed. 364.

⁵Suckley v. Slade, 5 Cranch C. C. 123, Fed. Cas. No. 13,587.

⁶Offutt v. Beatty, 1 Cranch, C. C. 213, Fed. Cas. No. 10,448.

⁷Goodyear, etc. Co. v. White, 17 Blatchf. 5, Fed. Cas. No. 5,601.

⁸Lamb v. Parkman, 21 Law Rep. 589, Fed. Cas. No. 8,019.

drawn if there is no allegation of mistake in fact or of law.⁹ The amendment of an answer by the assertion of an additional fact was refused, where the fact was known, at the time the answer was filed.¹⁰ It is not allowed where due diligence has not been exercised,¹¹ but it is not necessary that the new fact should be first established.¹²

[g] Amendment as to parties.

A defect of parties may be cured by amendment;¹⁵ as by striking out parties;¹⁶ or by inserting the names of the members of a firm.¹⁷ But not if the form of the action is such that the member is already embraced.¹⁸ So an error in a name may be corrected;¹⁹ as in the name of a corporation.²⁰ An amendment will be allowed, striking out a name from a petition.¹ On a plea of misnomer plaintiff may amend as to the name of defendant;² or by striking out the name of a defendant.³ Leave to dismiss as to certain defendants will not be granted after the court has rendered an opinion granting a motion to direct a verdict for defendants.⁴ A defect of nonjoinder of the husband in suit by the wife is curable by amendment.⁵ Whether an amendment substituting a different party plaintiff is allowable, is often an important question where the statute of limitations has become a bar to a claim if the amendment is not allowable. There are cases permitting amendment by substitution of the name of the real party in interest, for a nominal plaintiff;⁶ and holding that a refusal to permit such substitution where a claim would otherwise be defeated by the bar of the statute, is an abuse of discretion.⁷ Where the substitution of a new

⁹Morehead v. Jones, 3 Wall. Jr. 306, Fed. Cas. No. 9,791; Waterman v. Merrill, 2 Abb. U. S. 478, Fed. Cas. No. 17,258.

¹⁰Cross v. Morgan, 6 Fed. 241.

¹¹Snead v. McCoull, 12 Fed. 407, 13 L. ed. 1043; Clifford v. Coleman, 13 Blatchf. 210, Fed. Cas. No. 2,894; Ross v. Carpenter, 6 McLean, 382, Fed. Cas. No. 12,072; India Rubber Co. v. Phelps, 8 Blatchf. 85; Fed. Cas. No. 7,025; Webster Loom Co. v. Higgins, 13 Blatchf. 349, Fed. Cas. No. 17,341; Suydam v. Truesdale, 6 McLean, 459, Fed. Cas. No. 13,656.

¹²Smith v. Babcock, 2 Wood & M. 246, Fed. Cas. No. 13,009.

¹⁵Douglas v. Butler, 6 Fed. 228.

¹⁶Connolly v. Taylor, 2 Pet. 556, 7 L. ed. 518; Cole S. M. Co. v. Virginia G. H. W. Co. 1 Sawy. 470, Fed. Cas. No. 2,989.

¹⁷Tibbs v. Parrott, 1 Cranch C. C. 177, Fed. Cas. No. 14,022.

¹⁸United States v. McCoy, 54 Fed. 107.

¹⁹Furniss v. Ellis, 2 Brock. 14, Fed. Cas. No. 5,162.

²⁰Georgetown v. Beatty, 1 Cranch C. C. 234, Fed. Cas. No. 5,344.

¹Whitaker v. Pope, 2 Woods, 463, Fed. Cas. No. 17,528; Tobey v. Clafflin, 3 Sumn. 379, Fed. Cas. No. 14,066; but not substituting another in its place, Comegys v. Robb, 2 Cranch, C. C. 141, Fed. Cas. No. 3,049.

²Nelson v. Barker, 3 McLean, 379, Fed. Cas. No. 10,101; Scull v. Bridle, 2 Wash. C. C. 200, Fed. Cas. No. 12,570; see Craig v. Brown, Pet. C. C. 139, Fed. Cas. No. 3,326; Albers v. Whitney, 1 Story, 310, Fed. Cas. No. 137.

³Greeley v. Smith, 3 Story, 76, Fed. Cas. No. 5,747.

⁴Wright v. Southern Ry. Co. 80 Fed. 260.

⁵Douglas v. Butler, 6 Fed. 228.

⁶Essex Co. Nat. Bank v. Bank of Montreal, 7 Biss. 193, Fed. Cas. No. 4,532; Whitaker v. Pope, 2 Woods, 463, Fed. Cas. No. 17,528; McDonald v. Nebraska, 101 Fed. 171, 41 C. C. A. 278. But see Morris v. Barney, 1 Cranch C. C. 245, Fed. Cas. No. 9,826.

⁷Hodges v. Kimball, 91 Fed. 845,

plaintiff would also substitute a different cause of action it would not seem allowable.⁸

[h] Amendment of verdict.

It is well settled that R. S. § 954 applies to and permits amendment of verdicts.¹⁰ Hence if a verdict is general, it may be amended so as to apply to the count under which the evidence is given.¹¹ Leave may be granted to amend a verdict in replevin after the jury had returned and another cause had been tried.¹² A verdict in assumpsit "that defendant is guilty in manner and form as alleged" is amenable.¹³ On a stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal, and deliver it to the officer in charge and disperse, the entry of the verdict in proper form is allowed by this section.¹⁴ The court may enter the verdict in such form as to give legal effect to what the jury unmistakably found, under Rev. Stat., § 954, and the Practice Act of Illinois.¹⁵ The verdict may be amended to correct a mistake, in the nature of a clerical error, in announcing or making the record of the verdict actually agreed upon;¹⁶ and in a proceeding in equity to remedy a mistake in announcing the verdict of a jury the jurors are competent witnesses to prove that the verdict read out in the court by their foreman was not their verdict, but the result of an oversight by him in making the announcement.¹⁷ Omission of the word "dollars" in a verdict is immaterial.¹⁸

[i] Amendment on removal.

This section, both in letter and spirit, confers the power and makes it the duty of courts to cure defects in the record by enlarging the time for filing a transcript on the removal of a cause from a State court.¹ An amended transcript may be filed disclosing the requisite citizenship.² The declaration may be amended by inserting new counts for the same cause of action.³ But a sheriff may not amend his return of service of process in a suit begun

34 C. C. A. 103; Van Doren v. Penn. R. R. 93 Fed. 260, 35 C. C. A. 282.

⁸See *Morris v. Barney*, 1 Cranch C. C. 245, Fed. Cas. No. 9,286; *Comegys v. Robb*, 2 Cranch C. C. 141, Fed. Cas. No. 3,049; *The Detroit*, 1 Brown Adm. 141, Fed. Cas. No. 3,832.

¹⁰*Murphy v. Stewart*, 2 How. 263, 11 L. ed. 261; *Parks v. Turner*, 12 How. 39, 13 L. ed. 883; *Snyder v. United States*, 112 U. S. 217, 28 L. ed. 698, 5 Sup. Ct. Rep. 119; *Hopkins v. Orr*, 124 U. S. 513, 31 L. ed. 525, 8 Sup. Ct. Rep. 591. *Osborn v. Altschul*, 93 Fed. 383, 35 C. C. A. 354; *Gay v. Joplin*, 13 Fed. 653, 4 Mc Crary, 459, and see note thereto.

¹¹*Murphy v. Stewart*, 2 How. 263, 11 L. ed. 262; *Stockton v. Bishop*, 4 How. 155, 11 L. ed. 918.

¹²*Arguelles v. Wood*, 2 Cranch C. C. 579, Fed. Cas. No. 520.

¹³*Lincoln v. Iron Co.* 103 U. S. 412, 26 L. ed. 518.

¹⁴*Koon v. Ins. Co.* 104 U. S. 106, 26 L. ed. 670, S. C. 3 Morr. Trans. 125.

¹⁵*Koon v. Phoenix Mut. L. Ins. Co.* 104 U. S. 106, 26 L. ed. 670.

¹⁶*Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.* 71 Fed. 826.

¹⁷*Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co.* 76 Fed. 479, 22 C. C. A. 283.

¹⁸*Hopkins v. Orr*, 124 U. S. 513, 31 L. ed. 525, 8 Sup. Ct. Rep. 591.

¹*Woolridge v. McKenna*, 8 Fed. 663.

²*Kaeiser v. Illinois Cent. R. R. Co.* 6 Fed. 1, 2 McCrary, 187.

³*West v. Smith*, 101 U. S. 263, 25 L. ed. 810.

in the State court, after removal.⁴ A defective removal bond may be amended by a new one filed *nunc pro tunc*.⁵ A seal omitted from the attachment issued by the State court may be amended in the Federal court if the State law permits.⁶ A complaint framed as at law and placed on the law calendar may be amended after demurrer, reformed into a bill in equity, and placed on the equity calendar.⁷

[j] Amendments in equity.

R. S. § 954 applies to equity as well as to law cases. In addition there are several equity rules upon the subject.¹⁰ Amendments in mere matters of form, dates, or verbal inaccuracies, are liberally allowed.¹¹ The court has power in the interest of justice to permit an amendment to defective pleadings, both of bills and answers.¹² A bill may be amended by making new parties;¹³ or by adding an averment of citizenship;¹⁴ even after interlocutory decree on demurrer;¹⁵ and after remand from the Supreme Court.¹⁶ An invitation to other creditors to come in at any time before answer may be stricken out.¹⁷ A bill may be amended by adding a prayer for relief.¹⁸ It may be amended so as to conform its special prayer to its real purpose.¹⁹ So if the facts authorize a redemption from a creditors' sale, though the period for redemption is past, the court will permit an amendment to the prayer for relief.²⁰ If the amendment introduces a new case, defendant may plead in abatement or otherwise.¹ When due diligence is shown, the bill may be amended, even though the claim is stale.² An amendment is not allowable which introduces a new cause of action.³ An amendment which changed the character of the bill was however, allowed in a special case even after final decree.⁴ Where the original petition was lost, the court may allow the filing of a new petition.⁵ The amended bill should state so

⁴Hawkins v. Peirce, 79 Fed. 452.

⁵Harris v. Delaware, etc. R. R. Co. 18 Fed. 833; Deford v. Mehaffy, 13 Fed. 481.

⁶Wolf v. Cook, 40 Fed. 432.

⁷Dancel v. United S. M. Co. 120 Fed. 839.

¹⁰Rules No. 28, 29, 30, 35, 45, 46, 7 L. ed. 125.

See post, §§ 956 et seq.

¹¹Smith v. Babcock, 3 Sum. 583, Fed. Cas. No. 13,008.

¹²Neale v. Neales, 9 Wall. 1, 19 L. ed. 590; Foote v. Silsby, 1 Blatchf. 545, Fed. Cas. No. 4,918; Battle v. Mutual L. Ins. Co. 10 Blatchf. 417, Fed. Cas. No. 1,109; Caster v. Woods, Bald. 289, Fed. Cas. No. 2,505.

¹³Fisher v. Rutherford, Bald. 188, Fed. Cas. No. 4,823.

¹⁴Fisher v. Rutherford, Bald. 188, Fed. Cas. No. 4,823; Keene v. Wheatley, 4 Phila. 157, Fed. Cas. No. 7,644.

¹⁵Fisher v. Rutherford, Bald. 188, Fed. Cas. No. 4,823; Hilliard v. Brevoort, 4 McLean, 24, Fed. Cas. No.

6,505; Spofford v. Ritten, 4 McLean, 253, Fed. Cas. No. 13,244.

¹⁶Jackson v. Ashton, 10 Pet. 480, 9 L. ed. 502.

¹⁷Yates v. Arden, 5 Cranch C. C. 526, Fed. Cas. No. 18,126.

¹⁸Horsburg v. Baker, 1 Pet. 232, 7 L. ed. 125.

¹⁹Partee v. Thomas, 11 Fed. 772; see Estill v. Deckard, 4 Baxt. 497.

²⁰Burgess v. Graffam, 10 Fed. 216.

¹Keene v. Wheatley, 4 Phila. 157, Fed. Cas. No. 7,644.

²Wharton v. Lowrey, 2 Dall. 364, 1 L. ed. 417; Fisher v. Rutherford, Bald. 188, Fed. Cas. No. 4,823; Copen v. Flesher, 1 Bond, 440, Fed. Cas. No. 3,211.

³The Circassian, 2 Ben. 171, Fed. Cas. No. 2,723; see Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398.

⁴The Tremolo Patent, 23 Wall. 518, 23 L. ed. 97.

⁵Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603.

much of the original bill as is necessary.⁶ An amendment relates back to the filing of the original bill, and is incorporated into and is a part of it.⁷ An amendment was allowed where it was clear the cause was tried as it must have been tried, had the bill been originally drawn as amended.⁸ On a motion made before final argument, leave may be granted to amend an answer, so as to set up a new defense.⁹ An application to reform an answer is more favorably received than one to strike it off and substitute another.¹⁰ In a particular case an amendment was allowed so as to deny the validity of a patent;¹¹ and an amendment in an answer, on the ground of mistake or error in the admission of an infringement, was denied.¹² An amendment will not make evidence admissible which was taken under objections before admission.¹³ A motion to amend by adding new parties defendant after replication where plaintiff was in a position to make the amendment before, will not be allowed.¹⁴ A bill not framed with a view to compel the receiver and back tax collector to proceed with the collection of taxes cannot be amended so as to obtain relief against such a collector.¹⁵ An amendment to an answer cannot be made after an interlocutory decree.¹⁶ In equity the party amending may be required to pay costs.¹⁷ A motion to amend by averment on information and belief that the invention was in public use more than two years, denied.¹⁸

[k] Amendments in admiralty.

Certain of the admiralty rules apply to and govern the matter of amendments in admiralty.² A libel or information to enforce a forfeiture may be amended;³ or a libel in rem for violation of a municipal law.⁴ In case of smuggling, an amendment is allowed, to show that a foreign-owned vessel is liable to penalty for the infraction of duty laws.⁵ An informal libel or information in rem may be amended by leave of court.⁶ A libel in admiralty may be amended as to parties,⁷ by striking out names of

⁶Pierce v. West, 3 Wash. C. C. 354, Fed. Cas. No. 10,910.

⁷Gaylord v. Ft. W. M. & C. R. Co. 6 Biss. 286, Fed. Cas. No. 5,284.

⁸Tremaine v. Hitchcock, 23 Wall. 518, 23 L. ed. 97.

⁹Snow v. Tapley, 13 Off Gaz. 548, Fed. Cas. No. 13,147.

¹⁰Caster v. Wood, Bald. 289, Fed. Cas. No. 2,505.

¹¹Morehead v. Jones, 3 Wall. Jr. 306, Fed. Cas. No. 9,791.

¹²Ruggles v. Eddy, 11 Blatchf. 524, Fed. Cas. No. 12,118.

¹³Roberts v. Buck, 6 Fish. Pat. Cas. 325, Fed. Cas. No. 11,897.

¹⁴Clifford v. Coleman, 13 Blatchf. 210, Fed. Cas. No. 2,894; see Gaylord v. Fort Wayne & Co. 6 Biss. 286, Fed. Cas. No. 5,284.

¹⁵Meriwether v. Garrett. 102 U. S. 472, 26 L. ed. 197.

¹⁶Wilson v. Turberville, 2 Cranch C. C. 27, Fed. Cas. No. 17,844.

¹⁷Foot v. Silsby, 1 Blatchf. 545, Fed. Cas. No. 4,918; Yates v. Arden, 5 Cranch C. C. 526, Fed. Cas. No. 18,126; Davis v. Leslie, 1 Abb. Adm. 123, Fed. Cas. No. 3,639.

¹⁸Webster Loom Co. v. Higgins, 13 Blatchf. 349, 954, Fed. Cas. No. 17,341.

²Adm. Rule 24; see post, § 1201.

³The Caroline v. United States, 7 Cranch, 498, 3 L. ed. 418; The Edward, 1 Wheat. 261, 4 L. ed. 86.

⁴The Marianna Flora, 11 Wheat. 1, 6 L. ed. 407; Anon. 1 Gall, 22, Fed. Cas. No. 444.

⁵United States v. The Queen, 4 Ben. 237, Fed. Cas. No. 16,107.

⁶The Caroline v. United States, 7 Cranch, 498, 3 L. ed. 418.

⁷The Commander-in-Chief, 1 Wall. 43, 17 L. ed. 609.

libelants,⁸ as to name of the pilot,⁹ or by discharging the master.¹⁰ But it cannot be amended by striking out the name of the sole libellant and substituting another.¹¹ It may be amended by striking out unnecessary and impertinent allegations,¹² or immaterial averments as to ownership;¹³ or by adding new allegations;¹⁴ or a new cause of forfeiture;¹⁵ though not if barred by the statute of limitations.¹⁶ Averments may be added, as of negligence;¹⁷ or an averment that it is prosecuted for all interested who may come in and establish their rights.¹⁸ An amendment will be allowed to enable a party to obtain a contribution out of damages due for the loss of the vessel.¹⁹ A new cause of action may be introduced by amendment when it corresponds with the original bill;²⁰ but it cannot be amended so as to change from a libel in rem to a libel in personam;¹ or so as to increase the amount of the claim;² nor to show that a party was formerly owner, and sold with a covenant to discharge all liens.³ It may be amended by inserting a prayer for a decree against a party liable, even after a decree in rem has been rendered.⁴ An amendment to an answer will be allowed, though the effect be to defeat the action and compel libellant to seek another forum.⁵ A supplemental libel alleging new matter, and an answer thereto, may be filed after appeal in the discretion of the court.⁶ District courts, in the exercise of a sound discretion, may allow libels to be amended, even at the hearing;⁷ or at any stage of the proceedings;⁸ till the termination of the cause.⁹ But this is only done in the interest of sub-

⁸Taylor v. Harwood, Taney, 437, Fed. Cas. No. 13,794.

⁹Newell v. Norton, 3 Wall. 257, 18 L. ed. 271.

¹⁰United States v. The Queen, 11 Blatchf. 416, Fed. Cas. No. 16,108.

¹¹The Detroit, 1 Brown Adm. 141, Fed. Cas. No. 3,832.

¹²American Ins. Co. v. Johnson, Blatchf. & H. 9, Fed. Cas. No. 303.

¹³United States v. The Queen, 4 Ben. 237, Fed. Cas. No. 16,107.

¹⁴The Edward, 1 Wheat. 261, 4 L. ed. 86.

¹⁵United States v. Whiskey, 7 Phila. 603, Fed. Cas. No. 16,671.

¹⁶United States v. One Hundred and Twenty-three Casks, 1 Abb. U. S. 573, Fed. Cas. No. 15,943; The Harmony, 1 Gall. 123, Fed. Cas. No. 6,081.

¹⁷The Deer, 4 Ben. 352, Fed. Cas. No. 3,737.

¹⁸American Ins. Co. v. Johnson, Blatchf. & H. 9, Fed. Cas. No. 303.

¹⁹The C. H. Foster, 1 Fed. 733.

²⁰United States v. One Hundred and Twenty-Three Casks, 1 Abb. U. S. 573, Fed. Cas. No. 15,943.

¹The Young America, 1 Brown Adm. 463, Fed. Cas. No. 18,178.

²Agnew v. Dorman, Taney, 386, Fed. Cas. No. 100.

³The Prindiville, 1 Brown Adm. 485, Fed. Cas. No. 11,435.

⁴The Zenobia, Abb. Adm. 48, Fed. Cas. No. 18,208.

⁵Reppert v. Robinson, Taney, 492, Fed. Cas. No. 11,703.

⁶United States v. One Hundred and Twenty-three Casks, 1 Abb. U. S. 573, Fed. Cas. No. 15,943.

⁷Davis v. Leslie, 1 Abb. Adm. 123, Fed. Cas. No. 3,639; Crawford v. The William Penn, 3 Wash. C. C. 484, Fed. Cas. No. 3,373.

⁸The Hunter, 1 Ware, 249, Fed. Cas. No. 6,904; Pettingill v. Dinsmore, 2 Ware, 212, Fed. Cas. No. 11,045; Nevitt v. Clarke, Ilcott, 316, Fed. Cas. No. 10,138; The Deer, 4 Ben. 352, Fed. Cas. No. 3,737; The St. John, 7 Blatchf. 220, Fed. Cas. No. 12,224.

⁹The Edwin Post, 6 Fed. 206.

stantial justice.¹⁰ A libel may be amended in the circuit court;¹¹ and a defect in the signature will not be regarded if it appears it was verified.¹² It may be allowed without waiting for the disposition of the exceptions thereto.¹³ A supplemental libel and an answer thereto may be filed after appeal.¹⁴ This rule applies in collision cases;¹⁵ and after reversal where there is a want of a substantial averment it may be added;¹⁶ even after the case has been remanded from the Supreme Court.¹⁷ But an amendment in an admiralty case before the court of appeals cannot introduce a new subject of controversy.¹⁸

[1] Amendment of judgments and decrees, and defects therein.

Judgments may be corrected after the end of the term: (1) where the necessity for correction and the matter from which it is to be made appear upon the face of the record; (2) where justice requires a correction to be made from matters resting in the recollection of the judge or in the evidence aliunde. In the former case notice is unnecessary; in the latter case it is necessary if it rests on evidence aliunde.² All judgments, decrees, or orders are under control of the court which pronounces them during the term at which they are rendered, and may be set aside, vacated or modified.³ But amendments to judgments or decrees cannot be made except as to formal defects;⁴ as where the entry was erroneously made;⁵ or where there is a verbal mistake of the clerk in using a superfluity of words in entering judgment;⁶ or where by a misprision of the clerk the judgment had not been entered according to the declaration;⁷ or where the clerk had omitted to enter judgment allowing interest;⁸ or if a judgment by confession is entered without declaration or rule to plead;⁹ or if made by only one of several joint defendants;¹⁰ or if entered in a wrong case;¹¹ or if made by

¹⁰Pettingill v. Dinsmore, 2 Ware. 212, Fed. Cas. No. 11,045; Anon. 1 Gall. 22, Fed. Cas. No. 444.

¹¹The Sarah Ann, 2 Sum. 206, Fed. Cas. No. 12,342; The Morton, 1 Brown Adm. 137, Fed. Cas. No. 9,864.

¹²Hardy v. Moore, 4 Fed. 843.

¹³The Western Metropolis, 28 How. Pr. 283.

¹⁴The Boston, 1 Sum. 328, Fed. Cas. No. 1,673; Lamb v. Parkman, 21 Law Rep. 589.

¹⁵The Pennsylvania, 12 Blatchf. 67, Fed. Cas. No. 10,951.

¹⁶The Anne v. United States, 7 Cranch, 570, 3 L. ed. 442.

¹⁷The Caroline v. United States, 7 Cranch, 496, 3 L. ed. 417; The Anne, 7 Cranch, 570, 3 L. ed. 442; The Mary Ann, 8 Wheat. 380, 5 L. ed. 641.

¹⁸Houseman v. The North Carolina, 15 Pet. 40, 10 L. ed. 654.

²⁰Dell v. Reynolds, 70 Fed. 656, 17 C. C. A. 317.

³Bronson v. Schulten, 104 U. S. 410.

26 L. ed. 797; Aetna L. Ins. Co. v. Board of Commrs. 79 Fed. 575, 25 C. C. A. 94.

⁴Albers v. Whitney, 1 Story, 310, Fed. Cas. No. 137.

⁵United States v. Bennett, Hoff. 281, Fed. Cas. No. 14,573.

⁶Shaw v. Railroad Co. 101 U. S. 557, 25 L. ed. 892; Barnes v. Lee, 1 Cranch C. C. 471, Fed. Cas. No. 1,018.

⁷Woodward v. Brown, 13 Pet. 1, 10 L. ed. 31.

⁸Bank v. Wistar, 3 Pet. 431, 7 L. ed. 731.

⁹Ault v. Elliot, 2 Cranch C. C. 372, Fed. Cas. No. 655.

¹⁰Hyatt v. Hyatt, 2 Cranch C. C. 633, Fed. Cas. No. 6,976; Newton v. Weaver, 2 Cranch C. C. 685, Fed. Cas. No. 10,193; see Ringgold v. Elliot, 2 Cranch C. C. 462, Fed. Cas. No. 11,844.

¹¹Pierce v. Turner, 1 Cranch C. C. 433, Fed. Cas. No. 11,148.

an attorney by mistake.¹² A judgment may be amended by striking out a part which the court has no authority to make.¹³ Any clerical error may be corrected after the lapse of the term;¹⁴ as by making it payable in gold or silver coin.¹⁵ But a judgment or decree cannot be stricken out for error of law after the lapse of the term at which it is rendered.¹⁶ However, if the judge has been induced to enter a decree by false representation as to its character, and which he did not intend to enter, the decree may be set aside after the term.¹⁷ If irregularly entered it may be set aside.¹⁸ Where a judgment was entered in vacation the court properly vacated it at the next term and entered a new judgment to the same effect.¹⁹ A mistake in the assessment of damages has been corrected at a subsequent term.²⁰ Though the court cannot change the essential parts of a decree after the term at which it is entered, yet it may subsequently amend the decree as to the mode of execution, manner of sale, time of publication, and distribution of proceeds.¹ An interlocutory decree is always open to amendment and correction.² The rule that a cause may not be reheard after the term in which it was originally decided does not affect a proceeding in another cause to review the original suit.³ Where an order has been entered that the bill be taken pro confesso, defendant, even if he has entered an appearance, is not entitled to notice of subsequent application for final decree, when such application is made in open court.⁴ The power of amendment after term does not extend to the correction of judicial errors.⁵ But a judgment which is a mere nullity may be then vacated.⁶ Omission to enter judgment on one of two pleas is curable by R. S. § 954;⁷ so also is an omission to enter judgment on demurrer.⁸ Want of order for default judgment is a mere formal defect.⁹

¹²United States v. Fearson, 5 Cranch C. C. 238, Fed. Cas. No. 14, Cranch C. C. 95, Fed. Cas. No. 15, 354.

¹³Abraham v. Levy, 72 Fed. 124, 18 Cranch C. C. 173, Fed. Cas. No. 926. C. C. A. 469.

¹⁴The Hiram Wood, 6 Chicago L. N. 135. ²⁰Crooks v. Maxwell, 6 Blatchf. 468, Fed. Cas. No. 3,415.

¹⁵Scott v. Blaine, Bald. 287, Fed. Cas. No. 12,525; Brush v. Robbins, 3 McLean, 486, Fed. Cas. No. 2,059. ¹Turner v. I. B. & W. R. Co. 8 Biss. 380, Fed. Cas. No. 14,259.

¹⁶Cheang Kee v. United States, 3 Wall. 320, 18 L. ed. 72. ²De Florez v. Raynolds, 8 Fed. 434, 17 Blatchf. 436.

¹⁷Brush v. Robbins, 3 McLean, 486, Fed. Cas. No. 2,059; Wood v. Luse, 4 McLean, 254, Fed. Cas. No. 17,950; ³Jackson v. Munks, 58 Fed. 596.

¹⁸Scott v. Blaine, Bald. 287, Fed. Cas. No. 12,525; Doe v. Waterloo Min. Co. 60 Fed. 643; Austin v. Riley, 55 Fed. 833; Klever v. Seawall, 65 Fed. 373, 12 C. C. A. 653; Craven v. Canadian Pac. Ry. Co. 62 Fed. 170. ⁴Austin v. Riley, 55 Fed. 833.

¹⁹United States v. Williams, 67 Fed. 384, 14 C. C. A. 440; Fisher v. Simon, 67 Fed. 387. ⁵Elder v. Richmond G. & S. M. Co. 19 U. S. App. 118, 58 Fed. 536, 7 C. C. A. 354.

²⁰Wood v. Luse, 4 McLean, 254, Fed. Cas. No. 17,950; Harris v. Hardeman, 14 How. 334, 14 L. ed. 444. ⁶Morsell v. Hall, 13 How. 212, 14 L. ed. 117.

¹United States v. Williams, 67 Fed. 384, 14 C. C. A. 440; Fisher v. Simon, 67 Fed. 387. ⁷Townsend v. Jennison, 7 How. 706, 12 L. ed. 880.

²Union Bank v. Crittenden, 2 ⁸Linder v. Lewis, 1 Fed. 378.

[m] Formal defects on appeal.

There is a specific provision of the Revised Statutes regarding amendment of the writ of error;¹² and amendment of appeal in prize cases.¹³ R. S. § 954 forbids reversal for objections of formal or technical character first taken in the appellate court.¹⁴ Formal defects are not to be regarded as matters of error;¹⁵ but should be disregarded in the decision of the cause.¹⁶ A mere clerical omission¹⁷ or mistake in name¹⁸ will be disregarded. Abuse of a formal conclusion to a special court is immaterial.¹⁹ Defects of form, not demurred to, are not reversible error;²⁰ nor is a variance between averments and findings;¹ nor an error on trying issues out of their order.² A formal defect in the verdict will be disregarded; if it is otherwise sufficient to sustain the judgment;³ or a general verdict on distinct issues.⁴ It is immaterial that the verdict and judgment are only on one demise out of several.⁵ So if a declaration contains a special count, and the common counts, judgment may be sustained on the common counts.⁶ Other cases have refused to reverse where there was an omission to join issue on one out of two avowals in replevin;⁷ or an omission of a similitur;⁸ or omission to obtain leave to file an amended bill, or to file a replication.⁹ An omission on an appeal does not require the dismissal of the appeal, but the court may aid the appeal on terms.¹⁰

[n] Amendments of record on appeal.

The trial court may supply omissions in its record for the purpose of showing on appeal what was actually done;¹² but its power ceases with the taking of the appeal. Amendments cannot be made after writ of error brought.¹³ However, an order allowing an appeal may be amended in the

¹²Post, § 1928.

¹³Post, § 1333.

¹⁴Babbitt v. Burgess, 2 Dill. 169, Fed. Cas. No. 693.

¹⁵Smith v. Allyn, 1 Paine, 456, Fed. Cas. No. 13,064.

¹⁶Stockton v. Bishop, 4 How. 155, 11 L. ed. 918; Taylor v. Benham, 5 How. 277, 12 L. ed. 151.

¹⁷Adams v. Law, 16 How. 149, 14 L. ed. 880; Citizens Bank v. Farwell, 56 Fed. 572, 6 C. C. A. 24.

¹⁸Conrad v. Griffey, 11 How. 480, 13 L. ed. 779; Pacific Bank v. Mixter, 114 U. S. 464, 29 L. ed. 221, 5 Sup. Ct. Rep. 944; Crittenden v. Davis, Hemp. 96, Fed. Cas. No. 3393b.

¹⁹Bank of Metropolis v. Gutschlick, 14 Pet. 27, 10 L. ed. 335.

²⁰Ewing v. Howard, 7 Wall. 503, 19 L. ed. 295.

¹Railroad Co. v. Lindsay, 4 Wall. 650, 18 L. ed. 328.

²Townsend v. Jennison, 7 How. 706, 12 L. ed. 880; Morsell v. Hall, 13 How. 212, 14 L. ed. 117.

³Downey v. Hicks, 14 How. 240, 14 L. ed. 404.

⁴Roach v. Hulings, 16 Pet. 319, 10 L. ed. 979.

⁵Van Ness v. Bank, 13 Pet. 17, 10 L. ed. 38.

⁶Bank v. Moss, 6 How. 31, 12 L. ed. 331.

⁷Dermott v. Wallach, 1 Black, 96, 17 L. ed. 50.

⁸Hager v. Thompson, 1 Black, 90, 17 L. ed. 43.

⁹Clements v. Moore, 6 Wall. 299, 18 L. ed. 786.

¹⁰Dayton v. Lash, 94 U. S. 112, 24 L. ed. 33; see Vansant v. Gas Light Co. 99 U. S. 213, 25 L. ed. 265.

¹²Ex parte Buskirk, 72 Fed. 14, 18 C. C. A. 410; Walton v. United States, 9 Wheat. 651, 6 L. ed. 182.

¹³Honey v. Chicago, etc. Co. 82 Fed. 774, 27 C. C. A. 262; United States v. Hooe, 1 Cranch C. C. 116, Fed. Cas. No. 15,386; Michigan Ins. Bank v. Eldred, 143 U. S. 298, 36 L. ed. 162, 12 Sup. Ct. Rep. 450.

lower court where the appeal is not perfected.¹⁴ The Supreme Court has sustained action of a trial court in permitting at an ensuing term, the filing of the evidence and the charge to the jury.¹⁵ In the appellate court, amendments may be made by consent;¹⁶ though the Supreme Court views such amendments with disfavor, where for the purpose of showing the existence of jurisdiction;¹⁷ and prefers to remand the cause for that purpose.¹⁸ Error in taking an appeal in the name of a firm instead of the individual members may be cured by amendment;¹⁹ if the names appear elsewhere in the record. Name of a new administrator may be added by amendment.²⁰ A clerical error in the clerk's transcript may be amended without returning the record or a certiorari.¹ The appellate court may correct errors in the docket title of a cause² or an apparent error in the amount of the recovery.³ Even the pleadings may be amended on appeal if justice requires it.⁴ But the Supreme Court will not correct errors or omissions in the bill of exceptions.⁵

[o] Time of amendment.

The first portion of the section requiring formal defects to be disregarded and amended by the court, obviously applies at all stages of the proceeding,⁷ including appeal. Hence verdicts, judgments or decrees and the record on appeal are amendable for formal defects. But while the last portion of the section declares a pleading or process amendable "at any time" there is authority for holding that this means at any time prior to judgment or decree, when the amendment would involve more than a merely formal defect.⁸ These cases however, would seem to refer to amendment of pleadings and not to negative the existence of authority to amend process issued after judgment for its enforcement. The right to

¹⁴Aspen M. Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4.

¹⁵Kerr v. South P. Comrs. 117 U. S. 383, 29 L. ed. 924, 6 Sup. Ct. Rep. 801.

¹⁶Fletcher v. Peck, 6 Cranch, 127, 3 L. ed. 162; Hudgins v. Kemp, 18 How. 534, 15 L. ed. 512; Warren v. Moody, 9 Fed. 674; United States v. Hopewell, 51 Fed. 800, 2 C. C. A. 510; Fitchburg v. Nichol, 85, Fed. 870, 29 C. C. A. 464.

¹⁷Udall v. Steamship Ohio, 17 How. 18, 15 L. ed. 43.

¹⁸Kennedy v. Georgia St. Bank, 8 How. 611, 12 L. ed. 1209.

¹⁹Moore v. Simonds, 100 U. S. 146, 25 L. ed. 590; United States v. Schoverling, 146 U. S. 82, 36 L. ed. 893, 13 Sup. Ct. Rep. 24; In re Woerishoffer, 74 Fed. 916, 21 C. C. A. 175.

²⁰Walton v. Marietta C. Co. 157 U. S. 347, 39 L. ed. 727, 15 Sup. Ct. Rep. 628.

¹Woodward v. Brown, 13 Pet. 1, 10 L. ed. 31.

²United States v. Jahn, 155 U. S. 111, 39 L. ed. 87, 15 Sup. Ct. Rep. 39.

³Mills v. Scott, 99 U. S. 30, 25 L. ed. 294.

⁴Jones v. Meehan, 175 U. S. 28, 44 L. ed. 60, 20 Sup. Ct. Rep. 1; Wiggins F. Co v. Ohio, etc. Ry. 142 U. S. 415, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188.

⁵Stimpson v. West C. R. R. 3 How. 556, 11 L. ed. 722; Gayler v. Wilder, 10 How. 509, 13 L. ed. 517.

⁷Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398; Keene v. Wheatley, 4 Phila. 157 Fed. Cas. No. 7,644.

⁸Nelson v. Barker, 3 McLean, 379, Fed. Cas. No. 10,101; Smith v. Jackson, 1 Paine, 486, Fed. Cas. No. 13,065.

amend a pleading during, or at the close of the trial or hearing or after verdict, is well settled.⁹ But the court has a discretion to deny amendments offered at that time because too late, when the ends of justice do not require their allowance;¹⁰ or to disallow them from failure to exercise proper diligence.¹¹ Thus, leave to file a verified denial raising new issues as to the execution of the instrument in suit has been denied at the trial, where to the surprise and injury of the plaintiff.¹² So, after reversal, the trial court may and is often directed to allow amendment of pleadings.¹³ But an amendment of an intervenor's claim for personal injuries, setting up a distinct ground of negligence, is too late, after a master has finished a hearing and is preparing his report.¹⁴ A commissioner may not amend the complaint or warrant in extradition or supply defects by his certificate, after the case is closed and certorari is served on him.¹⁵

[p] Conditions as to costs and continuance.

It is usual to make payment of costs a condition of the allowance of an amendment. But where no fault is imputable to the amending party,¹⁷ or there was an agreed statement of facts,¹⁸ costs have been refused. Payment of costs is not a condition precedent unless made so by order.¹⁹ Where an amendment by plaintiff materially varies the line of the defense plaintiff may be required to pay all accrued costs.²⁰ Where the defendant misled the plaintiff, leave to amend the plea will be given only on payment of costs;¹ so after plea of misnomer;² or on leave to substitute a

⁹Garland v. Davis, 4 How. 131, 11 L. ed. 907; Clark v. Sohler, 1 Wood. & M. 368, Fed. Cas. No. 2,835; Mack v. Porter, 72 Fed. 243, 18 C. C. A. 527; Battle v. Mutual L. I. Co. 10 Blatchf. 407, Fed. Cas. No. 1,109; Neale v. Neales, 9 Wall, 1, 19 L. ed. 590; Bamberger v. Terry, 103 U. S. 40, 26 L. ed. 317; Shumacher v. St. Louis, etc. R. R. 39 Fed 181; Baker v. Barber A Co. 92 Fed. 122; Bowden v. Burnham, 59 Fed. 755, 8 C. C. A. 248.

¹⁰See Clark v. Mayfield, 3 Cranch C. C. 353, Fed. Cas. No. 2,858; Smith v. Barker, 3 Day, 312, Fed. Cas. No. 13,013; Lanning v. Dolph, 4 Wash. C. C. 624, Fed. Cas. No. 8,073; Bullock v. Van Pelt, Bald. 463, Fed. Cas. No. 2,131; Postmaster General v. Ridgway, Gilp, 135, Fed. Cas. No. 11,313.

¹¹Cross v. Morgan, 6 Fed. 241.

¹²Benedict v. Maynard, 6 McLean, 21, Fed. Cas. No. 1,296.

¹³In re Sanford F. & T. Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 391; Russell v. Clark, 7 Cranch, 69, 3 L. ed. 272; Caldwell v. Taggart, 4 Pet. 190, 7 L. ed. 828.

¹⁴Clyde v. Richmond, etc. R. R. 59, Fed. 394.

¹⁵Ex parte Lane. 6 Fed. 34.

¹⁷Lanning v. Dolph, 4 Wash. C. C. 624, Fed. Cas. No. 8,073.

¹⁸Hechscher v. Binney, 3 Wood. & M. 333, Fed. Cas. No. 6,316.

¹⁹Wigfield v. Dyer, 1 Cranch C. C. 405, Fed. Cas. No. 17,622; Wheaton v. Love, 1 Cranch C. C. 451, Fed. Cas. No. 17,485; Butts v. Chapman, 1 Cranch C. C. 570, Fed. Cas. No. 2,257.

²⁰Wright v. Hollingsworth, 1 Pet. 165, 7 L. ed. 97; Georgetown v. Beatty, 1 Cranch C. C. 234, Fed. Cas. No. 5,344; Ferris v. Williams, 1 Cranch C. C. 281, Fed. Cas. No. 4,749; Payen v. Hodgson, 1 Cranch C. C. 508, Fed. Cas. No. 10,853; Elliott v. Holmes, 1 McLean, 466, Fed. Cas. No. 4,392; Pierce v. Strickland, 2 Story, 292, Fed. Cas. No. 11,147; Fiedler v. Carpenter, 2 Wood. & M. 211, Fed. Cas. No. 4,759; Sanders v. Hamilton, 2 Hayw. 282, Fed. Cas. No. 12,294.

¹Anonymous, 2 Wash. C. C. 270, Fed. Cas. No. 476.

²Payen v. Hodgson, 1 Cranch C. C. 508, Fed. Cas. No. 10,853.

general denial.³ An amendment may be allowed with the costs of the term only;⁴ or the party applying may be required to pay the expenses of the adverse party.⁵ An amendment varying the amount of damages was allowed after verdict on payment of costs and consent to a new trial.⁶ If a material amendment is allowed, the opposite party may have a continuance;⁷ and if defendant amend his plea plaintiff may have a continuance and costs also;⁸ or his option between a continuance and costs;⁹ or defendant may be required to pay the costs of the term;¹⁰ or all costs up to the time of filing the amendment.¹¹ Where amendment is allowed at the close of the trial, the court must determine whether the submission of the cause ought not to be set aside.¹²

[q] Discretion of court.

The allowance of amendments rests in the sound discretion of the court.¹³ While they are usually allowed with liberality,¹⁴ this is not so true of actions for penalties or forfeitures.¹⁵ They should only be allowed in furtherance of justice;¹⁶ as, to prevent part of plaintiff's remedy from being cut off.¹⁷ When allowed at the close of the trial, the court must determine whether the submission of the cause ought to be vacated.¹⁸ Since the allowance of amendments is discretionary, a refusal to allow is not review-

³Krouse v. Sprogell, 1 Cranch C. C. 78, Fed. Cas. No. 7,940; see Milburne v. Kearnes, 1 Cranch C. C. 77, Fed. Cas. No. 9,543.

⁴Greeley v. Smith, 3 Story, 76, Fed. Cas. No. 5,747.

⁵United States v. Batchelder, 9 Int. Rev. Rec. 98, Fed. Cas. No. 14,541.

⁶Elting v. Campbell, 5 Blatchf. 183, Fed. Cas. No. 4,422.

⁷Schnertzell v. Purcell, 1 Cranch C. C. 246, Fed. Cas. No. 12,472; Georgetown v. Beaty, 1 Cranch C. C. 234, Fed. Cas. No. 5,344; Elliott v. Holmes, 1 McLean, 466, Fed. Cas. No. 4,392; Walker v. Johnson, 2 McLean, 255, Fed. Cas. No. 17,075; Wyatt v. Harden, Hemp. 17, Fed. Cas. No. 18, 106a; United States v. Whiskey, 7 Phila. 603, Fed. Cas. No. 16,671.

⁸Semmes v. O'Neale, 1 Cranch C. C. 246, Fed. Cas. No. 12,654; Marsteller v. McLean, 1 Cranch C. C. 550, Fed. Cas. No. 9,138; Short v. Wilkinson, 2 Cranch C. C. 22, Fed. Cas. No. 12,810.

⁹Milburne v. Kearnes, 1 Cranch C. C. 77, Fed. Cas. No. 9,543.

¹⁰Krouse v. Sprogell, 1 Cranch C. C. 78, Fed. Cas. No. 7,940.

¹¹Semmes v. O'Neale, 1 Cranch C. C. 246, Fed. Cas. No. 12,654; Marsteller v. McLean, 1 Cranch C. C. 550, Fed. Cas. No. 9,138; Short v. Wilkinson, 2 Cranch C. C. 22, Fed. Cas. No. 12,810; Anonymous, 2 Wash. C. C. 270, Fed. Cas. No. 476.

¹²Bamberger v. Terry, 103 U. S. 40, 26 L. ed. 317.

¹³Wright v. Hollingsworth, 1 Pet. 165, 7 L. ed. 97; United States v. Buford, 3 Pet. 12, 7 L. ed. 585; Ex parte Bradstreet, 7 Pet. 634, 8 L. ed. 810; Walden v. Craig, 9 Wheat. 576, 6 L. ed. 164; Murphy v. Stewart, 2 How. 263, 11 L. ed. 261; Stevens Adm. v. Nichols, 157 U. S. 370, 39 L. ed. 737, 15 Sup. Ct. Rep. 640; Phillip, etc. Co. v. American I. Co. 77 Fed. 138, 23 C. C. A. 89; Jefferson v. Burhans, 85 Fed. 924, 29 C. C. A. 487.

¹⁴Supra, note[a].

¹⁵United States v. Batchelder, 9 Int. Rev. Rec. 98, Fed. Cas. No. 14,546.

¹⁶Eberly v. Moore, 24 How. 158, 16 L. ed. 614; Bamberger v. Terry, 103 U. S. 43, 26 L. ed. 318.

¹⁷Wilbur v. Abbott, 6 Fed. 817.

¹⁸Bamberger v. Terry, 103 U. S. 40, 26 L. ed. 317.

able on appeal or writ of error;¹⁹ unless there has been an abuse of discretion.²⁰

§ 814. Effect of death of party before final judgment—revivor.

When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may,^[c] in case the cause of action survives by law,^[d] prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias^[e] from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.^{[a]-[b]}

R. S. § 955, U. S. Comp. Stat. 1901, p. 697.

[a] Scope and construction of sections.

The common law rule was that death of party before judgment abated the suit.² R. S. § 955, originally part of § 31 of the judiciary act of 1789,³ provides that the cause shall proceed by or against the personal representative in all cases in which the "cause of action survives by law."⁴ Under that section death of a party, if the action survives, does not determine the suit,⁵ nor produce any change in the rights of the parties.⁶ The revivor is a mere continuance of the original suit.⁷ The action must however, have been actually commenced. If complaint is not filed until

¹⁹Walden v. Craig, 9 Wheat. 576, 44 L. ed. 1138, 20 Sup. Ct. Rep. 951; 6 L. ed. 164; United States v. Buford, 3 Pet. 31, 32, 7 L. ed. 592; Ex parte Bradstreet, 7 Pet. 634, 8 L. ed. 810; Tilton v. Cofield, 93 U. S. 166, 23 L. ed. 860; Ayers v. Watson, 137 U. S. 585, 34 L. ed. 803, 11 Sup. Ct. Rep. 201.

²⁰Mandeville v. Wilson, 5 Cranch, 17, 18, 3 L. ed. 24.

²Green v. Watkins, 6 Wheat. 262, 5 L. ed. 256.

³Act Sept. 24, 1789, § 31, 1 Stat. 90.

⁴Ex parte Connaway, 178 U. S. 430,

5 Clark v. Matthewson, 12 Pet. 171, 9 L. ed. 1041.

⁶Green v. Watkins, 6 Wheat. 263, 264, 5 L. ed. 256.

⁷Clark v. Matthewson, 12 Pet. 172, 9 L. ed. 1041; Fitzpatrick v. Domingo, 4 Woods, 163, 14 Fed. 217; Shirley v. Waco Tp. Ry. 4 Woods, 414, 13 Fed. 707; Jones v. Andrews, 10 Wall, 333, 19 L. ed. 937.

after plaintiff's death, the entire proceeding is a nullity.⁸ In States where an action is commenced by the filing of a complaint, a case is deemed pending within this section, if the complaint is filed before death, though not served.⁹ The section applies, a fortiori, if there has been service of process;¹⁰ and at all subsequent stages of the cause even after verdict,¹¹ if prior to final judgment.¹² It applies to removed cases.¹³ Death of a party after final judgment so far as affecting appeal;¹⁴ the right to execution;¹⁵ and death while appeal is pending,¹⁶ are governed by other provisions of law. But death after execution sale does not abate the proceeding or prevent the giving of a deed.¹⁷ The Equity Rules also treat of the subject of bills of revivor.¹⁸ The effect of death of bankrupt or trustee is also treated elsewhere.¹⁹ There is no provision in the equity rules or practice for compulsory revival by the defendant after death of complainant.²⁰

[b] Section not applicable to real actions or in admiralty.

Since the section provides for appearance by executor or administrator and not the heirs, the Supreme Court early decided that it refers only to personal and not real actions.² Hence where complainant in a real action in equity dies, a supplemental bill and not a bill of revivor is the proper proceeding;³ and revivorship of a real action at law is governed by the law of the State and not by R. S. § 955.⁴ A bill of revivor cannot be filed by a devisee or assignee⁵ since he is not the personal representative, but a transferee. It has been held also that R. S. § 955 does not relate to admiralty causes.⁶ The mode of bringing in the decedent's representative in common law causes, is governed in general by State law.⁷

[c] The personal representative—continuance—pleadings.

The section is intended to permit a personal representative who might originally have brought the suit, to continue it. It does not permit one

⁸Harter v. Twohig, 158 U. S. 448, 39 L. ed. 1049, 15 Sup. Ct. Rep. 883.

⁹Ex parte Connaway, 178 U. S. 430, 44 L. ed. 1138, 20 Sup. Ct. Rep. 951.

¹⁰Mandeville v. Riggs, 2 Pet. 487, 7 L. ed. 493.

¹¹Baldwin v. Lamar, Chase 432, Fed. Cas. No. 800.

¹²Hatch v. Eustis, 1 Gall. 160, Fed. Cas. No. 6,207.

¹³Baltimore, etc. Ry. v. Joy, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387; Y-ta-tah-wah v. Rebeck, 105 Fed. 265.

¹⁴Post, § 1895.

¹⁵See Ransom v. Williams, 2 Wall. 313, 17 L. ed. 803; post, § —.

¹⁶Post, § 1896.

¹⁷Insley v. United States, 150 U. S. 516, 37 L. ed. 1163, 14 Sup. Ct. Rep. 158.

¹⁸Post, § 960.

¹⁹Post, § 2248.

²⁰Brown v. Fletcher, 140 Fed. 639.

²Macker v. Thomas, 7 Wheat. 530, 5 L. ed. 515.

³Currell v. Villars, 72 Fed. 331.

⁴McArthur v. Williamson, 45 Fed. 155.

⁵Slack v. Wolcott, 3 Mason, 508, Fed. Cas. No. 12,932; Metal S. Co. v. Crandall, 18 O. G. 1531, Fed. Cas. No. 9,493c.

⁶The Jas. A. Wright, 10 Blatchf. 160, Fed. Cas. No. 7,191. But see The Ship Norway, 1 Ben. 493, Fed. Cas. No. 10,357; The M. B. Roper, 106 Fed. 741, 45 C. C. A. 578; United States v. Sampson, 187 U. S. 436, 47 L. ed. 248, 23 Sup. Ct. Rep. 216.

⁷Martin v. Baltimore, etc. Ry. 151 U. S. 693, 38 L. ed. 311, 14 Sup. Ct. Rep. 533.

who has not obtained letters testamentary or properly qualified himself to sue, thus to revive an action.⁹ He must show that he is executor or administrator and produce his letters if required.¹⁰ The citizenship of the personal representative is immaterial, though the original ground of jurisdiction was diverse citizenship in the parties.¹¹ He is entitled to a continuance but may waive the right, and it not available to the other party.¹² The proceedings after the revivor are exactly as though the representative were a voluntary party to the suit;¹³ and he may plead only what his decedent might have pleaded.¹⁴ The State law as to mode of bringing in the representative is followed by the Federal court in common law causes.¹⁵ The section does not apply to a devisee or assignee, or heir of decedent, but merely to the personal representative, and to personal actions.¹⁶

[d] By what law survivorship of action is determined.

This section does not attempt to declare what actions survive.¹⁷ Without attempting to review the authorities deciding that question, it is important to determine by what law it is governed. The survivability of a cause of action is a matter of substantive law, and to be ascertained as such, while the revival of a suit is mere matter of procedure.¹⁸ Bearing in mind the principles discussed in another portion of this work,¹⁹ it is plain that where a cause of action is founded upon State law and within the scope of a State's legislative powers, the question of its survivorship is determined by State law as much in the Federal as in the local tribunals.²⁰ In the absence of State statute the common law is resorted to in such a case,¹ but it is conceived that the common law referred to by the cases is the

⁹Kropff v. Poth, 19 Fed. 200; see Mason v. Hartford, etc. R. R. 10 Fed. 337; Mellus v. Thompson, 1 Cliff. 125, Fed. Cas. No. 9,405.

¹⁰Wilson v. Codman, 3 Cranch, 193, 2 L. ed. 409.

¹¹Clarke v. Matthewson, 12 Pet. 171, 9 L. ed. 1041; Hardenbergh v. Ray, 151 U. S. 118, 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

¹²Griswold v. Hill, 1 Paine, 483, Fed. Cas. No. 5,834; Wilson v. Codman, 3 Cranch, 193, 2 L. ed. 408.

¹³Hatch v. Eustis, 1 Gall. 160, Fed. Cas. No. 6,207.

¹⁴McKnight v. Craig, 6 Cranch, 183, 3 L. ed. 193.

¹⁵Martin v. Baltimore, etc. R. R. 151 U. S. 693, 38 L. ed. 318, 14 Sup. Ct. Rep. 533.

¹⁶Supra, note[b].

¹⁷Martin v. Baltimore, etc. R. R. 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; Patton v. Brady, 184 U. S. 612, 46 L. ed. 716, 22 Sup. Ct. Rep. 493.

¹⁸Schreiber v. Sharpless, 110 U. S. 76, 80, 28 L. ed. 65, 3 Sup. Ct. Rep. 423; Warren v. Furstenheim, 35 Fed. 691, 1 L.R.A. 40; Sanders v. Louisville & N. R. R. 111 Fed. 708, 49 C. C. A. 565; Martin v. Baltimore, etc. R. R. 151 U. S. 692, 38 L. ed. 318, 14 Sup. Ct. Rep. 541. But see Jones v. Van Zandt, 4 McLean, 599, Fed. Cas. No. 7,503.

¹⁹Ante, § 10.

²⁰Sanders v. Louisville, etc. R. R. 111 Fed. 708, 49 C. C. A. 565; Baltimore, etc. Ry. v. Joy, 173 U. S. 229, 43 L. ed. 677, 19 Sup. Ct. Rep. 387; Y-ta-tah-wah v. Rebeck, 105 Fed. 265; Martin v. Baltimore, etc. R. R. 151 U. S. 692, 38 L. ed. 318, 14 Sup. Ct. Rep. 541; Witters v. Foster, 23 Blatchf. 457, 26 Fed. 737; Warren v. Furstenheim, 35 Fed. 691, 1 L.R.A. 40; Barker v. Ladd, 3 Sawy. 44, Fed. Cas. No. 990; Hatfield v. Bushnell, 1 Blatchf. 393, Fed. Cas. No. 6,211.

¹Henshaw v. Miller, 17 How. 218, 15 L. ed. 222; United States v.

common law of the particular State and not a common law of the nation.² Where the cause of action is based on Federal law, Congress has full power to declare its survivability. Congress however, has passed no such law and the question of survivability arose some years ago in a *qui tam* suit for a penalty under the Federal copyright law. By the law of Pennsylvania, where the case arose, suits for penalties survived, but at common law it was otherwise. The court applied the common law rule although counsel argued that R. S. § 721,³ adopting State laws as rules of decision, should govern.⁴

[e] Scire facias.

Another provision of law confers general power to issue scire facias and its general nature and uses are elsewhere considered.⁵ The personal representative may, if he chooses, come in *instanter*, and scire facias is then unnecessary.⁶ As no period of time is fixed for his appearance, if the other party fails to summon him laches cannot be predicated upon mere lapse of time.⁷ But a petition to revive may be denied after great lapse of time for lack of diligence;⁸ and where barred by statute.⁹ However, a reasonable time to revive will always be allowed.¹⁰

§ 815. Death of one of several parties.

If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant.

R. S. § 956 U. S. Comp. Stat. 1901, p. 697.

R. S. § 955 and § 956 originally constituted § 31 of the judiciary act of 1789;¹² and are modeled after an English statute.¹³ There are however, important differences between the foregoing provision and R. S. § 955. The latter provided for revivorship of the suit by or against decedent's executor

Daniel, 6 How. 11, 12 L. ed. 323; Cas. No. 10,357; Simmons v. Morris, Patton v. Brady, 184 U. S. 612, 46 109 Fed. 707.
L. ed. 716, 22 Sup. Ct. Rep. 493.

²See ante, § 13, and see the case of ⁸McArthur v. Williamson, 45 Fed. 154; Simmons v. Morris, 109 Fed. Bucher v. Cheshire R. R. 125 U. S. 707; Goodyear D. V. Co. v. White, 584, 31 L. ed. 795, 8 Sup. Ct. Rep. 974. 46 Fed. 278.

³Ante, § 12.

⁴Schreiber v. Sharpless, 110 U. S. 53. ⁹Mason v. Hartford, etc. R. R. 19

76, 28 L. ed. 65, 3 Sup. Ct. Rep. 423. ¹⁰Tilghman v. Paxson Co. 115 Fed. 906.

This case is referred to under the ¹²Act Sept. 24, 1789, § 31, 1 Stat. discussion of the question of a Fed- 90.

⁵§ 841[a].

⁶Griswold v. Hill, 1 Paine 483, Fed. ¹³Act 8 and 9 Wm. III., c. 11 § 7. See Moses v. Wooster, 115 U. S. 285, Cas. No. 5,834. 29 L. ed. 391, 6 Sup. Ct. Rep. 38.

⁷The Ship Norway, 1 Ben. 493, Fed.

or administrator. The action abates so far as decedent's estate is concerned. This does not. Moreover R. S. § 955 affected all personal actions where the right of action survived. This section applies only where the action survives "to the surviving plaintiff or against the surviving defendant." Hence in case of a defendant's death, the liability must be several as in tort cases and not merely joint.¹⁴ In case of a plaintiff's death the right must not only survive, but it must survive to the remaining plaintiff.¹⁵ Many States have provisions governing death of one of several plaintiffs or defendants, making decedent's executor or administrator a party, and so continuing the cause. But enactments of that sort cannot be deemed in force in the Federal courts because the above provision by Congress controls.¹⁶ However where the death of co-obligor or obligee is before suit brought this section does not apply and the State law would be applicable.¹⁷

R. S. § 956 is not confined to death before final judgment, as is the case with R. S. § 955. It is applicable on appeal, upon the theory that the cause of action upon an appeal or writ of error is the damage sustained by the judgment below, a damage which survives though some of the appellants die.¹⁸

§ 816. No abatement by officer's death, expiration of term, etc.

No suit, action or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof, to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs.

Act Feb. 8, 1899, c. 121, 30 Stat. 622, U. S. Comp. Stat. 1901, p. 697.

A recent case reviews earlier decisions upon the abatement of suits against, officers, commissioners, boards, etc., remarking that "it was doubtless to meet the difficulties occasioned by these decisions" that Congress passed the above law.¹

¹⁴See *Union Bank v. Mott*, 27 N. Y. 633.

¹⁵*Fisher v. Rutherford*, *Baldw.* 188, Fed. Cas. No. 4,823; see *Tobin v. Missouri P. Ry. (Mo.)* 18 S. W. 996.

¹⁶*Seaman v. Slater*, 18 Fed. 485; see *Fitzpatrick v. Domingo*, 4 Woods, 163, 14 Fed. 216.

¹⁷*United States v. Bullard*, 103 Fed. 257.

¹⁸*Moses v. Wooster*, 115 U. S. 285, 29 L. ed. 391, 6 Sup. Ct. Rep. 38.

¹*Murphy v. Utter*, 186 U. S. 101, 46 L. ed. 1075, 22 Sup. Ct. Rep. 776.

§ 817. Non-joinder of, or failure to serve parties as ground of abatement.

When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer;^[b] and nonjoinder of parties who are not inhabitants of nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit.^{[a]-[e]}

R. S. § 737, U. S. Comp. Stat. 1901, p. 587.

[a] History and scope of section, and related matters.

The above provision was originally enacted in 1839.³ As respects equity cases, it is merely declaratory of a doctrine previously established by the Supreme Court.⁴ The 47th equity rule embodies that doctrine in ampler form.⁵ It will be observed that the above section has reference only to non-joinder of, or failure to serve parties because beyond the reach of the process of the court.⁶ It does not refer to cases where the joinder of a proper party within reach, would defeat Federal jurisdiction and is excused on that ground.⁷ In such cases however, and in cases of removal of a controversy in a State court as between certain of the parties because separable from the case as to other defendants,⁸ the Federal courts have been obliged to create peculiar rules of their own respecting non-joinder as ground of abatement, and a peculiar classification of parties for purposes of Federal jurisdiction. These result from the limited and delegated nature of Federal jurisdiction and the rule against service of process outside of the district wherein issued.

[b] Formal, necessary and indispensable parties.

The Federal courts classify parties as formal, necessary, and indispensable¹⁰ and by that classification determine questions of abatement,

³Act Feb. 28, 1839, c. 36, § 1, 5 15 L. ed. 161; *Barney v. Baltimore*, Stat. 321. 6 Wall. 280, 18 L. ed. 826.

⁴*Shields v. Barrow*, 17 How. 130, 141, 15 L. ed. 161; *Coiron v. Millaudon*, 19 How. 115, 15 L. ed. 575; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Greeley v. Lowe*, 155 U. S. 70, 39 L. ed. 74, 15 Sup. Ct. Rep. 26. ⁷In equity cases rule 47 governs as to nonjoinder of persons within the courts jurisdiction. See post, § 1019.

⁸*Ante*, § 135; R. S. § 737 does not apply to such cases: *Ames v. Chicago*, etc. Co. 39 Fed. 884, 885.

⁵Post, §§ 1019, et seq.

⁶*Shields v. Barrow*, 17 How. 140, 3 L. ed. 271; *Shields v. Barrow*, 17

dismissal and removal. A formal party is one not interested in the controversy between the immediate litigants, but who has an interest in the subject matter that may conveniently be settled in the suit and thereby prevent further litigation.¹¹ Thus a woman's husband is but a formal party to her suit to enforce the trusts of a marriage settlement and set aside a conveyance of the property;¹² the original grantor under whom all parties claim is but a formal party to a suit for a conveyance.¹³

Necessary parties are those who have an interest in the controversy and who should be joined to insure a final determination of the entire controversy; yet whose interests are so separable from those of the parties before the court that it can proceed to a complete and final decree without affecting such necessary parties if absent.¹⁴ Thus on a bill by one heir claiming as trustee for all, to have a deed of their decedent set aside and for a sale of the property, the other heirs are necessary parties; but if they cannot be joined the undivided interests of those before the court may be ordered sold.¹⁵ A bill to compel transfer of patent as agreed, is maintainable against the patentee though not against other defendants who bought some of the patented articles.¹⁶ In suit by one heir to set aside decedents fraudulent deed the other is merely a necessary and not an indispensable party.¹⁷ An agent is often a proper and necessary party to a suit against his principal, but yet is not indispensable within Federal rules.¹⁸ A corporate treasurer may sue his predecessor for an accounting and to recover corporate moneys and to that suit the corporation would be a necessary but not an indispensable party.¹⁹ Intermediate holders of a title are usually only necessary or proper parties to a suit regarding it.²⁰

Indispensable parties are those having an interest in the controversy of such a nature that final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.¹ There is an exception to this definition of indispensable parties, in cases where the parties so interested in the controversy are too numerous to join or be joined in one suit and one appears for all.² In suit for re-

How. 130, 15 L. ed. 160; Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184, 187; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 826; Gregory v. Swift, 39 Fed. 712; Tobin v. Walkinshaw, McAll. 31, Fed. Cas. No. 14,068; Conolly v. Wells, 33 Fed. 207; Gross v. Scott Mfg. Co. 48 Fed. 40.

¹¹Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184, 187; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14.
¹²Wormley v. Wormley, 8 Wheat. 451, 5 L. ed. 659.

¹³Vattier v. Hinde, 7 Pet. 252, 8 L. ed. 675.

¹⁴Cameron v. McRoberts, 3 Wheat. 593, 4 L. ed. 467; Shields v. Barrow, 17 How. 130, 15 L. ed. 160.

¹⁵Harding v. Handy, 11 Wheat. 132, 6 L. ed. 429.

¹⁶Nesmith v. Calvert, 1 Wood. & M. 38, Fed. Cas. No. 10,123.

¹⁷Williams v. Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425.

¹⁸Donovan v. Campion, 85 Fed. 71, 29 C. C. A. 30; Shingleur v. Jenkins, 111 Fed. 452; Union. etc. Co. v. Moore, 79 Fed. 705, 25 C. C. A. 150; Gross v. Scott Mfg. Co. 48 Fed. 35.

¹⁹Hunter v. Robbins, 117 Fed. 920.

²⁰See United States v. Hendy, 54 Fed. 447; Smith v. Lee, 77 Fed. 779.

¹Shields v. Barrow, 17 How. 130, 15 L. ed. 160; Donovan v. Campion, 85 Fed. 71, 29 C. C. A. 30.

²Williams v. Bankhead, 19 Wall.

scission of a contract all parties thereto would generally be indispensable.³ In proceedings for dissolution of partnership, all partners are indispensable.⁴ All qualified executors are indispensable in suit for accounting.⁵ All part owners are indispensable parties to a partition suit;⁶ or to a suit to compel cancellation of title.⁷ The trustee of a fund in which another's interest is sought to be reached is an indispensable party to such a suit.⁸ In suits by heirs attacking a creditor's sale of decedent's realty, all heirs are indispensable parties.⁹ Assignors who have parted with all their interest are not indispensable in a suit by their assignee;¹⁰ but it is often otherwise if they retain an interest.¹¹ In suits by stock or bondholders of a corporation regarding its property or affairs the corporation is often and perhaps usually an indispensable party.¹² Where deficiency in a fund is probable all equal claimants must be before the court.¹³ In suit for disposal of a specific fund one claiming the same is an indispensable party.¹⁴ Bona fide purchasers are indispensable to a suit to cancel a title.¹⁵

[c] Abatement for want of indispensable parties.

Taking these definitions of formal, necessary, and indispensable parties, the section should be read as referring to necessary parties but not to indispensable parties. If necessary parties are joined and cannot be reached by process, the jurisdiction is not ousted, although the decree must be so framed as to affect only the parties duly served. If necessary parties are not joined it is no ground of abatement provided they be not within reach of process.¹⁷ But the section is not to be construed as excusing the joinder of, or service upon indispensable parties, although no exception is in terms made; and this because no court can adjudicate directly upon a person's rights without the party being actually or constructively before the court.¹⁸ The section is not an attempt to subvert this fundamental princi-

563, 22 L. ed. 184, 187; e. g. see *Bacon v. Robertson*, 18 How. 489, 15 L. ed. 499. See post, § 1020.

³*Shields v. Barrow*, 17 How. 130, 15 L. ed. 160.

⁴*Gray v. Larrimore*, 2 Abb. 554, Fed. Cas. No. 5,721.

⁵*Conolly v. Wells*, 33 Fed. 207.

⁶*Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 826.

⁷*Tobin v. Walkinshaw*, McAll. 28, Fed. Cas. No. 14,068.

⁸*Merchants C. P. Co. v. Insurance Co.* 151 U. S. 382, 38 L. ed. 195, 14 Sup. Ct. Rep. 367.

⁹*Hoe v. Wilson*, 9 Wall. 503, 504, 19 L. ed. 762.

¹⁰*Batesville Inst. v. Kauffman*, 18 Wall. 154, 21 L. ed. 775. See *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

¹¹*Hubbard v. Manhattan T. Co.* 87 Fed. 51, 30 C. C. A. 520.

¹²See *Consol. Water Co. v. Babcock*, 76 Fed. 243; but see *Hunter v. Robbins*, 117 Fed. 920; *Conery v. Sweeney*, 81 Fed. 14, 26 C. C. A. 309.

¹³*Railroads v. Orr*, 18 Wall. 474, 21 L. ed. 810.

¹⁴*Williams v. Bankhead*, 19 Wall. 572, 22 L. ed. 184.

¹⁵*United States v. Winona, etc. R.* 67 Fed. 948, 15 C. C. A. 96.

¹⁷*Payne v. Hook*, 7 Wall. 431, 19 L. ed. 261; *Ribon v. Chicago, etc. R.* 16 Wall. 450, 21 L. ed. 369; *Kendig v. Dean*, 97 U. S. 425, 24 L. ed. 1062; *Fisher v. Shopshire*, 147 U. S. 145, 37 L. ed. 109, 13 Sup. Ct. Rep. 201; *Plume, etc. Co. v. Baldwin*, 87 Fed. 785. See also post, § 1019[a].

¹⁸*Mallow v. Hinde*, 12 Wheat. 198,

ple of jurisprudence, but to legislate respecting necessary parties.¹⁹ If an indispensable party is not within reach and does not appear, the case must be discussed notwithstanding this section,²⁰ though in some cases and for purposes of justice, a preliminary injunction granted will be continued against the party in court, until resort can be had to another tribunal.¹ Since the section only excuses non-joinder where the parties are not inhabitants of nor found within the district, it is necessary that a bill or complaint failing to join parties who are necessary should set forth the fact that they cannot be reached.²

[d] Decree must not prejudice parties not served nor appearing.

This principle was recognized before the above statutory provision was enacted.³ It applies as fully where indispensable parties are not joined⁴ as where they are joined but not served, and limits the operation of R. S. § 737 to parties that are necessary but not indispensable.⁵

[e] Objections for non-joinder, and waiver.

It is the general rule that non-joinder of parties must be taken advantage of by demurrer or plea, or it is waived;⁶ and the State law as to the time and manner of objecting is followed in actions at law.⁷ But where the non-joinder is of an indispensable party the court has no power to make decree,⁸ the defect is jurisdictional⁹ and cannot be waived.¹⁰

6 L. ed. 601; *Shields v. Barrow*, 17 How. 130, 15 L. ed. 161.

¹⁹See *Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; *Hamilton v. Savannaah R. R.* 49 Fed. 412; *Collins M. Co. v. Ferguson*, 54 Fed. 721.

²⁰*Barney v. Baltimore*, 6 Wall. 285, 18 L. ed. 826; *California v. Southern Pac. R. Co.* 157 U. S. 249, 39 L. ed. 690, 15 Sup. Ct. Rep. 599; *Florence, etc. Co. v. Singer, etc. Co.* 8 Blatchf. 127, Fed. Cas. No. 4,884; *Chadbourne v. Coe*, 45 Fed. 826; *Coiron v. Millaudon*, 19 How. 115, 15 L. ed. 576; *Christmas v. Russell*, 14 Wall. 80, 20 L. ed. 763; *Kendig v. Dean*, 97 U. S. 425, 24 L. ed. 1062; *Swan, etc. Co. v. Frank*, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 694; *Lawrence v. Times P. Co.* 90 Fed. 28. See also post, § 1019[a].

¹*Mallow v. Hinde*, 12 Wheat. 198, 199, 6 L. ed. 600. See *United States v. Parrott, McAll.* 281, 284, Fed. Cas. No. 15,998. Perhaps such course would not now be proper in view of the act requiring dismissal at any time want of jurisdiction is made to appear. Post, § 818.

³*Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 600; *Elmendorf v. Taylor*, 10 Wheat 167, 6 L. ed. 294; *Russell v. Clarke*, 7 Cranch, 98, 3 L. ed. 281.

⁴See *California v. Southern Pac. Co.* 157 U. S. 229, 39 L. ed. 690, 15 Sup. Ct. Rep. 599.

⁵Supra, note[c].

⁶*Moore v. Bank of Metropolis*, 13 Pet. 311, 10 L. ed. 172; *Story v. Livingston*, 13 Pet. 375, 10 L. ed. 200; *Carey v. Brown*, 92 U. S. 173, 23 L. ed. 469; *Burbank v. Bigelow*, 154 U. S. 559, 19 L. ed. 51, 14 Sup. Ct. Rep. 1163.

⁷See *Buckingham v. Dake*, 112 Fed. 258, 50 C. C. A. 492; *Merchants' Ins. Co. v. Buckner*, 110 Fed. 345, 49 C. C. A. 80.

⁸*Russell v. Clarke*, 7 Cranch, 98, 3 L. ed. 271; *Hagan v. Walker*, 14 How. 36, 14 L. ed. 312; supra, note[c].

⁹*Coy v. Mason*, 17 How. 583, 15 L. ed. 125.

¹⁰See *Farni v. Tesson*, 1 Black, 315, 17 L. ed. 67.

§ 818. Dismissal or remand for want of jurisdiction or collusion therein.

If, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court,^[b] at any time after such suit has been brought or removed thereto^{[c]-[e]} that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court,^{[f]-[g]} or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act,^[h] the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it^[i] to the court from which it was removed as justice may require, and shall make such order as to costs^[j] as shall be just.

Part of § 5, act Mar. 3, 1875, c. 137, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 511.

[a] History and general purpose of section.

As originally enacted the above section further provided that "the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be." This clause was repealed in 1887.¹⁴ A judgment of dismissal is still reviewable by the Supreme Court if it involves a question of the jurisdiction of the circuit court as such,¹⁵ and by the circuit court of appeals in other cases.¹⁶ But an order of remand is not reviewable because not a final judgment.¹⁷ The chief effect of the above provision was in the matter of the time when objection to jurisdiction might be taken and in making dismissal or remand mandatory. The courts had long been accustomed to dismissing causes for want of jurisdiction upon plea in abatement, and already had rules upon the subject of collusive jurisdiction.¹⁸ This statute made it possible to raise these questions "at any time." It is for the protection of the court, as well as the parties, against fraud upon its jurisdiction.¹⁹ Its principal object was to relieve the national courts of the necessity of passing upon cases plainly outside their jurisdiction.²⁰

¹⁴Act March 3, 1887, c. 373, § 6, 24 Stat. 555, as corrected by act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436.

¹⁵Wetmore v. Rymer, 169 U. S. 118, 42 L. ed. 683, 18 Sup. Ct. Rep. 293. See ante, § 42.

¹⁶Ante, § 77.

¹⁷Missouri P. Ry. v. Fitzgerald, 160 U. S. 582, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Whitcomb v. Smithson, 175 U. S. 637, 44 L. ed. 303, 20 Sup.

Ct. Rep. 248; Gurnee v. Patrick Co. 137 U. S. 143, 34 L. ed. 601, 11 Sup. Ct. Rep. 34; Levinski v. Middlesex

B. Co. 92 Fed. 462, 34 C. C. A. 452.

¹⁸As to transfers to give jurisdiction. See ante, § 23.

¹⁹Williams v. Nottawa Tp. 104 U. S. 209, 26 L. ed. 716.

²⁰Nashua, etc. R. R. v. Boston & L. R. R. 136 U. S. 356, 34 L. ed. 367, 10 Sup. Ct. Rep. 1004.

It strikes a blow at improper collusive attempts to impose upon the Federal courts the cognizance of cases not justly belonging to them.¹ A decree in equity dismissing for want of jurisdiction should so state, and reserve the merits of the case.²

[b] Jurisdictional defect or fraud must be clear.

It must appear "to the satisfaction" of the court that its jurisdiction has been wrongfully invoked. This creates a legal discretion in the court and a duty to dismiss only when the facts create a legal certainty of the conclusion based on them.³ It is proper for the court to leave the decision of a question of fact upon which the issue as to jurisdiction must turn, to a jury,⁴ and if properly so submitted and under a correct charge, their finding will not be disturbed.⁵ So it may be referred to a master to take testimony and report.⁶ Where the complaint alleges the requisite diverse citizenship, it must be overcome by some further evidence than the allegations in a plea in abatement.⁷ The burden of proof is upon the party denying the jurisdiction.⁸ But if by state practice a general denial puts allegations of citizenship in issue and there is no proof to sustain it, then on appeal judgment will be reversed.⁹

Many cases involving the question of removal have, however, declared that if there was doubt as to the existence of a separable controversy,¹⁰ or otherwise as to the right of removal, the circuit court should remand.¹¹ This seems to be on grounds of general expediency to avoid the expensive results of an improper removal, and not in obedience to any statutory principle.¹² Moreover the remanding order was formerly, but is not now, quickly appealable, and some of the cases gave weight to that fact.¹³

¹Hawes v. Oakland, 104 U. S. 459, 26 L. ed. 831.

²Indian L. & T. Co. v. Shoenfelt, 135 Fed. 484, 68 C. C. A. 196.

³Barry v. Edmunds, 116 U. S. 559, 562, 565, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; Wetmore v. Rymer, 169 U. S. 128, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Colvin v. Jacksonville, 158 U. S. 460, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; Deputron v. Young, 134 U. S. 252, 33 L. ed. 923, 10 Sup. Ct. Rep. 539; Put-in-Bay Waterworks v. Ryan, 181 U. S. 430, 45 L. ed. 938, 21 Sup. Ct. Rep. 709.

⁴Terry v. Davy, 107 Fed. 50, 46 C. C. A. 141; Mexican C. R. R. v. Glover, 107 Fed. 356, 46 C. C. A. 334.

⁵Alabama G. S. Ry. v. Carroll, 84 Fed. 772, 28 C. C. A. 207; Chicago, etc. Ry. v. Ohle, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632.

⁶Egerton v. Starin, 91 Fed. 932.

⁷Adams v. Shirk, 117 Fed. 801, 805, 55 C. C. A. 25.

⁸Adams v. Shirk, 117 Fed. 801, 805, 55 C. C. A. 25; Wiemer v. Louisville, etc. Co. 130 Fed. 244; Pennsylvania Co. v. Bay. 138 Fed. 203.

⁹Yocum v. Parker, 130 Fed. 770, 66 C. C. A. 80.

¹⁰Concord C. Co. v. Haley, 76 Fed. 882; Ernst v. American S. M. Co. 114 Fed. 981.

¹¹Evans v. Faxon, 11 Biss. 175, 10 Fed. 312; Sanger v. Seymour, 25 Fed. 289; Kansas v. Bradley, 26 Fed. 291, 292; Kessinger v. Vannatta, 27 Fed. 891; Hutcheson v. Bigbee, 56 Fed. 329; Plant v. Harrison, 101 Fed. 307; In re Cilley, 58 Fed. 989; Johnson v. Wells, 91 Fed. 4.

¹²Wolff v. Archibald, 4 McCrary, 581, 14 Fed. 369; Levy v. Laclede Bank, 18 Fed. 194; Adams v. May, 27 Fed. 908.

¹³Wilson v. St. Louis, etc. Ry. 22 Fed. 5; supra note[a].

[c] Dismissal "at any time"—mode of objection.

Formerly objection to jurisdiction had to be raised by plea in abatement, and was waived by pleading to the merits.¹⁵ Unless one of the parties raised a question by such plea the court was accordingly unable to take notice of colorable assignments or transfers to give jurisdiction so long as the pleadings made out a case of jurisdiction.¹⁶ The act of 1875 not only enabled the question to be raised at any time,¹⁷ but permitted and indeed requires¹⁸ the circuit court to notice any such imposition upon its jurisdiction in the absence of any plea or motion of the parties.¹⁹ It is the court's duty where a question of jurisdictional defect is raised to determine it before proceeding further with the case.²⁰ On motion to dismiss however, if a bona fide claim with a plausible case of jurisdiction is made out, the court will not ordinarily enter into the merits but will leave the jurisdictional question to be determined on formal pleadings. The section does not restrict the court to any mode of inquiry so long as the parties are given a fair hearing.² But it is still proper for the parties to raise the issue by plea to the jurisdiction;³ or by petition or motion to remand.⁴ Parties may be permitted to amend their pleading for that purpose.⁵ Indeed the Supreme Court was at first disposed not to alter the rule requiring parties claiming a defect of jurisdiction to plead in abatement;⁶ but later cases have declared in favor of liberality and permit the parties to raise the issue by answer,⁷ or still later by affidavits, petition or motion, so long as the adverse party is given due notice.⁸ A motion to remand a removed cause, is in the nature of a special plea to the

¹⁵De Sobry v. Nicholson, 3 Wall. 423, 18 L. ed. 264; Wickliffe v. Owings, 17 How. 47, 15 L. ed. 44.

¹⁶Farmington v. Pillsbury, 114 U. S. 138, 143, 29 L. ed. 114, 5 Sup. Ct. Rep. 807.

¹⁷Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; Deputron v. Young, 134 U. S. 252, 33 L. ed. 923, 10 Sup. Ct. Rep. 539.

¹⁸Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; Egerton v. Starin, 91 Fed. 932; Oberlin College v. Blair, 70 Fed. 414.

¹⁹Morris v. Gilmer, 129 U. S. 326, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; Oberlin College v. Blair, 70 Fed. 414; Bland v. Fleeman, 29 Fed. 670; Teas v. Albright, 13 Fed. 406; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81; United States v. Crawford, 47 Fed. 561.

²⁰Ashley v. Bd. of Superv. 60 Fed. 68, 8 C. C. A. 455.

¹York etc. Bk. v. Abbot, 131 Fed. 980

²Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. Rep. 521, 29 L. ed. 725.

³Imperial R. Co. v. Wyman, 38 Fed. 577, 3 L.R.A. 503; see Bland v. Fleeman, 29 Fed. 669.

⁴Penn. R. R. v. Allegheny V. R. R. 25 Fed. 113.

⁵Ashley v. Presque I. Co. 60 Fed. 55, 8 C. C. A. 455.

⁶Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; see Draper v. Springport, 21 Blatchf. 240, 15 Fed. 328, 332.

⁷Anderson v. Watt, 138 U. S. 701, 32 L. ed. 1078, 11 Sup. Ct. Rep. 449; Cameron v. Hodges, 127 U. S. 322, 32 L. ed. 133, 8 Sup. Ct. Rep. 1154.

⁸See Morris v. Gilmer, 129 U. S. 315, 326, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Anderson v. Watt, 138 U. S. 694, 701, 32 L. ed. 1078, 11 Sup. Ct. Rep. 449, 450; Deputron v. Young, 134 U. S. 252, 33 L. ed. 928, 10 Sup. Ct. Rep. 539; Blythe v. Hinckley, 84 Fed. 247; Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25; Hartog v. Memory, 23 Fed. 836; Dennistoun v. Draper, 5 Blatchf. 336, Fed. Cas. No. 3,804.

jurisdiction.⁹ The fact that a motion to remand has been denied does not make the jurisdictional question *res adjudicata*, so as to prevent its being raised and the motion to remand renewed, at a later trial.¹⁰ The fact of previous demurrer for failure to state a cause of action, does not make a motion to remand for want of jurisdiction, too late.¹¹ Motion to remand may sometimes be entertained at the final hearing.¹² A question of jurisdictional fact may properly be submitted to a jury as a distinct issue.¹³

But if a plea of want of diverse citizenship has once been fully inquired into, the court will not hear further proofs directed thereto.¹⁴ And where there is no issue in the pleadings of a jurisdictional character, it has been held improper and not within the purpose of the act of 1875 to permit irrelevant evidence upon that point to be introduced at the hearing or trial.¹⁵

[d] —time for making objection.

It is not perceived that the section restricts the power of the court to proceed upon its own motion at any time while a case is within its control⁸ and if a defect of jurisdiction apparent in a bill is overlooked, it is still the court's duty to dismiss upon discovering it.¹⁹ A petition for dismissal by parties to the suit has been entertained after proofs taken before master,²⁰ after evidence closed,¹ after verdict and judgment,² and after two trials had been had.³ A motion to dismiss for want of jurisdiction comes too late when made long after entry and collection of the judgment.⁴ But cases have been remanded even after judgment recovered at, the same term, upon ascertaining the impropriety of removal.⁵ The court is not required to wait until trial or final judgment before remanding or dismissing.⁶ But very often the jurisdictional defect or fraud does not appear until the trial, and the court should then act.⁷ Sometimes it does not

⁹Mansfield, etc. R. R. v. Swan, 111 U. S. 379, 28 L. ed. 463, 4 Sup. Ct. Rep. 510.

¹⁰Missouri P. R. R. v. Fitzgerald, 160 U. S. 580, 40 L. ed. 543, 16 Sup. Ct. Rep. 389; Collins v. Wellington, 31 Fed. 244; Egerton v. Starin, 91 Fed. 932; Falls W. M. Co. v. Broderick, 2 McCrary, 489, 6 Fed. 654; Hamblin v. Chicago, etc., Ry. 43 Fed. 401. etc., Ry. 43 Fed. 401.

¹¹Indiana v. Lake Erie, etc. R. R. 85 Fed. 2.

¹²See Richmond, etc. R. R. v. Findley, 32 Fed. 641.

¹³Chicago, etc. Ry. v. Ohle, 117 U. S. 124, 29 L. ed. 837, 6 Sup. Ct. Rep. 632; Terry v. Davy, 107 Fed. 50, 48 C. C. A. 141. See also *supra*, note [] and cases cited.

¹⁴Sharon v. Hill, 26 Fed. 341.

¹⁵Draper v. Springport, 21 Blatchf. 240, 15 Fed. 332. See Hartog v. Memory, 116 U. S. 588, 2 L. ed. 725, 6 Sup. Ct. Rep. 521.

¹⁸Egerton v. Starin, 91 Fed. 932;

Kingman v. Holthans, 59 Fed. 315; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Bel-
lowes v. Sowles, 53 Fed. 325; McCormick v. McDonald, 110 Fed. 50.

¹⁹Hanley v. Beatty, 117 Fed. 67, 54 C. C. A. 445.

²⁰Stegleder v. McInesten, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616.

¹Anderson v. Bassman, 140 Fed. 10.

²Toledo, etc. Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28.

³Deputron v. Young, 134 U. S. 252, 33 L. ed. 929, 10 Sup. Ct. Rep. 539.

⁴Muhlenberg Co. v. Cit. Nat. Bank, 65 Fed. 537.

⁵Ayres v. Wiswall, 112 U. S. 187, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; Lazensky v. Sup. Lodge, 32 Fed. 417. See also Hartog v. Memory, 23 Fed. 837.

⁶Rosenbaum v. Bauer, 120 U. S. 459, 30 L. ed. 747, 7 Sup. Ct. Rep. 633; Magee v. Union P. R. R. 2 Sawy. 447, Fed. Cas. No. 8,945.

⁷Kain v. Texas P. R. R. 3 Cent. L.

appear until all the pleadings are in.⁸ And dismissal has been refused where an apparent want of jurisdiction might be remedied where the pleadings were completed.⁹ Sometimes amendment of the pleadings may show the impropriety of a removal granted because of a separable controversy and the cause should then be remanded;¹⁰ or such fact may develop at the trial or hearing.¹¹ So where the jurisdictional amount is properly alleged, a denial of its sufficiency, does not warrant a dismissal in advance of the hearing.¹² The fact that the parties have pleaded and taken evidence after the removal does not make the court's duty to remand any the less imperative.¹³ The circuit court's jurisdiction may be ousted by discontinuance of nonsuit as to the party removing a cause, and the cause should then be remanded.¹⁴ So also it may be ousted for inability to reach the parties by its process within the district.¹⁵ It is the duty of a party discovering facts showing an imposition upon the court's jurisdiction to act at the first opportunity thereafter.¹⁶

[e] Dismissal or reversal in appellate court.

The Supreme Court will on its own motion notice a defect in the jurisdiction of the court below, and reverse.¹⁸ The circuit court of appeals follows the same rule.¹⁹ and the failure of the parties to raise the question or their consent to waive it does not prevent that court from considering it.²⁰

[f] Want of controversy really within circuit court's cognizance.

This clause includes cases where the jurisdiction is based, upon character of parties as well as upon the nature of the subject matter.²

J. 12, Fed. Cas. No. 7,596; *Lozano v. Wehmer*, 22 Fed. 756.

⁸*Excelsior W. P. Co. v. Pacific B. Co.* 185 U. S. 282, 46 L. ed. 911, 22 Sup. Ct. Rep. 681; *Ryan v. Young*, 9 Biss. 63, Fed. Cas. No. 12,188.

⁹*Reding v. Texas, etc. Ry.* 10 Rep. 136, Fed. Cas. No. 11,630a.

¹⁰*Long v. Buford*, 24 Fed. 241.

¹¹*Collins v. Wellington*, 31 Fed. 244.

¹²*Pennsylvania Co. v. Bay*, 138 Fed. 203.

¹³*Broadway Ins. Co. v. Chicago, G. W. R.* 101 Fed. 507.

¹⁴*Texas T. Co. v. Seeligson*, 122 U. S. 519, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1261; *Cassidy v. Atlanta, etc. R. R.* 109 Fed. 673; *Bane v. Keefer*, 66 Fed. 610.

¹⁵*Stowe v. Sante Fe. P. R. R.* 117 Fed. 368.

¹⁶*Deputron v. Young*, 134 U. S. 252, 33 L. ed. 929, 10 Sup. Ct. Rep. 539.

¹⁸*Mansfield, etc. R. R. v. Swan*, 111 U. S. 379, 28 L. ed. 463, 4 Sup. Ct.

Rep. 510; *Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 817; *King B. Co. v. Otoe Co.* 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Koenigsberger v. Richmond S. M. Co.* 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. Rep. 751.

¹⁹*Thurber v. Miller*, 67 Fed. 373, 14 C. C. A. 432; *Barth v. Coler*. 60 Fed. 466, 9 C. C. A. 81; *Grand T. Ry. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237; *Gorman, etc. Co. v. Wright*. 134 Fed. 364, 67 C. C. A. 345; *Kansas, etc. Ry. v. Prunty*, 133 Fed. 13, 66 C. C. A. 163; *C. C. Taft Co. v. Century Sav. Bank*, 141 Fed. 369 — (C. C. A.) —. So, the appellate court will dismiss where satisfied that the jurisdiction has been collusively and improperly invoked: *Twinbull v. Ross*, 141 Fed. 649 — (C. C. A.) —.

²⁰*Utah-Nevada Co. v. De Lamar*, 133 Fed. 116, 66 C. C. A. 179.

²*Hartog v. Memory*, 23 Fed. 837.

It has reference to the jurisdictional capacity of the court, to hear, determine, and grant relief.³ That may be questioned "at any time." But the section does not seem to direct the court to remand or dismiss "at any time" for errors or irregularities arising from acts or omissions of the parties which tend to defeat the full exercise of jurisdiction, and which are waived by failure to plead in abatement.⁴ If the controversy by virtue of the character of the parties, subject matter, and value in dispute, is one over which Congress has conferred jurisdiction upon the Federal court original or by removal, then this clause cannot apply;⁵ though of course remand of the case might be necessary for irregularity in the removal proceedings.⁶ It has reference, moreover, to the real and substantial character, of the controversy, and not merely to the case made out in the face of the pleadings;⁷ and since that may not fully appear until the trial, the court is permitted to dismiss or remand at any time.⁸ So a case nominally between an alien and a citizen will be dismissed when really between a county and one of its citizens.⁹ However, where there has been no collusion, and a defendant removes in good faith believing citizenship to be diverse, it has been decided that the plaintiff after trial cannot be heard to deny the diversity of citizenship and so procure a remand,¹⁰ though another case has declared that the removing party may, on appeal, allege want of jurisdiction in the Federal court, as ground of error.¹¹ Where the sustaining of demurrer as to part of plaintiff's cause of action leaves a balance in dispute, below the jurisdictional amount, it would seem improper to dismiss or remand so long as the original demand made out a case really and substantially within the court's jurisdiction.¹² But if plaintiff includes in his demand part of debt he knows to be paid, in order to make the jurisdictional value, the court will dismiss the cause when that fact is brought out.¹³

[g] Section inapplicable where jurisdiction lawfully attached in first instance.

This provision as to dismissal did not supersede the established principle that where jurisdiction has rightfully attached, the transfer or devolution of the right involved will not oust it,¹⁴ nor the principle which per-

³Rosenbaum v. Bauer, 120 U. S. 459, 30 L. ed. 747, 7 Sup. Ct. Rep. 633.

⁴See Osgood v. Chicago, etc. R. R. 6 Biss. 336, Fed. Cas. No. 10,604; Ruckman v. Ruckman, 1 Fed. 591; Betzholtz v. American I. Co. 47 Fed. 705; Woolridge v. McKenna, 8 Fed. 668; Northern P. T. Co. v. Lowenberg, 18 Fed. 343. But see Webber v. Bishop, 13 Fed. 49.

⁵Warner v. Pennsylvania R. R. 13 Blatchf. 231, Fed. Cas. No. 17,186.

⁶Olds W. Wks. v. Benedict, 67 Fed. 1, 14 C. C. A. 285.

⁷Ryan v. Young, 9 Biss. 63, Fed. Cas. No. 12,188.

⁸Williams v. Nottawa Tp. 104 U. S. 209, 26 L. ed. 716.

⁹Cashman v. Amador, etc. Co. 118 U. S. 58, 30 L. ed. 72, 6 Sup. Ct. Rep. 926.

¹⁰Davies v. Lathrop, 13 Fed. 565, 21 Blatchf. 164.

¹¹Wabash R. R. v. Barbour, 73 Fed. 515, 19 C. C. A. 546.

¹²Levinski v. Middlesex B. Co. 92 Fed. 457, 34 C. C. A. 452; Hardin v. Cass Co. 42 Fed. 652.

¹³Lozano v. Wehmer, 22 Fed. 757.

¹⁴Ante, § 2 [u].

mits intervention and other ancillary proceedings as incident to a suit which is rightfully of Federal cognizance.¹⁷ In other words the question whether a cause is really and substantially a controversy of Federal cognizance is determined as of the time when the jurisdiction first attached;¹⁸ and in removal cases this involves both the time of removal and of the institution of the proceeding.¹⁹

[h] Parties collusively or improperly made or joined.

Congress has from the first legislated to prevent assignments and transfers made to confer jurisdiction on the Federal courts;² and the courts have themselves made rules for their protection against fraud in this respect.³ Prior to this provision of the act of 1875, however, the courts were unable to dismiss or remand many such causes when no plea in abatement was made.⁴ The foregoing provision gave them that power.⁵ A case brought in the name of a party who has no interest, in order to confer colorable jurisdiction should be dismissed;⁶ and if removed through collusion or improper joinder it should be remanded.⁷ So an alleged change of residence may appear to be a fraudulent attempt to secure Federal jurisdiction.⁸ However, if a transfer is bona fide even though the intent was to confer jurisdiction, it is not within this provision.⁹ Where assignments is made to defeat Federal jurisdiction, this section affords no relief.¹⁰

[i] Dismiss or remand.

These words are not used interchangeably, but "dismiss" applies to suits brought in the circuit court and "remand" to suits removed thereto.¹¹

¹⁷Ante, § 3.

¹⁸See *Phelps v. Oaks*, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714.

¹⁹The writer finds no cases so declaring, but it seems clear. The decision might have been rested upon this ground in *Levinski v. Middlesex B. Co.* 92 Fed. 457, 34 C. C. A. 452, and *Hardin v. Cass Co.* 42 Fed. 652, in which dismissal was refused, although the value in dispute was reduced by the sustaining of demurrers, below the jurisdictional sum.

²Ante, § 23.

³Ante, § 2-[q] et seq.

⁴*Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

⁵*Supra*[a].

⁶*Lake Co. Comrs. v. Dudley*, 173 U. S. 253, 43 L. ed. 689, 19 Sup. Ct. Rep. 402; *Detroit v. Dean*, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 560; *Lehigh M. etc. Co. v. Kelly*, 160 U. S. 342, 40 L. ed. 450, 16 Sup. Ct. Rep. 307; *Coffin v. Haggins*, 11 Fed. 219, 7 Sawy. 509; *Industrial Guaranty, etc. Co. v. Electrical S. Co.* 58 Fed. 543, 7 C. C. A. 471; *New A. W. Fed. Proc.*—48.

Works v. Louisville B. Co. 122 Fed. 776, 58 C. C. A. 576.

⁷*Little v. Giles*, 118 U. S. 602, 30 L. ed. 271, 7 Sup. Ct. Rep. 32; *McLean v. Clark*, 31 Fed. 501.

⁸*Alabama, etc. R. R. v. Carroll*, 84 Fed. 780, 28 C. C. A. 207.

⁹*Lanier v. Nash*, 121 U. S. 404, 410, 30 L. ed. 947, 7 Sup. Ct. Rep. 919; *Cross v. Allen*, 141 U. S. 533, 35 L. ed. 847, 12 Sup. Ct. Rep. 69; *Stanley v. Albany Co.* 15 Fed. 483, 21 Blatchf. 249. And see ante, § 23.

¹⁰*Oakley v. Goodnow*, 118 U. S. 44, 30 L. ed. 61, 6 Sup. Ct. Rep. 944; *Leather Mfg. Bank v. Cooper*, 120 U. S. 781, 30 L. ed. 816, 7 Sup. Ct. Rep. 777. See *Dow v. Bradstreet*, 46 Fed. 826; *Carson v. Dunham*, 149 Mass. 56, 14 Am. St. Rep. 400, 20 N. E. 314, 3 L.R.A. 205; *Bowley v. Railroad*, 110 N. C. 318, 14 S. E. 777. It is suggested that the State courts should take notice of such a fraud; *Provident, etc. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104.

¹¹*Cates v. Allen*, 149 U. S. 460, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977;

[j] Costs.

Where the fault is distinctly traceable to one party and the other is free therefrom, costs should of course be taxed against the former.¹³ Thus, the party removing is usually¹⁴ the one in fault and should pay the costs of both trial and appellate courts.¹⁵ Where parties are equally responsible for the removal or bringing of the suit in the Federal court, costs have sometimes been refused to either¹⁶ and sometimes each has been decreed to pay one-half.¹⁷ So where one improperly brought a case in the Federal court and the other removed a case thereto, each was decreed to pay his own costs.¹⁸ There has been some question whether an attorney's docket fee should be allowed as taxable costs upon remand. In a Michigan district the usual \$20 docket fee was allowed,¹⁹ but in the district of Indiana the right to any docket fee was denied.²⁰ Elsewhere the docket fee of \$10 allowable in trials at law without a jury was deemed a fair compromise.¹ Compensation for typewriting, pleadings, motions, etc., has been refused.²

§ 819. Either party may notice cause for trial.

In all civil actions in the courts of the United States either party may notice the same for trial.

R. S. § 950, U. S. Comp. Stat. 1901, p. 695.

This provision was first enacted in 1871.⁵ In common law causes the State practice is followed "as near as may be."⁶ This includes the time of giving notice of hearing on demurrer which is a trial of an issue of law.⁷

§ 820. Priority in hearing of state cases.

When a State is a party, or the execution of the revenue laws of

Northern P. T. Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348; Gombert v. Lyon, 80 Fed. 306. But see the dictum of Harlan J. in Barney v. Latham, 103 U. S. 205, 216, 26 L. ed. 518.

¹³Tennessee v. Union, etc. Bank, 152 U. S. 464, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

¹⁴But see Egerton v. Starin, 91 Fed. 932; Bane v. Keefer, 66 Fed. 610.

¹⁵Mansfield v. Swan, 111 U. S. 386, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Hanrick v. Hanrick, 153 U. S. 196, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; Graves v. Corbin, 132 U. S. 590, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; La Confiance, etc. Co. v. Hall, 137 U. S. 62, 34 L. ed. 573, 11 Sup. Ct. Rep. 5; Walker v. Collins, 167 U. S. 59, 42 L. ed. 76, 17 Sup. Ct. Rep. 38; Torrence v. Shedd, 144 U. S. 533, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; Kellam v. Keith, 144 U. S. 570, 36 L. ed.

544, 12 Sup. Ct. Rep. 922; North A. etc. Co. v. Morrison, 178 U. S. 269, 44 L. ed. 106, 20 Sup. Ct. Rep. 869.

¹⁶First Nat. Bank of Parkersburg v. Prager, 91 Fed. 689, 34 C. C. A. 51.

¹⁷Hancock v. Holbrook, 112 U. S. 230, 28 L. ed. 715, 5 Sup. Ct. Rep. 115.

¹⁸Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287.

¹⁹Josslyn v. Phillips, 27 Fed. 481.

²⁰Smith v. Tel. Co. 81 Fed. 242; and see Lozano v. Wehmer, 22 Fed. 755.

¹Riser v. Southern Ry. 116 Fed. 1014.

²Pellett v. Great N. R. R. 105 Fed. 194.

⁵Act Feb. 28, 1871, c. 99, § 17, 16 Stat. 439.

⁶Post, § 900.

⁷Rosenbach v. Dreyfuss, 2 Fed. 23.

a State is enjoined or stayed, in any suit in a court of the United States, such State, or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties.

R. S. § 949, U. S. Comp. Stat. 1901, p. 695.

This provision was enacted in 1870.⁹ It applies both to the trial docket and to hearing on appeal. As the court judges the sufficiency of the reason shown, the section is not imperative but vests a discretion in the court.¹⁰ Hence advancement of causes upon the docket has been denied where the enjoining of a State's revenue law affected only one property holder and did not appear to embarrass the State's governmental operations.¹¹ So the motion must be made on the part of the State or the party claiming under the revenue laws.¹² The State must be more than a nominal party as in the case of quo warranto against corporate directors.¹³ The rules of the Supreme Court also provide as to advancement of causes upon its docket.¹⁴ R. S. § 949, has also been referred to argumentatively as supporting the right of Federal courts to enjoin State revenue officers.¹⁵

§ 821. Deposit of moneys paid into court.

All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court: Provided, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

R. S. § 995, U. S. Comp. Stat. 1901, p. 711.

This provision was originally enacted in 1871.¹⁷ National banks may be designated as depositories of the United States.¹⁸ Though money deposited in them is not money in the United States treasury.¹⁹ Money thus de-

⁹Act June 30, 1870, c. 181, 16 Stat. 176.

¹⁰Hoge v. Richmond, etc. R. R. 93 U. S. 1, 23 L. ed. 781.

¹¹Hoge v. Richmond, etc. R. R. 93 U. S. 1, 23 L. ed. 781.

¹²Ward v. Maryland, 12 Wall. 163, 20 L. ed. 260; Central R. R. v. Bourbon Co. 116 U. S. 538, 29 L. ed. 725, 6 Sup. Ct. Rep. 601.

¹³Miller v. New York, 12 Wall. 159, 20 L. ed. 259.

¹⁴Post, § 2040 et seq.

¹⁵Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Parsons v. Marye, 23 Fed. 113.

¹⁷Act March 2, 1871, c. 2, § 1, 17 Stat. 1.

¹⁸R. S. § 5153, U. S. Comp. Stat. 1901, p. 3465.

¹⁹Branch v. United States, 100 U. S. 674, 25 L. ed. 759; Coudert v. United States, 175 U. S. 180, 44 L. ed. 122, 20 Sup. Ct. Rep. 56.

posited is in the custody of the law²⁰ and in the possession of the court as fully as though actually in the clerk's hands.¹ It is not subject to process even from the same court in another suit.² The bank acting as depository is not to be sued.³ The principles of law respecting the exclusiveness of such courts custody, and forbidding interference by any other court, apply to such deposits.⁴ Attempts to reach funds so deposited, or to obtain a share thereof, must be by ancillary application in the suit in which the funds were deposited, not by separate suit with different parties.⁵ Claimants to the fund may be heard at any time prior to final distribution.⁶ Tender of payment by deposit in court has long been recognized both in equity and common law practice.⁷

§ 822. Withdrawal of deposit—transfer to credit of United States.

No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn. And it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid, which have remained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depository of the United States, to the credit of the United States.

R. S. § 996 as amended by act Feb. 19, 1897, c. 265, § 3, 29 Stat. 578, U. S. Comp. Stat. 1901, p. 711.

The amendment of 1897 consisted in the addition of the last sentence requiring deposit to the credit of the United States after ten years. The first portion of the section was originally enacted in 1871.⁹

²⁰The Lottawana, 20 Wall. 201, 22 L. ed. 259; In re Forsyth, 78 Fed. 296.

¹Jones v. Merchants' Nat. Bank, 76 Fed. 683, 22 C. C. A. 483, 35 L.R.A. 698. Where a bidder at judicial sale is permitted to deposit a check as part payment which by agreement is to be credited on a decree in his favor, this need not be deposited under this section: Curtice v. Crawford County Bank, 124 Fed. 919.

²Gregory v. Boston S. D. Co. 144 U. S. 665, 36 L. ed. 585, 12 Sup. Ct. Rep. 783.

³Jones v. Merchants' Nat. Bank, 76 Fed. 683, 22 C. C. A. 483, 35 L.R.A. 698.

⁴Ante, § 17.

⁵Gregory v. Boston S. I. Co. 144 U. S. 665, 36 L. ed. 585, 12 Sup. Ct. Rep. 783.

⁶In re Howard, 9 Wall. 183, 19 L. ed. 634; Martin v. Rainwater, 56 Fed. 10, 5 C. C. A. 398.

⁷Potter v. Gardner, 5 Pet. 722, 8 L. ed. 285. The power of courts to order payment of money thus tendered, to the opposite party, both at law and in equity is elaborately considered in Caesar v. Capell, 83 Fed. 428, et seq.

⁹Act March 24, 1871, c. 2, § 2, 17 Stat. 1.

§ 823. Consolidation of causes.

When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may . . . consolidate said causes when it appears reasonable to do so.^{[a]-[c]}

R. S. § 921, U. S. Comp. Stat. 1901, p. 685.

[a] Scope and discretionary nature of provision.

The section also provides for making orders and rules to avoid costs and delay in such causes.¹⁰ It was enacted in 1813,¹¹ and carried forward without substantial change, into the Revised Statutes. From its wording it is obvious that a discretion is conferred upon the trial court,¹² and consolidation orders made in the exercise of that discretion will not be set aside on appeal;¹³ unless for gross abuse thereof.¹⁴ Nor is such discretion controllable by mandamus from an appellate court.¹⁵ The section applies in equity¹⁶ as well as at law; and in admiralty it is declared to be merely declaratory of existing principles.¹⁷ Another provision of law requires consolidation of suits for revenue penalties.¹⁸

[b] Instances of consolidation.

The cases present a variety of instances of consolidation. Actions on insurance policies involving the same risk and same questions of fact, are a common and perhaps the first illustration of the enforcement of the rule.¹ Patent infringement suits are often consolidated;² and ejectment cases involving the same title.³ So suits involving the foreclosure or administration of corporate assets, can frequently be consolidated to advantage.⁴ Suits against joint tortfeasors or for different torts growing out of the same fact, against one defendant may be consolidated.⁵ Re-

¹⁰See post, § 1833.

¹¹Act July 22, 1813, c. 14, 3 Stat. 21. Prior thereto consolidation was refused in absence of a general rule: *Bank v. Young*, 2 Cranch C. C. 52, Fed. Cas. No. 858.

¹²*Seawell v. Berry*, 55 Fed. 732; *Toledo, etc. R. R. v. Continental T. Co.* 95 Fed. 497, 36 C. C. A. 155.

¹³*Mutual L. I. Co. v. Hillmon*, 145 U. S. 292, 36 L. ed. 706, 12 Sup. Ct. Rep. 909; *Hanover Ins. Co. v. Kinneard*, 129 U. S. 176, 32 L. ed. 653, 9 Sup. Ct. Rep. 269.

¹⁴*Lincoln, etc. M. Co. v. Hendry*, 9 N. Mex. 152, 50 Pac. 330.

¹⁵*Lewis v. Baltimore, etc. R. R.* 62 Fed. 218, 10 C. C. A. 446.

¹⁶*Toledo, etc. R. R. v. Continental T. Co.* 95 Fed. 497, 36 C. C. A. 155; *Lant v. Kinne*, 75 Fed. 636, 21 C. C. A. 466.

¹⁷*Salmon Falls Mfg. Co. v. Tanager*, 3 Ware, 110, Fed. Cas. No. 12,267.

¹⁸Post, § 1384.

¹*Mutual L. I. Co. v. Hillmon*, 145 U. S. 292, 36 L. ed. 706, 12 Sup. Ct. Rep. 909.

²*Andrews v. Spear*, 4 Dill. 470, Fed. Cas. No. 379; *Frank v. Geiger*, 121 Fed. 126; see *Deering v. Winona H. Co.* 24 Fed. 90.

³See *Keep v. Indianapolis, etc. R. R.* 10 Fed. 455, 3 McCrary, 302.

⁴*Wabash, etc. R. R. v. Central T. Co.* 23 Fed. 513; *Continental T. Co. v. Toledo, etc. R. R.* 82 Fed. 642; *Toledo, etc. R. R. v. Continental T. Co.* 95 Fed. 497, 36 C. C. A. 155.

⁵See *Union P. Ry. v. Jones*, 49 Fed. 343, 1 C. C. A. 282; *Keep v. Indianapolis, etc. R. R.* 10 Fed. 454, 3 McCrary, 302.

plevin for cattle and action for damages for breach of contract of adjustment of same cattle may be consolidated.⁶ Libel suits against different newspapers may be consolidated where the principal issues are substantially identical in all.⁷ Collision suits and other proceedings in admiralty have been consolidated.⁸ A bill to enjoin may be consolidated with a bill to enforce an execution, the latter being treated as a cross-bill.⁹ It is proper to consolidate several causes of action for penalties against the same defendant.¹⁰ And where a plaintiff brought eleven *qui tam* actions for penalties against the same defendant, his motion to have decision on demurrer in one stand for all, was denied and he was required to take the risk of costs and burden imposed by his own action in bringing the separate suits.¹¹ Actions which might properly have been consolidated have been tried together and to the same jury without formal consolidation.¹² The fact that service on defendants was at different times and a term intervened, does not prevent consolidation;¹³ nor does the fact that defendants will as a result be brought into antagonism.¹⁴

But the purpose of consolidation is the saving of time, labor and expense, and where that would not result, it may properly be denied.¹⁵ Where proceedings are *prima facie* against distinct corporations, consolidation has been refused, though they were alleged to be practically the same.¹⁶

[c] Effect of consolidation.

The causes of action remain distinct.¹⁸ Consolidation of separate causes does not deprive the parties to the respective suits of their original right to three peremptory challenges.¹⁹ It does not prevent or defeat the right to dismissal of one of them.²⁰ There must be separate verdicts, judgments or decrees,¹ even although the consolidating party wished for one verdict.²

⁶Teal v. Bilby, 123 U. S. 573, 31 L. ed. 263, 8 Sup. Ct. Rep. 239.

⁷Butler v. Courier-Citizen Co. 127 Fed. 1015.

⁸The North Star, 106 U. S. 27, 27 L. ed. 95, 1 Sup. Ct. Rep. 41; The Job T. Wilson, 84 Fed. 206; The Eliza Lines, 61 Fed. 310; The Burke, 4 Cliff. 582, Fed. Cas. No. 2,159.

⁹Lant v. Kinne, 75 Fed. 636, 21 C. C. A. 466.

¹⁰Wolverton v. Lacey, 18 L. R. 672, Fed. Cas. No. 17,932.

¹¹Ferrett v. Atwill, 1 Blatchf. 151, Fed. Cas. No. 4,747.

¹²Holmes v. Sheridan, 1 Dill. 351, Fed. Cas. No. 6,644.

¹³Smith v. Woodward, 2 Cranch C. C. 226, Fed. Cas. No. 13,129.

¹⁴Keep v. Indianapolis, etc. R. R. 10 Fed. 454, 3 McCrary, 302.

¹⁵Davis v. St. Louis & S. F. R. R. 25 Fed. 786; Mercantile T. Co. v. Missouri K. & T. Ry. 41 Fed. 8.

¹⁶Central T. Co. v. Virginia, etc. Co. 55 Fed. 769.

¹⁸Toledo, etc. R. R. v. Continental T. Co. 95 Fed. 506, 36 C. C. A. 155.

¹⁹Mutual L. I. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909.

²⁰Young v. Grand T. Ry. 9 Fed. 348, 10 Biss. 550.

¹Mutual L. I. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909, but see in an admiralty case: The North Star, 106 U. S. 27, 27 L. ed. 96, 1 Sup. Ct. Rep. 41.

²Union P. Ry. v. Jones, 49 Fed. 343, 1 C. C. A. 282.

§ 824. Actions for mining claims governed by law of possession.

No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

R. S. § 910, U. S. Comp. Stat. 1901, p. 679.

§ 825. Procedure upon arbitration award between carrier and its employees—filing award and exceptions.

The award [made by arbitrators between an interstate carrier and its employees pursuant to a submission by the parties] and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the circuit court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon both parties, unless set aside for error of law apparent upon the record. . . . The award being filed in the clerk's office of a circuit court of the United States, as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation and judgment be entered accordingly when such exceptions shall have been finally disposed of either by said circuit court or on appeal therefrom.

Part of §§ 3 and 4 of act June 1, 1898, c. 370, 30 Stat. 425, 426, U. S. Comp. Stat. 1901, p. 3207, 3208.

§ 826. — judgment and appeal.

At the expiration of ten days from the decision of the circuit court upon exceptions taken to said award, as aforesaid, judgment shall be entered in accordance with said decision unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided. The determination of said circuit

court of appeals upon said question shall be final, and being certified by the clerk thereof to said circuit court, judgment pursuant thereto shall thereupon be entered by said circuit court. If exceptions to an award are finally sustained, judgment shall be entered setting aside the award. But in such case the parties may agree upon a judgment to be entered disposing of the subject-matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Part of § 4 act June 1, 1898, c. 370, 30 Stat. 426, U. S. Comp. Stat. 1901, p. 3208.

CHAPTER 22.

WRITS AND PROCESS.

- § 835. Cross references and related matters.
- § 836. Form of writs and process.
- § 837. Teste of process from day of its issue.
- § 838. Supreme Court process in name of President.
- § 839. Form of process of circuit court of appeals.
- § 840. Amendment of circuit and district court process.
- § 841. Power of Federal courts to issue writs.
- § 842. Power of circuit court of appeals to issue writs.
- § 843. Federal courts' power to issue writs of ne exeat.
- § 844. Supreme Courts' power to issue mandamus and prohibition.
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- § 847. —remedy by mandamus merely cumulative.
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- § 850. Bankruptcy courts' power to issue process.
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- § 852. Provisions authorizing service of process throughout districts containing judicial divisions.
- § 853. Place, mode and sufficiency of service.
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- § 855. Process in local actions may run in another district of State.
- § 856. Service by publication, etc., in suits to enforce liens, remove clouds, etc.
- § 857. Service of process when marshal is party.
- § 858. Service of process in suit against a State.
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- § 861. Process against foreign ministers and their domestics void.
- § 862. —penalty for suing out and executing such process.
- § 863. —when process may be issued against persons in service of ministers.
- § 864. Issuance of prohibition by circuit court of appeals in admiralty.

§ 835. Cross references and related matters.

Habeas corpus¹ and injunction² are treated elsewhere. Attachment

¹Post, §§ 1669 et seq.

²Post, §§ 1111 et seq.

and execution while discussed generally in this chapter,³ are more fully treated in the chapter on common law procedure.⁴ Provisions as to writ of error are contained in the chapter on appeals.⁵ The sections dealing with the necessity for writs to bring prisoners into court, or for arrest upon several indictments or for removal from one district to another, are set forth in the chapter on criminal procedure.⁶ Equity and admiralty process may be prescribed by the Supreme Court;⁷ and the circuit and district courts may also make rules governing their process.⁸ The alteration of the time of holding term does not abate process;⁹ or the holding of special criminal sessions.¹⁰ The Yellowstone Park Commissioner has power to issue process of arrest.¹¹ Where a criminal cause is remitted from circuit to district court, or vice versa, process goes with it.¹² It is the marshal's duty to serve process;¹³ though the plaintiff sue in forma pauperis.¹⁴ Provisions as to unserved process in a marshal's hands on his retirement are given elsewhere;¹⁵ so also as to costs where several processes are issued where one would do.¹⁶ Provisions respecting subpoenas for witnesses will be found in the chapter on witnesses.¹⁷ Penal provisions punishing the obstructing of an officer executing writ or process¹⁸ or the stealing or falsifying of them¹⁹ are not within the scope of this work. The jurisdiction of the Federal courts to issue mandamus against the Union Pacific Railroad²⁰ and to compel equal facilities to shippers¹ is set forth in a preceding chapter.

Author's Section.

§ 836. Form of writs and process.

All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the as-

³Post, 841 [c].

⁴Post, §§ 904-907, 925.

⁵Post, §§ 1923, et seq.

⁶Post, §§ 1584, 1581, 1583.

⁷Ante, § 802.

⁸Ante, § 805.

⁹Ante, §§ 367, 304.

¹⁰Ante, § 358.

¹¹§ 5, act May 7, 1894, 28 Stat. 74
U. S. Comp. Stat. 1901, p. 1563.

¹²Post, § 1590.

¹³Ante, § 644; see also § 657.

¹⁴Ante, § 478.

¹⁵Ante, §§ 663, 664.

¹⁶Post, § 1832.

¹⁷Post, §§ 1742, 1743, 1748.

¹⁸R. S. § 398, U. S. Comp. Stat.
1901, p. 3655.

¹⁹R. S. § 53, 94 U. S. Comp. Stat.

1901, p. 3654.

²⁰Ante, § 159.

¹Ante, § 152.

sociate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of the said courts shall be provided at the expense of the United States.^{[a]-[c]}

R. S. § 911, U. S. Comp. Stat. 1901, p. 683.

[a] Scope and general construction.

The foregoing provision was enacted in 1792,⁴ although R. S. § 912 as to date of teste was not enacted until 1872.⁵ Writ is a form of process, and process is the larger or generic term. This and the next succeeding section control as to the sealing, signing and teste of Federal process, thus excluding the operation of State laws under the section conforming Federal to State practice in common-law causes, so far as respects signing, seal, or teste.⁶ Otherwise neither the form of process nor its contents are prescribed by Congress,⁷ except in admiralty and equity.⁸ In common-law cases the State practice and procedure govern, both by virtue of the general conformity clause,⁹ and particular provisions respecting attachment and execution.¹⁰ But while Congress has not specifically required it, the general style of State process, which runs usually in the name of the State or the people, is very properly departed from by the Federal courts.¹¹ In the Federal courts process runs in the name of the President.¹² This practice is not affected or controlled by the fact that the constitution of a State where the court sits, requires process to be in the name of the State.¹³ One result of the Federal statutory requirement as to form of process is that in States like New York and Wisconsin, where process of summons is issued and served by the attorney, in the State court, the Federal courts will not adopt or follow that practice under the conformity provisions of R. S. § 914, but will require their summons to be signed and sealed by the clerk.¹⁴ A suitor or his attorney may, however, draft the writ in the Federal court and a valid writ of summons may be written in over the seal and signature affixed by the clerk to a blank.¹⁵ Where garnishment is accomplished under State practice by delivery of notice under the writ of attachment issued, and is not treated as process by the State courts, it will not be deemed process required to be signed and sealed under R.

⁴Act May 8, 1792, c. 36, § 1, 1 Stat. 275.

⁵Post, § 837.

⁶Gillum v. Stewart, 112 Fed. 30.

⁷Jewett v. Garrett, 47 Fed. 627; Chamberlain v. Mensing, 47 Fed. 436.

⁸Post, §§ 1195, 936.

⁹Post, § 900.

¹⁰Post, §§ 905, 925.

¹¹See Chamberlain v. Mensing, 47 Fed. 436; Middleton P. Co. v. Rock R. Co. 19 Fed. 253, 254.

¹²Middleton P. C. v. Rock R. Co. 19 Fed. 253, 254; see post, § 838.

¹³Chamberlain v. Mensing, 47 Fed. 436.

¹⁴Peaslee v. Haberstro, 15 Blatchf. 472, Fed. Cas. No. 10,884; Dwight v. Merritt, 4 Fed. 614, 18 Blatchf. 305; Middleton P. Co. v. Rock R. P. Co. 19 Fed. 253; Brown v. Pond, 5 Fed. 37. As to the proper form and procedure in New York see Martin v. Criscuola, 10 Blatchf. 211, Fed. Cas. No. 9,159; Johnson v. Healy, 9 Ben. 318, Fed. Cas. No. 7,389.

¹⁵Jewett v. Garrett, 47 Fed. 627.

S. § 911.¹⁶ Yet where by State practice garnishment is effected through a garnishee summons, running in the name of the State and executed and served by plaintiff's attorney, it has been held that such summons is a process and hence must conform to R. S. § 911.¹⁷ The original process apprising defendant of proceedings against him is within this section, whether called citation or summons or by any other name.¹⁸ This section does not apply to the Territories.¹⁹ Notice of motion for judgment on a contract under Virginia practice is not process.^{19a}

[b] Teste.

The term teste is now applied generally to the concluding attestation part of a process,²⁰ although originally applied to the first word of the attestation. A writ of venire facias summoning a grand jury which bears teste of the deputy clerk is fatally defective.¹ A writ from the district court bearing teste of the Chief Justice instead of the district judge is also defective, but may be amended.² A writ of error with the teste of a territorial court clerk instead of the Chief Justice must be dismissed.³ But the date of the teste may be amended;⁴ or if there is a mere clerical error therein it may be disregarded.⁵ So a writ with the teste, seal, signature, and return day, all wrong has been amended.⁶ If teste is entirely lacking in a writ of error it cannot be amended, but must be dismissed.⁷

[c] Seal and signature.

A United States commissioner is not required to have a seal and his warrants are not process out of a Federal court and may be merely under his own hand,⁸ at least in States where the local law adopted as to process of arrest by R. S. § 1014,¹⁰ does not require a seal.¹¹ A writ of error bearing no seal is fatally defective. And it has been said all writs not under seal are void¹² and must be dismissed.¹³ But the absence of a seal

¹⁶Wile v. Cohn, 63 Fed. 759.

¹⁷Middleton P. Co. v. Rock L. P. Co. 19 Fed. 252.

¹⁸See Gillum v. Stewart, 112 Fed. 30.

¹⁹Hornbuckle v. Toombs, 18 Wall. 648, 21 L. ed. 966.

^{19a}Leas v. Merriman, 132 Fed. 510.

²⁰E. g. "Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this — day of — in the year of our Lord —, and of the independence of the United States the —."

¹United States v. Antz, 16 Fed. 122, 1 Woods, 174.

²United States v. Turner, 50 Fed. 734.

³Wells F. Co. v. McGregor, 13 Wall. 188, 20 L. ed. 538; Germain v. Mason, 154 U. S. 588, 20 L. ed. 689, 14 Sup. Ct. Rep. 1171.

⁴Course v. Stead, 4 Dall. 25, 1 L. ed. 726.

⁵O'Dowd v. Russell, 14 Wall. 405, 20 L. ed. 857.

⁶Texas, etc. Ry. v. Kirk, 111 U. S. 487, 28 L. ed. 481, 4 Sup. Ct. Rep. 500.

⁷Moulder v. Forrest, 154 U. S. 567, 19 L. ed. 154, 14 Sup. Ct. Rep. 1207.

⁸Starr v. United States, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919. A recent amendment however, provides for a seal for commissioners. See ante, § 672.

¹⁰Post, § 1537.

¹¹United States v. Clough, 55 Fed. 374, 5 C. C. A. 140.

¹²Overton v. Check, 22 How. 48, 16 L. ed. 285; Washington v. Dennison, 6 Wall. 496, 18 L. ed. 863.

¹³Insurance Co. v. Hallock, 6 Wall. 558, 18 L. ed. 948.

has been declared an amendable defect if the writ is otherwise in proper form as respects signature, etc.¹⁴ Where summons is not signed by the clerk, nor sealed, the defect is fatal and there is nothing to amend by.¹⁵ The fact that a deputy clerk signed a writ otherwise regular, with his own name and omitted that of the clerk, is at most a mere irregularity.¹⁶ Where a court has not yet adopted a seal, a substitute, with the reasons therefor stated, will suffice.¹⁷

§ 837. Teste of process from day of its issue.

All process issued from the courts of the United States shall bear teste from the day of such issue.

R. S. § 912, U. S. Comp. Stat. 1901, p. 683.

This provision was enacted as part of a statute "to further the administration of justice" in 1872.²⁰ Previously it was the practice to make writ of error bear teste of the term preceding that to which it was made returnable.¹ Now it is proper² and indeed imperative that it bear teste from the day of its issue; and it is returnable in thirty and sixty days.³

§ 838. Supreme Court process in name of President.

All process of this court shall be in the name of the President of the United States.

Supreme Court rule 5, part 1.

This rule was originally promulgated Feb. 5, 1790.⁵ It was revised as at present at the December term 1858.⁶ It is also the practice in all the other Federal courts to have process run in the name of the President.⁷

§ 839. Form of process of circuit court of appeals.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

Original circuit court of appeals, rule No. 9.

This rule is in force without modification, in each of the nine circuits.

¹⁴See *Wolf v. Cook*, 40 Fed. 434; *Peaslee v. Haberstro*, 15 Blatchf. 472, Fed. Cas. No. 10,884.

¹⁵*Dwight v. Merritt*, 4 Fed. 614, 18 Blatchf. 305; *Brown v. Pond*, 5 Fed. 37.

¹⁶*Bragg v. Lorio*, 1 Woods, 209, Fed. Cas. No. 1,800; *Griswold v. Connolly*, 1 Woods, 193, Fed. Cas. No. 5,833.

¹⁷*Wehrman v. Conklin*, 155 U. S. 330, 39 L. ed. 167, 15 Sup. Ct. Rep. 129.

²⁰Act June 1, 1872, c. 255, 17 Stat. 197.

¹*Hamilton v. Moore*, 3 Dall. 377, 1 L. ed. 642.

²See *Atherton v. Fowler*, 91 U. S. 143, 23 L. ed. 265.

³Post, § 1950-1952.

⁵See 2 Dall. 399, 1 Cranch, XVI, 1 Pet. VI, 1 Wheat. XIV.

⁶21 How. 6.

⁷See *Middleton P. Co. v. Rock R. Co.* 19 Fed. 252.

§ 840. Amendment of circuit and district court process.

Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just; allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues.

R. S. § 948, U. S. Comp. Stat. 1901, p. 695.

R. S. § 954 empowers the court to amend process and pleadings and to disregard merely formal defects.⁹ There is also a specific provision of the Revised Statutes permitting amendment of writ of error.¹⁰ The general power to amend process is discussed under R. S. § 954.¹¹

§ 841. Power of federal courts to issue writs.

The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias.^[a] They shall also have power to issue all writs not specifically provided for by statute,^[b] which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.^[c]

R. S. § 716, U. S. Comp. Stat. 1901, p. 580.

[a] History and scope of section.

R. S. § 716 was originally § 14 of the judiciary act of 1789, and § 5 of the supplementary act of March 2, 1793. The act of 1891 establishing the circuit court of appeals conferred upon that tribunal also, the powers above specified.¹⁴ The section confers the power on the courts, and while it has been held that a judge at chambers may issue a writ;¹⁵ the section grants no power in the issuing of writs to commissioners.¹⁶ The writ authorized by this section need not be agreeable to the principles and usages of the law of any particular State, nor must they conform to the State law.¹⁷ The requirement that they be necessary to jurisdiction and agreeable to law, has been found to involve important limitations in the issuance of many writs by the Federal courts, as subsequent notes will show.¹⁸

[aa] Scire facias.

Scire facias is generally used to revive a judgment¹ or enforce a recognition,² so that execution may issue thereon. In England it has been used

⁹Ante, § 813.

¹⁰Post, § 1928.

¹¹Ante, § 813[d].

¹⁴See post, § 842.

¹⁵Bennett v. Bennett, 1 Deady, 299, Fed. Cas. No. 1,318.

¹⁶Chittenden v. Darden, 2 Woods, 437, Fed. Cas. No. 2,688.

¹⁷Bank of U. S. v. Halstead, 10 Wheat. 51, 6 L. ed. 266.

¹⁸See especially infra, notes[e], [f], [m].

¹Walden v. Craig, 14 Pet. 151, 10 L. ed. 393; Brown v. Wygant, 163 U. S. 622, 41 L. ed. 284, 16 Sup. Ct. Rep. 1159; Browne v. Chavez, 181 U. S. 68, 45 L. ed. 752, 21 Sup. Ct. Rep. 514.

²Kirk v. United States, 131 Fed.

334; Hunt v. United States, 61 Fed.

for annulling letters patent; but other remedies are substituted in this country.³ The Massachusetts statutory liability for costs against the indorser⁴ of a writ may be enforced by scire facias. It is a very convenient writ and accommodates itself to almost any case in which its use is either necessary or desirable.⁵ R. S. § 955 provides for scire facias to revive actions against representatives of party dying before judgment.⁶ In an early case scire facias was invoked by Vermont against a charitable corporation to show cause why certain lands claimed by it should not be forfeited.⁷ It has been used to revive a judgment against a taxing district succeeding to the fiscal obligations of the city, which was the original judgment debtor,⁸ and to revive a judgment against devisees.⁹ It has issued to enforce a mechanics lien in the District of Columbia under a statute providing that mode of proceeding.¹⁰ By the law of some States a form of scire facias is used in foreclosing mortgages.¹¹ Its use for the purpose of reviving judgment in ejectment is considered in several cases.¹² When used to revive a judgment it is a continuation of the original suit,¹³ and maintainable as ancillary regardless of citizenship,¹⁴ but scire facias in a recognition is, in a sense at least, an original cause.¹⁵ Where a law provides the time within which a judgment may be revived by an "action" it includes scire facias, and the writ may not be maintained thereafter upon the theory that it is not an action.¹⁶ It is a judicial writ or writ of execution, but so far original that a defendant may plead to it.¹⁷ A demurrer to the writ is the same in legal effect as demurrer to the declaration on which it is

795, 10 C. C. A. 74; *Morsell v. Hall*, 13 How. 215, 14 L. ed. 117.

³*United States v. Stone*, 2 Wall. 525, 17 L. ed. 765; *Mowry v. Whitney*, 14 Wall. 434, 20 L. ed. 858; *United States American Bell Tel. Co.* 128 U. S. 370-372, 32 L. ed. 450, 9 Sup. Ct. Rep. 90.

⁴*Pullman's P. Co. v. Washburn*, 66 Fed. 790.

⁵*Grantland v. Memphis*, 12 Fed. 288.

⁶*Hatch v. Eustis*, 1 Gall. 160, Fed. Cas. No. 6,207; *Butler v. Poole*, 44 Fed. 586; *Allen v. Fairbanks*, 40 Fed. 188; ante, § 814.

⁷*Vermont v. Society for the Propagation*, etc. 1 Paine, 652, Fed. Cas. No. 16,919.

⁸*Grantland v. Memphis*, 12 Fed. 288.

⁹*Deneale v. Archer*, 8 Pet. 526, 8 L. ed. 1033.

¹⁰*Winder v. Caldwell*, 14 How. 434, 14 L. ed. 487.

¹¹*Fox v. Seal*, 22 Wall. 441, 22 L. ed. 774; *Black v. Black*, 74 Fed. 978; *Kenosha*, etc. R. R. v. *Sperry*, 3 Biss. 309, Fed. Cas. No. 7712.

¹²*Walden v. Craig*, 14 Pet. 151, 10 L. ed. 393; *Penn v. Klyne*, Pet. C. C. 446, Fed. Cas. No. 10,936.

¹³*McKnight v. Craig*, 6 Cranch, 183, 3 L. ed. 193; but see *Browne v. Chavez*, 181 U. S. 68, 21 Sup. Ct. Rep. 515, 45 L. ed. 751; *Penn v. Klyne*, Pet. C. C. 446, Fed. Cas. No. 10,936; *Wonderly v. Lafayette Co.* 77 Fed. 665.

¹⁴See ante, § 3.

¹⁵*United States v. Payne*, 147 U. S. 690, 37 L. ed. 333, 13 Sup. Ct. Rep. 442.

¹⁶*Browne v. Chavez*, 181 U. S. 68, 21 Sup. Ct. Rep. 515, 45 L. ed. 751; see *Deneale v. Archer*, 8 Pet. 530, 8 L. ed. 1033.

¹⁷*Brown v. Chavez*, 181 U. S. 68, 21 Sup. Ct. Rep. 515, 45 L. ed. 751; *Winder v. Caldwell*, 14 How. 443, 14 L. ed. 491; *Brown v. Chesapeake & O. C. Co.* 4 Fed. 770, Hughes, 584; *McRoberts v. Lyon*, 79 Mich. 33, 44 N. W. 163; *Eddy v. Caldwell*, 23 Ore. 166, 37 Am. St. Rep. 674, 31 Pac. 476.

er should be based;¹⁸ but it cannot reach defects in the original proceeding.¹⁹ On scire facias after judgment debtor's death his representative can make no plea not open to the original defendant;²⁰ nor is any defense available of matters prior to the original judgment.¹ Demurrer to the writ, raises only questions of law based on facts in the writ and cannot include facts in the marshal's return.² Defendant may interpose a plea or several pleas to the writ.³ Where the writ is returned by the marshal "nihil" an alias writ should issue, and upon a like return thereon and no appearance by defendant, judgment may be entered.⁴ A payment or other plea which might have been made to an original scire facias issued to revive a judgment cannot be pleaded to a second writ.⁵ Defendants claiming that other terre tenants have lands also liable to the judgment cannot plead that as a defense to the writ, but should seek audita querela, or a stay of proceedings.⁶ No action lies against one judgment debtor on scire facias reviving a judgment against the other.⁷ Scire facias is based on matters of record and parol evidence is inadmissible thereon. However, if parol admitted did not vary the record it is harmless error.⁸ It seems proper to follow the State practice in the matter of scire facias at law, under the conformity requirements of R. S. § 914.⁹

[b] Writs otherwise provided by statute—execution.

Execution is a writ agreeable to legal usages and principles and power to issue it might be derived from R. S. § 716, which does not authorize merely writs prior to judgment.¹² It is not required to be a form of execution agreeable to the usages and principles of the common law, but probably such as is sanctioned by the principles and usages of the State laws.¹³ Congress has undoubted power to make laws necessary for carrying Federal judgments into effect.¹⁴ The power of the Federal courts to

¹⁸Vermont v. Society, etc. 1 Paine, 652, Fed. Cas. No. 16,919.

¹⁹Dixon v. Wilkinson, 3 How. 61, 11 L. ed. 491.

²⁰McKnight v. Craig, 6 Cranch, 183, 3 L. ed. 193; Janney v. Mandeville, 2 Cranch C. C. 31, Fed. Cas. No. 7,213.

¹United States v. Thompson, Gilp. 614, Fed. Cas. No. 16,487; Dickson v. Wilkinson, 3 How. 61, 11 L. ed. 491.

²Walden v. Craig, 14 Pet. 147, 10 L. ed. 393.

³Morsell v. Hall, 13 How. 212, 14 L. ed. 117; Wilson v. Watson, Pet. C. C. 269, Fed. Cas. No. 17,847.

⁴Brown v. Wygant, 163 U. S. 618, 41 L. ed. 284, 16 Sup. Ct. Rep. 1159; two successive returns "nihil" are equivalent to personal service only when defendant is domiciled or found within jurisdiction of court is-

suing writ: Kirk v. United States, 131 Fed. 331.

⁵Wilson v. Hurst, Pet. C. C. 441, Fed. Cas. No. 17,809; Dickson v. Wilkinson, 3 How. 61, 11 L. ed. 491.

⁶Wilson v. Watson, Pet. C. C. 269, Fed. Cas. No. 17,847.

⁷Owens v. Henry, 161 U. S. 646, 40 L. ed. 837, 16 Sup. Ct. Rep. 693.

⁸Hunt v. United States, 61 Fed. 793, 10 C. C. A. 74.

⁹King v. Davis, 137 Fed. 205; Brown v. Chesapeake & O. C. Co. 4 Fed. 770, 4 Hughes, 584.

¹²Wayman v. Southard, 10 Wheat. 1, 22, 6 L. ed. 258; Bank of U. S. v. Halstead, 10 Wheat. 55, 56, 6 L. ed. 265, 266.

¹³Bank of U. S. v. Halstead, 10 Wheat. 56, 6 L. ed. 266; Grantland v. Memphis, 12 Fed. 288; Adler v. Cole, 12 Wis. 211.

¹⁴See ante, § 799 [b].

issue execution is derived from Congress and is governed by R. S. §§ 916¹⁵ and 990,¹⁶ which do not require the same conformity to the State practice as is required by R. S. § 914 respecting proceedings prior to judgment.¹⁷

[c] — Replevin, attachment, garnishment and sequestration.

While authority to issue the ordinary writs of replevin, garnishment or attachment against property might undoubtedly be derived from R. S. § 716, other provisions empower the Federal circuit and district courts to similar remedies by attachment or otherwise against the property of defendant as are given by the State laws.¹⁸ So also the writ of sequestration is provided for in equity rule.²⁰ R. S. § 716 has, however, been relied upon as authorizing attachment against the person for contempt or to compel his attendance as a witness.¹ The Supreme Court has issued attachment against sureties on a cost bond² under authority presumably derived from that section. No power is conferred on the Federal courts by this or any other section and regardless of the local law on the subject to use the process of foreign attachment, i. e., there is no right to attach property within a given district for the purpose of compelling a defendant not resident or found there to come in and defend.³ In the Federal courts attachment is but an incident of a suit and unless the suit is properly maintainable the attachment fails.⁴ Appearance waives the invalidity of such proceeding.⁵ Where the defendant in an action begun in a State court by foreign attachment and where actual seizure of his goods has been made, appears and removes it to the Federal court, the attachment will stand and the Federal court has jurisdiction to proceed.⁶

[d] — injunction, habeas corpus, writ of error, ne exeat.

Injunction is clearly a writ, the issuance of which would be authorized by R. S. § 716. Other sections, however, define the powers of Federal courts

¹⁵See post, § 925.

¹⁶See post, § 1558.

¹⁷United States v. Arnold, 69 Fed. 992, 16 C. C. A. 575.

¹⁸R. S. §§ 915, 933; see post, §§ 905, 906.

²⁰See post, § 1097.

¹Voss v. Luke, 1 Cranch C. C. 331, Fed. Cas. No. 17,014; United States v. Williams, 4 Cranch C. C. 372, Fed. Cas. No. 16,712; see Equity Rule 18, post, § 1507.

²Craig v. Leitensdorfer, 127 U. S. 764, 32 L. ed. 322, 8 Sup. Ct. Rep. 1393.

³Toland v. Sprague, 12 Pet. 330, 9 L. ed. 1105; Chaffee v. Hayward, 20 How. 215, 15 L. ed. 852; Ex parte Railway Co. 103 U. S. 794, 26 L. ed. 461; Noyes v. Canada, 30 Fed. 666; Harland v. United States T. Co. 40

Fed. 310, 6 L.R.A. 253; Boston, etc. Co. v. Electric, etc. Co. 23 Fed. 839; Lockett v. Rumbaugh, 45 Fed. 30; Anderson v. Shaffer, 10 Fed. 267. This is because of the provisions of R. S. § 739 and § 1 of act of Aug. 13, 1898; see ante, § 402.

⁴Ibid.

⁵Toland v. Sprague, 12 Pet. 331, 9 L. ed. 1105; Central T. Co. v. Chattanooga, etc. R. R. 68 Fed. 695, 696.

⁶Amsinck v. Balderston, 41 Fed. 641; Crocker Nat. Bank v. Pagenstecher, 44 Fed. 705; Vermilyn v. Brown, 65 Fed. 149; see New York L. E. etc. R. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444, 452; Commonwealth T. Co. v. Frick, 120 Fed. 688; contra, see Perkins v. Hendryx, 40 Fed. 657.

as respects its use.⁹ It has been said that R. S. § 720, forbidding injunction against State court proceedings, is to be read in connection with R. S. § 716 authorizing its use when necessary to the exercise of the court's jurisdiction.¹⁰ Habeas corpus was originally included in the enactment here under consideration, but its issuance by the Federal courts is now otherwise provided for.¹¹ Habeas corpus cum causa is authorized upon removal of a cause where a person is in custody.¹² Writ of error is otherwise provided for.¹³ Error coram nobis may not be issued by the circuit or district courts in criminal cases.¹⁴ The writ of ne exeat is provided for by R. S. 717¹⁵ as respects the circuit and Supreme Courts. It has been held at circuit that R. S. § 716 empowers the district court to issue the writ when necessary to the exercise of its jurisdiction.¹⁶

[e] Certiorari.

R. S. § 716, authorizes certiorari in a proper case.¹⁹ Certiorari is usually defined as a writ issuing from a superior to an inferior court commanding the latter to certify to the former certain proceedings before it. It has several uses. It is employed as an auxiliary process to supplement a record already before an appellate court by commanding the lower court to certify additional facts or matters to it. This use of the writ by the Supreme Court is regulated by rule 14 and considered elsewhere.²⁰ It is also used as an original process and a mode of appeal, being a command to an inferior court to certify the entire record in a cause that the same may be reviewed in the appellate court. In this use it differs from other modes of appeal in that its issuance is discretionary in the appellate tribunal.¹ The Supreme Court is expressly authorized by statute to employ the writ in this way, for the review of decisions of the court of appeals of the District of Columbia² and of the circuit courts of appeals.³ The writ is further sometimes used in an auxiliary form prior to judgment in the court to which it is directed, as, when directed to a State court after removal of a cause to a Federal court, for the purpose of obtaining a copy of the record there;⁴ and when used in conjunction with habeas corpus to enable the court to pass upon the matters raised by the habeas corpus.⁵ But ordinarily, and as an original process, it is not proper prior to judgment in

⁹See post, §§ 1111, et seq.

¹⁰See ante, § 20[a].

¹¹See post, §§ 1670-1674.

¹²See post, § 1146.

¹³See post, § 1925 et seq.

¹⁴United States v. Plumer, 3 Cliff. 28, Fed. Cas. No. 16,056.

¹⁵See post, § 843.

¹⁶Lewis v. Shainwald, 48 Fed. 500, 501; contra see: Gernon v. Boecaine, 2 Wash. C. C. 130, Fed. Cas. No. 5,367.

¹⁹In re Tampa, etc. R. R. 168 U. S. 587, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; In re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151.

²⁰See post, § 1997.

¹Ex parte Hitz, 111 U. S. 766, 28 L. ed. 592, 4 Sup. Ct. Rep. 698; Harhis v. Barber, 129 U. S. 369, 32 L. ed. 697, 9 Sup. Ct. Rep. 315; In re Tampa, etc. R. R. 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177.

²See ante, § 46.

³See ante, § 41.

⁴This use of the writ is authorized by Congress: Act March 3, 1875, § 7; see post, § 1146; State v. Sullivan, 50 Fed. 593; Staffords v. King, 90 Fed. 141, 32 C. C. A. 536.

⁵Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 554; Ex parte Lange, 18

the court to which it is directed.⁶ Thus, certiorari as an original process is not a proper mode of removing to the Supreme Court a cause pending in the circuit court and not yet decided, upon the ground that the former properly has original jurisdiction;⁷ and it is equally improper as a mode of removing a case before trial, from a district to a circuit court.⁸

R. S. § 716 only authorizes the writ when necessary to the exercise of jurisdiction.⁹ Hence it does not enlarge jurisdiction,¹⁰ and if the Supreme Court is not vested with jurisdiction in a given case, this section does not confer it. Having no appellate jurisdiction over the proceedings of a military commission, the Supreme Court is not enabled by this section to review their proceedings by certiorari.¹¹ Nor will certiorari lie in a criminal case over which no appellate jurisdiction exists.¹² So also it may not be substituted for the modes of review provided by Congress: Hence where Congress has provided appeal as a mode of reviewing the decision of the Court of Claims, the section does not authorize certiorari to be employed instead.¹³ The Supreme Court's power to issue certiorari is not at all analogous to the power exercised by the Kings Bench in England.¹⁴ It has been said that except as provided in the circuit court of appeals act, the Supreme Court can never use certiorari as an original process; but this statement has reference to its use in an attempt to enlarge or vary the Supreme Court's appellate jurisdiction. In cases within the Supreme Court's original jurisdiction it would seem that certiorari¹⁵ might sometimes be proper as an original process. Moreover, a comparatively recent case adopts certiorari as a mode for relieving against the improper action of the circuit court in attempting to enjoin parties from taking a writ of error from the highest court of a State; and declares, without apparently examining the prior decisions, that while the Supreme Court has no power to review judgments in contempt proceedings by appeal or error, certiorari may be used in the absence of other adequate remedy. It is further said that certiorari may be allowed as at common law, to correct excesses of juris-

Wall. 166, 21 L. ed. 872; In re Kaine, 14 How. 103, 148, 14 L. ed. 345; Ex parte Royall, 112 U. S. 182, 28 L. ed. 690, 5 Sup. Ct. Rep. 98; Ex parte Dugan, 2 Wall. 134, 17 L. ed. 871; Ex parte Burford, 3 Cranch, 448, 2 L. ed. 495.

⁶People v. Lindsay, 1 Idaho, 401; American C. Co. v. Railway Co. 148 U. S. 380, 37 L. ed. 490, 13 Sup. Ct. Rep. 762; Ex parte Van Orden, 3 Blatchf. 168, Fed. Cas. No. 16,870.

⁷Fowler v. Lindsey, 3 Dall. 413, 1 L. ed. 659.

⁸Patterson v. United States, 2 Wheat. 225, 4 L. ed. 225.

⁹Ex parte Van Norden, 3 Blatchf. 166, Fed. Cas. No. 16,870.

¹⁰But see In re Chetwood, 165 U.

S. 462, 41 L. ed. 782, 17 Sup. Ct. Rep. 391, 392; see also infra, note[].

¹¹Ex parte Vallandigham, 1 Wall. 251, 17 L. ed. 589; In re Vidal, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 48.

¹²Ex parte Gordon, 1 Black, 503, 17 L. ed. 134.

¹³United States v. Young, 94 U. S. 258, 24 L. ed. 153.

¹⁴Ex parte Vallandigham, 1 Wall. 251, 17 L. ed. 589.

¹⁵Ex parte Hitz, 111 U. S. 766, 28 L. ed. 592, 4 Sup. Ct. Rep. 698, raised this question, but there was doubt as to the rank of petitioner as a foreign minister, and his application was denied. See Commonwealth of Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

diction and in furtherance of justice whenever circumstances imperatively demand that form of interposition.²⁰ As the writ issued in that case to protect parties in their right of appeal to the Supreme Court it may fairly be regarded as an auxiliary use of it, and "necessary for the exercise" of the Supreme Court's jurisdiction.

When there is doubt whether certiorari should issue, a rule to show cause should be granted.² When used as a mode of review the questions disclosed by the record are examined and decided as in other cases of appeal.³ R. S. § 587 provides for bringing district court cases before the circuit court where the district judge is unable to perform his duties, by an order in the nature of certiorari to the clerk.⁴

[ee]—Certiorari by circuit court of appeals.

The same reasoning which forbids certiorari as an original process and mode of review by the Supreme Court, forbids that use of the writ by the circuit court of appeals.⁸ Hence that court has no power to issue it as a substitute for appeal or error to review a conviction in a lower court claimed to have been without jurisdiction.⁹ Congress has provided for the exercise of the appellate powers of that court by appeal and writ of error and this excludes the use of certiorari or prohibition merely as a mode of review.¹⁰

[f] Mandamus.

Mandamus is one of the writs authorized by R. S. § 716.¹² It is defined as a command issuing from a court of competent jurisdiction in the name of the State or United States, directed to some corporation, officer or inferior court, requiring the performance of a particular thing therein specified, a duty to perform which results from the official position of the party to whom it is directed or by operation of law. There must be a clear legal right to have the thing done and an absence of other adequate remedy.¹⁴ The adequacy of other remedy is tested by its availability in the same tribunal. The fact that another remedy might be had in a State court is no objection to the issue of the writ by a Federal tribunal.¹⁵ R. S. § 688 governs the jurisdiction of the Supreme Court to issue mandamus and is

²⁰In re Chetwood, 165 U. S. 462, 41 L. ed. 782, 17 Sup. Ct. Rep. 391, 392. It is doubtful whether the expressions in this opinion should be construed as a repudiation of the reasoning in the earlier cases. See *Travis Co. v. King Co.* 92 Fed. 693, 34 C. C. A. 620.

²*American Con. Co. v. Jacksonville*, etc. Ry. 148 U. S. 388, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

³*Harris v. Barber*, 129 U. S. 369, 32 L. ed. 697, 9 Sup. Ct. Rep. 314.

⁴See ante, § 116.

⁸*Travis Co. v. King*, etc. Co. 92 Fed. 693, 34 C. C. A. 620.

⁹*Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584.

¹⁰In re Paquet, 114 Fed. 440, 52 C. C. A. 239.

¹²*McIntire v. Wood*, 7 Cranch, 504, 3 L. ed. 420; *Bath Co. v. Amy*, 13 Wall. 248, 20 L. ed. 539; In re Forsythe, 78 Fed. 301; *Board of Comrs. v. Aspinwall*, 24 How. 384, 16 L. ed. 735.

¹⁴*Marbury v. Madison*, 1 Cranch, 169-173, 2 L. ed. 60.

¹⁵*Board of Comrs. v. Aspinwall*, 24 How. 385, 16 L. ed. 735; see *Wheeling v. Baltimore*, 1 Hughes, 90, Fed. Cas. No. 17,502.

elsewhere considered.¹⁶ In a few special cases the circuit and district courts have specific statutory authority for the issue of mandamus. Thus, the circuit court has power to enforce the provisions of the act of 1875 respecting fees and costs of Federal officers by mandamus;¹⁷ and to compel the Union Pacific Railroad to operate.¹⁸ The circuit and district courts have power to compel carriers to grant equal facilities to shippers and publish schedules of rates.¹⁹

But apart from these provisions, the power of the circuit and district courts to issue the writ is governed by R. S. § 716. It is not dependent upon the laws or practice of the individual States.² R. S. § 716 limits the issuance of the writ to cases where necessary to the exercise of their respective jurisdictions.³ That is, they have power to use it only when auxiliary to a jurisdiction already otherwise acquired.⁴ Mandamus will not lie in a Federal court to compel a national bank receiver to allow a claim based on a State court judgment,⁵ or otherwise to enforce a State court's judgment;⁶ nor to compel a city to make a conveyance;⁷ nor to compel a municipality to transfer its bonds to an aided railroad as agreed.⁸ The circuit and district courts may not use mandamus as an original process against executive officers of the government to compel them to perform a duty.¹⁰ Their power to issue the writ is no larger when sitting in States where mandamus is regarded as a civil action.¹¹ Nor is it larger where an action for mandamus is begun in a State court and removed to the Federal court; and such a suit is not removable.¹²

But they may use it as an auxiliary process. Where having jurisdiction of a suit against a county the circuit court has entered judgment,¹³ it may in the absence of other remedy for its enforcement, compel the county

¹⁶See post, § 844.

¹⁷See post, § 845.

¹⁸Ante, § 157.

¹⁹See post, §§ 846-849.

²Board of Liquidation v. United States, 108 Fed. 689, 47 C. C. A. 587.

³Riggs v. Johnson Co. 6 Wall. 184, 198, 18 L. ed. 768; McIntire v. Wood, 7 Cranch, 506, 716, 3 L. ed. 420; Rosenbaum v. Bauer, 120 U. S. 458, 30 L. ed. 743, 7 Sup. Ct. Rep. 634; Graham v. Norton, 15 Wall. 427, 21 L. ed. 177; Greene Co. v. Daniel, 102 U. S. 187, 26 L. ed. 101.

⁴Mystic, etc. Co. v. Chicago, etc. Ry. 132 Fed. 289; Large v. Consol. etc. Bank, 137 Fed. 168; In re Coleman, 131 Fed. 151.

⁵Denton v. Baker, 79 Fed. 194, 24 C. C. A. 476.

⁶United States v. New Orleans, 117 Fed. 610, 54 C. C. A. 106.

⁷Provisional Municip. v. Lehman, 57 Fed. 330, 331, 6 C. C. A. 349.

⁸Smith v. Bourbon Co. 127 U. S. 112, 32 L. ed. 73, 8 Sup. Ct. Rep. 1046.

¹⁰McIntire v. Wood, 7 Cranch, 504, 3 L. ed. 420; Van Antwerp v. Hulburd, 7 Blatchf. 426, 433, Fed. Cas. No. 16,826. But the courts of the District of Columbia may do so; see Kendall v. United States, 12 Pet. 617, 9 L. ed. 1218.

¹¹Gares v. Northwestern, etc. Assn. 55 Fed. 210.

¹²Rosenbaum v. Supervisors, 28 Fed. 224; Rosenbaum v. Bauer, 120 U. S. 453, 30 L. ed. 745, 7 Sup. Ct. Rep. 634; Kelly v. Grand Circle, 129 Fed. 830; State v. Lake E. & W. Ry. 85 Fed. 3; contra Erwin v. Walsh, 27 Fed. 580, 23 Blatchf. 535.

¹³Judgment is a necessary prerequisite: Green Co. v. Daniel, 102 U. S. 195, 26 L. ed. 101; McCauley v. Kellogg, 2 Woods, 18, Fed. Cas. No. 8,688.

officers to levy a tax to pay it,¹⁴ though it will refuse the remedy if the judgment is invalid.¹⁵ Formerly when the circuit court had appellate power over the district court, mandamus was sometimes a proper auxiliary process in aid of the circuit court's jurisdiction; but its use was of course subject to the usual tests determining the propriety of the remedy by mandamus.¹⁶ While the use of mandamus to compel a State court to allow the removal of a cause might be deemed ancillary, it would be improper on grounds of comity and unnecessary.¹⁸ Mandamus by a court to its clerk to compel the allowance of a claim against a fund in court is unnecessary and improper as a single order will suffice.¹⁹ It is a proper auxiliary use of mandamus, however, to compel a corporation to transfer stock on its books to a purchaser at Federal execution sale.²⁰ Mandamus in aid of a judgment is in the nature of an execution and not a proceeding in equity;¹ and should conform to the practice in common-law actions.²

The effect of denying the inferior Federal courts power to mandamus executive officers of the Federal government by a proceeding instituted for that purpose and of the rule that the State courts are equally without that power,⁵ is much mitigated by the further well-settled rule that the Supreme Court of the District of Columbia has power to mandamus such officers in cases where that remedy is proper.⁶

[ff]—mandamus by circuit court of appeals.

The power of the circuit court of appeals to issue mandamus is subject to the limitations prescribed in R. S. § 716.⁸ Being exclusively an appellate court it may use the writ only in aid of its appellate jurisdiction.⁹ It may not mandamus an inferior court to compel it to accept a certain bail,¹⁰ or to take jurisdiction,¹¹ or dismiss a cause for want of jurisdic-

¹⁴*Riggs v. Johnson Co.* 6 Wall. 188, 18 L. ed. 774; *Bath Co. v. Amy*, 13 Wall. 249, 20 L. ed. 541; *Heine v. Levee Comrs.* 19 Wall. 660, 22 L. ed. 226; *Stryker v. Board of Comrs.* 77 Fed. 574, 23 C. C. A. 286; *Labette Co. Comrs. v. United States*, 112 U. S. 217, 28 L. ed. 698, 5 Sup. Ct. Rep. 108.

¹⁵*Moore v. Edgefield*, 32 Fed. 496.

¹⁶*Smith v. Jackson*, 1 Paine, 455, Fed. Cas. No. 13,064; *The New England*, 3 Sumn. 495, Fed. Cas. No. 10,151; *The Enterprise*, 3 Wall. Jr. 58, Fed. Cas. No. 4,500; *Ex parte Hoyt*, 13 Pet. 279, 10 L. ed. 162.

¹⁸*Ladd v. Tudor*, 3 Wood. & M. 332, Fed. Cas. No. 7,975; *Fisk v. Union P. R. R.* 6 Blatchf. 396, Fed. Cas. No. 4,827; *Hough v. Western T. Co.* 1 Biss. 425, Fed. Cas. No. 6,724.

¹⁹*In re Forsythe*, 78 Fed. 301.

²⁰*Hair v. Burnell*, 106 Fed. 280.

¹*Kinney v. Eastern, etc. Co.* 123 Fed. 297, 59 C. C. A. 586; *Carter Co. v. Schmalstig*, 127 Fed. 126, 62 C. C. A. 78.

²*Cleveland v. United States*, 127 Fed. 667, 62 C. C. A. 393.

⁵*McClung v. Silliman*, 6 Wheat. 598, 604, 5 L. ed. 341.

⁶*Kendall v. United States*, 12 Pet. 610, 9 L. ed. 1215; *Decatur v. Paulding*, 14 Pet. 497, 10 L. ed. 559; *United States v. Lamont*, 155 U. S. 308, 39 L. ed. 163, 15 Sup. Ct. Rep. 98; *United States v. Black*, 128 U. S. 48, 32 L. ed. 357, 9 Sup. Ct. Rep. 14.

⁸See post, § 842.

⁹*Barber, etc. Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55.

¹⁰*United States v. Judges*, 85 Fed. 179, 29 C. C. A. 78.

¹¹*United States v. Swan*, 65 Fed. 647, 13 C. C. A. 77.

tion,¹² or to punish for contempt after the lower court has acquitted.¹³ Mandamus is not a proper remedy to correct a misconstruction of the mandate of the appellate court after a cause has been returned to the circuit court,¹⁴ nor to compel the lower court to revoke its order staying proceedings in execution of mandate where new circumstances have since arisen.¹⁵ Though it is a proper remedy where a stay of execution of a mandate was unwarranted and improper.¹⁶

[fff] Practice in issuance of mandamus

While the practice is mandamus proceedings in the Supreme Court is unaffected by the procedure in particular States,²⁰ it seems the better rule that mandamus proceedings in the circuit and district courts should conform under R. S. § 914 "as near as may be" to the State practice.¹ It is essentially a common-law remedy,² although a jury is not required for the determination of issues of fact therein.³ However some cases have taken the view that conformity to State practice is not required.⁴ In any event, the power to issue the writ is denied from the act of Congress;⁵ and the fact that State statute forbids it, is of no moment.⁶ The application for the writ is usually in the form of verified petition or complaint or by information.⁷ The writ usually issues in the alternative form;⁸ and a hearing is had upon the return, before a peremptory writ will issue. There must be some notice or rule to show cause before peremptory mandamus will be granted.⁹ Generally some demand for the performance of the required act must be shown;¹⁰ though not where the public interests are concerned,¹¹

¹²United States v. Severens, 71 Fed. 768, 18 C. C. A. 314.

¹³Minnesota Plow Co. v. Dowagiac M. Co. 126 Fed. 746, 61 C. C. A. 352.

¹⁴James v. Central T. Co. 108 Fed. 929, 47 C. C. A. 374.

¹⁵United States v. Marshall, 122 Fed. 428, 58 C. C. A. 410.

¹⁶L. Bucki & Son Co. v. Atlantic L. Co. 128 Fed. 339, 63 C. C. A. 62.

²⁰Post, § 844[j].

¹Wisdom v. Memphis, 2 Flip. 285, Fed. Cas. No. 17,903; Stewart v. Justices, etc. 47 Fed. 482, 484; Laird v. Mayor, 25 Fed. 76, per Brewer, J. And see: Mayor, etc., v. United States, 104 Fed. 115, 116; Louie v. Alleghany Co. 10 Pittsb. L. J. 241, Fed. Cas. No. 8,544; Northern Pac. R. R. v. Dustin, 142 U. S. 508, 35 L. ed. 1098, 12 Sup. Ct. Rep. 283, following the State practice without discussion.

²Heine v. Levee Comrs. 19 Wall. 660, 22 L. ed. 226.

³In re Delgado, 140 U. S. 586, 35 L. ed. 578, 11 Sup. Ct. Rep. 814.

⁴See Davenport v. Dodge Co. 105 U.

S. 242, 26 L. ed. 1018; United States v. Union Pac. Ry. 2 Dill 527, Fed. Cas. No. 16,599; Rusch v. Des Moines Co. Woolw. 313, Fed. Cas. No. 12,142; Mayor v. Lord, 9 Wall. 413, 19 L. ed. 707. The last two of these cases were, however, decided before the conformity law of 1872, and are not of much weight now.

⁵Commissioners of Knox Co. v. Aspinwall, 24 How. 376, 16 L. ed. 735; Board of Liquidation v. United States, 108 Fed. 691, 47 C. C. A. 587.

⁶Hart v. New Orleans, 12 Fed. 292; New Orleans v. Morris, 3 Woods, 103, 115, Fed. Cas. No. 10,182.

⁷See Deuel Co. v. First Nat. Bank, 86 Fed. 264, 30 C. C. A. 30; United States v. Brown, 41 Fed. 481.

⁸See United States v. Cape G. Co. 16 Fed. 836, 5 McCrary, 280.

⁹Fairbanks v. Amoskeag Nat. Bank, 30 Fed. 602.

¹⁰United States v. Boutwell, 17 Wall. 607, 21 L. ed. 722; United States v. Indian G. D. 85 Fed. 933.

¹¹Northern P. R. R. v. Washing-

nor demand upon all of the officers involved.¹² Mandamus cases are still often brought in the name of the government upon the relation of the party affected,¹³ and this is especially proper where sought to enforce a public duty;¹⁵ but where merely for the purpose of enforcing some private right it is a survival of times when mandamus was a strictly prerogative writ. The relator is the real party in interest where it is sought to enforce a mere private right.¹⁶ The writ must be directed to the holder of the office and not merely the office itself;¹⁷ but it makes no difference that the incumbents are not the same as at the time the right accrued.¹⁸ Several different officers may be joined where all have a duty to perform in the premises.¹⁹ It must of course issue to the proper persons.²⁰ Mandamus against a continuing board to perform some official duty does not abate by changes in its personnel.¹ Disobedience to a mandamus is punishable as contempt.²

[g] Writ of prohibition.

Prohibition is a writ issuing out of a superior court directed to the judge⁵ or the judge and parties to a suit in an inferior court, commanding them to cease proceedings therein because of want of jurisdiction. Its effect is to suspend all action and prevent further proceedings; it cannot require affirmative action or undo anything already done.⁶ It enables the appellate court in case of disobedience to punish the inferior court as being in contempt.⁷ Prohibition is a common law writ and proceedings therein are properly reviewable by writ of error.⁸ R. S. § 688 authorizes the Supreme Court to issue the writ in admiralty causes.⁹ But the only other authority to issue the writ possessed by Federal courts, is conferred by this section, and it limits the power in terms to cases where the writ is necessary to the exercise of a jurisdiction already otherwise required.¹⁰ The same limitation attends its use by the circuit court of appeals whose powers

ton, Dustin, 142 U. S. 508, 35 L. ed. 1098, 12 Sup. Ct. Rep. 283.

¹²Marion Co. v. Coler, 75 Fed. 352, 21 C. C. A. 392.

¹³See Cleveland v. United States, 127 Fed. 667, 62 C. C. A. 393.

¹⁵See Northern P. R. R. v. Washington, Dustin, 142 U. S. 508, 35 L. ed. 1098, 12 Sup. Ct. Rep. 283.

¹⁶Indiana v. Lake Erie, 85 Fed. 3.

¹⁷United States v. Boutwell, 17 Wall. 607, 21 L. ed. 722.

¹⁸In re Parker, 131 U. S. 226, 33 L. ed. 124, 9 Sup. Ct. Rep. 708.

¹⁹Labette Co. v. United States, 112 U. S. 217, 28 L. ed. 700, 5 Sup. Ct. Rep. 108.

²⁰Secretary v. McGarahan, 9 Wall. 298, 19 L. ed. 579.

¹See Murphy v. Utter, 186 U. S. 100, 46 L. ed. 1074, 22 Sup. Ct. Rep. 776, reviewing the authorities. See

ante, § 816, where Congress has provided against abatement by retirement of Federal officers.

²President, etc. v. Mayor of Elizabeth, 40 Fed. 799; United States v. Green, 53 Fed. 769.

⁵See United States v. Hoffman, 4 Wall. 158, 18 L. ed. 355.

⁶United States v. Hoffman, 4 Wall. 158, 18 L. ed. 355; Ex parte Jones, 191 U. S. 102, 48 L. ed. 111, 24 Sup. Ct. Rep. 27.

⁷Penhallow v. Doane, 3 Dall. 87, 1 L. ed. 507.

⁸Smith v. Whitney, 116 U. S. 174, 29 L. ed. 601, 6 Sup. Ct. Rep. 573.

⁹See post, § 844.

¹⁰Ex parte City Bank, 3 How. 332, 11 L. ed. 622; Ex parte Gordon, 1 Black, 505, 17 L. ed. 134; In re Bininger, 7 Blatchf. 159, Fed. Cas. No. 1417.

in this respect are defined by this section.¹¹ No case yet presented has been deemed to justify this auxiliary use of the writ and its use has been confined to admiralty cases as provided in R. S. § 688. It has been refused as a mode of reviewing contempt proceedings;¹² as a mode of rectifying alleged error in setting aside a judgment after a term, there being no appeal to which the writ could be deemed ancillary;¹³ as a mode of reviewing bankruptcy proceedings;¹⁴ criminal proceedings;¹⁵ and confiscation proceedings.¹⁶ The district court sitting in bankruptcy has refused to employ it against a State tribunal;¹⁷ or against its own commissioner in a criminal proceeding.¹⁸ The Supreme Court has recently refused to use it to prohibit circuit court proceedings where there is no remedy by appeal to the circuit court of appeals;¹⁹ or to issue it where the proceeding to be prohibited had already passed to judgment.²⁰ It seems that the Supreme Court of the District of Columbia has full common law power to issue prohibition; but the question of its power or the power of any court to issue the writ to a court martial although raised, has not been decided.¹

[h] Writ of supersedeas.

R. S. § 716 authorizes the writ of supersedeas.⁴ Other provisions of law declare the terms and circumstances upon which parties are entitled to supersedeas⁵ and no writ is ordinarily necessary.⁶ It may however be issued by the Supreme Court whenever necessary to the exercise of its appellate jurisdiction.⁷ And when through mistake or otherwise, the judgment below is in fact, being carried into execution notwithstanding that the party is by law entitled to a supersedeas, the Supreme Court will issue the writ;⁸ unless by rule upon the lower court the required result is otherwise se-

¹¹United States v. Williams, 67 Fed. 384, 14 C. C. A. 440; In re Paquet, 114 Fed. 440, 52 C. C. A. 239.

¹²In re Paquet, 114 Fed. 440, 52 C. C. A. 239.

¹³United States v. Williams, 67 Fed. 384, 14 C. C. A. 440.

¹⁴Ex parte City Bank, 3 How. 372, 11 L. ed. 603.

¹⁵Ex parte Gordon, 1 Black, 505, 17 L. ed. 134.

¹⁶Ex parte Graham, 10 Wall. 543, 19 L. ed. 982; Ex parte Waples, 154 U. S. 579, 38 L. ed. 1088, 14 Sup. Ct. Rep. 1214.

¹⁷In re Bininger, 7 Blatchf. 161, Fed. Cas. No. 1,417.

¹⁸United States v. Berry, 4 Fed. 779, 2 McCrary. 58.

¹⁹In re Huguley, etc. Co. 184, U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455. The opinion does not refer to the distinction between its use in ad-

miralty cases under R. S. § 688 and in other cases under R. S. § 716.

²⁰Ex parte Joins, 191 U. S. 102, 48 L. ed. 110, 24 Sup. Ct. Rep. 27.

¹See Smith v. Whitney, 116 U. S. 175, 6 Sup. Ct. Rep. 574, 29 L. ed. 601; United States v. Maney, 61 Fed. 140.

⁴Hardeman v. Anderson, 4 How. 642, 11 L. ed. 1139; In re Claassen, 140 U. S. 208, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; Goddard v. Ordway, 94 U. S. 672, 24 L. ed. 237.

⁵See post, § 2012 et seq.

⁶Slaughter House Cases, 10 Wall. 273, 19 L. ed. 920.

⁷Stockton v. Bishop, 2 How. 75, 11 L. ed. 185; Ex parte Milwaukee, etc. R. R. 5 Wall. 188, 18 L. ed. 676; French v. Shoemaker, 12 Wall. 86, 20 L. ed. 270.

⁸Stockton v. Bishop, 2 How. 75, 11 L. ed. 185; Hardeman v. Anderson, 4 How. 640, 11 L. ed. 1138; Ex parte

cured.⁹ It was issued to stay proceedings in a State court after writ of error.¹⁰ The fact that an inferior court is misconstruing the scope of an injunction decree does not enable the Supreme Court to issue supersedeas not otherwise in aid of its appellate powers.¹¹ Where the party is in fact not entitled to supersedeas applications in the Supreme Court therefor, have been denied.¹² A Supreme Court justice has no discretionary power to issue the writ unless the party has brought himself strictly within the statutes as to stay.¹³ The circuit court of appeals has a like power to issue a writ of supersedeas when a decree below is improperly being executed notwithstanding that the party is entitled to a stay.¹⁴

[1] Quo warranto.

The ancient writ of quo warranto has been superseded in modern practice by information in the nature of quo warranto¹⁸ and it is doubtful whether the writ would now be deemed a writ agreeable to the usages of law. Moreover as a writ it is in its nature an original process and therefore there would probably be no case in which it would be necessary to the exercise of an existing jurisdiction. No case has sought to derive authority for the use of quo warranto from R. S. § 716; and it would seem clear that the Federal courts can issue the writ only where specific authority is conferred by other enactments than the one here under consideration. But the power of the Supreme Court of the District of Columbia is undoubtedly larger.²⁰ Quo warranto in a State court is removable to the Federal Court where arising under the Federal Constitution or laws;¹ but probably not because of diverse citizenship between defendant and the relator in cases where the State is regarded as the real party in interest, since a State is not a citizen within the removal laws.² Where the proceeding is such that relator seeks to oust defendant from an office and secure it himself, the State might be deemed a merely nominal party³ and the proceeding be removable for diverse citizenship.⁴ Want of power in the circuit court to entertain the writ to try title to the office of Fed-

Milwaukee, etc. R. R. 5 Wall. 188; 18 L. ed. 676; Railroad Cos. v. Bradley, 7 Wall. 575, 19 L. ed. 274.

⁹Goddard v. Ordway, 94 U. S. 672, 24 L. ed. 237.

¹⁰Green v. Van Buskirk, 3 Wall. 448, 18 L. ed. 245.

¹¹French v. Shoemaker, 12 Wall. 86, 20 L. ed. 270.

¹²Hogan v. Ross, 11 How. 294, 13 L. ed. 702; Adams v. Low, 16 How. 144, 14 L. ed. 880; Slaughter House Cases, 10 Wall. 273, 19 L. ed. 918.

¹³Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810.

¹⁴Gunn v. Black, 60 Fed. 160, 8 C. C. A. 542; In re McKenzie, 180 U. S. 536, 45 L. ed. 657, 21 Sup. Ct. Rep. 468.

¹⁸Nebraska v. Lockwood, 3 Wall. 236, 18 L. ed. 47.

²⁰See United States v. Addison, 6 Wall. 298, 18 L. ed. 919.

¹Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 447; Illinois v. Illinois C. R. R. 33 Fed. 721.

²Missouri, etc. Ry. v. Missouri, etc. Comrs. 183 U. S. 58, 46 L. ed. 78, 22 Sup. Ct. Rep. 18.

³Boyd v. Nebraska, 143 U. S. 157, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

⁴In Place v. Illinois, 69 Fed. 481, 16 C. C. A. 300, defendant was citizen of a Territory and therefore diverse citizenship did not exist.

eral district attorney seems to have led in one instance to a proceeding before such court by simple motion to obtain possession of the books and papers of the office in which the right of applicant to the office was virtually determined.⁵

[j] Writ of entry and writ of right.

These writs have never been decided to be within the contemplation of R. S. § 716. If they are writs at all in the sense of R. S. § 716 they are original writs; but are more properly forms of action for the recovery of realty, and available as such in the Federal courts under the terms of the conformity clause,⁷ when they are in use in the courts of the State where the Federal court is sitting.

[k] Writs of assistance.

Writs of assistance in equity, and of habere facias possessionem at law, are undoubtedly authorized by R. S. § 716. They are used for the purpose of putting a purchaser at judicial sale or plaintiff in ejectment into possession.¹⁰ The seventh and ninth equity rules provide for issuance of the writ of assistance.¹¹ It should not issue except against parties or privies or persons coming into possession pendente lite.¹²

[l] Writs of subpoena and venire facias.

Power to issue the writ of subpoena is derivable from R. S. § 716.¹⁵ Subpoena for the summoning of witnesses¹⁶ and the production of papers and documents¹⁷ in Federal courts is provided for in other enactments. The writ of venire facias to summon a grand jury has been held derivable from R. S. § 716.¹⁸

[m] Necessary to jurisdiction and agreeable to law.

No enlargement of the Federal courts' jurisdiction was intended by this clause. The issuance of other writs is only authorized in cases where the jurisdiction already exists and not where it is to be acquired by means of the writ to be issued.¹ As already shown this debars the inferior Federal courts of power to issue mandamus certiorari, quo warranto and other writs except in aid of their judgments and decrees.² Nor have they power

⁵The Supreme Court refused mandamus to correct the proceeding: *In re Parsons*, 150 U. S. 150, 37 L. ed. 1035, 14 Sup. Ct. Rep. 50.

⁷See post, § 900.

¹⁰*Terrell v. Allison*, 21 Wall. 289, 22 L. ed. 634; *Gormley v. Clark*, 134 U. S. 350, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Lacassagne v. Chapuis*, 144 U. S. 125, 36 L. ed. 371, 12 Sup. Ct. Rep. 662.

¹¹See post, § 1097.

¹²*Terrell v. Allison*, 21 Wall. 289, 22 L. ed. 634; *Comer v. Felton*, 61 Fed. 735, 10 C. C. A. 28.

¹⁵*In re Shephard*, 3 Fed. 12, 18 Blatchf. 225.

¹⁶See post, § 1742.

¹⁷See post, §§ 1763, 1768.

¹⁸*United States v. Antz*, 16 Fed. 122, 4 Woods, 174.

¹*McClung v. Silliman*, 6 Wheat. 601, 5 L. ed. 341; *McIntire v. Wood*, 7 Cranch, 506, 3 L. ed. 421; *Kendall v. United States*, 12 Pet. 624, 9 L. ed. 1221; *United States v. Plumer*, 3 Cliff. 23, Fed. Cas. No. 16,056.

²*Supra*, under this section.

by this section to issue writ of error coram nobis to review error in their own judgments and proceedings in criminal cases and thus enlarge their criminal jurisdiction.³

§ 842. Power of circuit court of appeals to issue writs.

The circuit court of appeals shall have the power specified in section seven hundred and sixteen of the revised statutes⁵ of the United States.

Act § 12 of act Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 553.

Discussion of the power of circuit courts of appeals is considered in the annotation of the preceding section.⁶

§ 843. Federal courts' power to issue writs of ne exeat.

Writs of ne exeat may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

R. S. § 717, U. S. Comp. Stat. 1901. p. 580.

This provision is carried forward into the Revised Statutes from acts of 1793 and 1869.⁹ Ne exeat is a writ directed to the sheriff or marshal commanding him to cause one who owing money is about to depart the realm, to appear before him and give sufficient bail or security in the sum endorsed on the writ that he will not depart without leave of court, and on the party's refusal to give such security, to commit him to prison.¹⁰ Equity rule 21 provides that it must be asked in the prayer for relief if it is to be obtained "pending the suit."¹¹ But after final decree it may be awarded under a prayer for general relief.¹² In view of R. S. § 990 forbidding imprisonment for debt in Federal courts except as allowed by the local law¹³ it would seem that R. S. § 717 should be construed as allowing ne exeat in Federal courts only in States where the State laws permit imprisonment for debt.¹⁴ In any event there are few instances of its

³United States v. Plumer, 3 Cliff. S. 290, 35 L. ed. 678, 11 Sup. Ct. Rep. 28, Fed. Cas. No. 16,056. 999.

⁵Ante, § 841.

⁶See especially § 841[ee], [ff], [g].

⁹Act March 2, 1793, c. 22, § 5, 1 Stat. 334; act April 10, 1869, c. 22, § 2, 16 Stat. 44.

¹⁰See Griswold v. Hazard, 141 U. S. 290, 35 L. ed. 678, 11 Sup. Ct. Rep. 28, Fed. Cas. No. 16,056.

¹¹See post, § 945.

¹²Lewis v. Shainwald, 48 Fed. 500, 7 Sawy. 403.

¹³See post, § 1558.

¹⁴See Mallory Mfg Co. v. Fox, 20

issuance out of the Federal courts among the reported cases. Where permissible under the State practice it will issue if the party is about to leave the State,¹⁵ but the Federal court can issue it only if the party intends to leave the United States.¹⁶ It must be a definite pecuniary claim¹⁷ and complainant must swear positively to it.¹⁸ By specifically authorizing a Supreme or circuit court judge to issue the writ where issuable by their respective courts, U. S. § 717 inferentially denies this power to district judges;¹⁹ but a district court has been held authorized to issue the writ when it possesses equity powers.²⁰ It has also been held that it should not be granted in an action to revive a judgment where not granted or prayed in the original judgment;¹ and the propriety of its allowance cannot be raised on demurrer to a bill to revive.² In a recent case the court exercised its equitable discretion in refusing the writ to hold in custody a debtor who was in Maine on a pleasure trip and resided permanently in Montreal where complainant might sue him quite as conveniently.³ Senators and Representatives upon official duty are privileged from arrest;⁴ and diplomatic agents of foreign countries and their registered servants are privileged from process against goods or person.⁵

§ 844. Supreme Court's power to issue mandamus and prohibition.

The Supreme Court shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction;^{[b]-[d]} [j] and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States,^{[e]-[j]} or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul or vice consul, is a party.^[k]

R. S. § 688, U. S. Comp. Stat. 1901, p. 565.

¹⁵See *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 973.

¹⁶*Lowenstein v. Biernbaum*, Fed. Cas. No. 8,461a. See *Union Mut. Ins. Co. v. Kellogg*, Fed. Cas. No. 14,373. The courts in the District of Columbia are controlled by the provisions of law; *Patterson v. McLaughlin*, 1 Cranch C. C. 352, Fed. Cas. No. 10,828; *Patterson v. Bowie*, 1 Cranch C. C. 425, Fed. Cas. No. 10,825. No. 10,825.

¹⁷*Graham v. Stucken*, 4 Blatchf. 50, Fed. Cas. No. 5,677.

¹⁸*Gernon v. Boecaline*, 2 Wash. C. C. 130, Fed. Cas. No. 5,367.

¹⁹*Gernon v. Boecaline*, 2 Wash. C. C. 130, Fed. Cas. No. 5,367. See *Lowenstein v. Biernbaum*, Fed. Cas. No. 8,461a.

²⁰See *Lewis v. Shainwald*, 7 Sawy. 403, 48 Fed. 500.

¹*Shainwald v. Lewis*, 46 Fed. 839. See *Shainwald v. Lewis*, 69 Fed. 487.

²*Shainwald v. Lewis*, 69 Fed. 487.

³*Harrison v. Graham*, 110 Fed. 896.

⁴See U. S. Const. Art. 1, § 6 cl. 1.

⁵See post § 861.

[a] History of section and cross references.

This provision is from § 13 of the original judiciary act.⁸ As originally enacted the statute authorized the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." This was declared unconstitutional by a case which has become a landmark in the history of constitutional law,⁹ in so far as authorizing mandamus against governmental officers in any other class of cases than those in which the Constitution expressly grants the Supreme Court original jurisdiction.¹⁰ Hence the addition of the qualifying words "where a State, or an ambassador" etc. The general power of Federal courts to issue mandamus and prohibition is elsewhere considered.¹¹

[b] Prohibition by Supreme Court in admiralty.

The writ of prohibition authorized by this section, is the common law writ.¹² It is as well settled by the decisions of the Supreme Court, as it was at common law, that it will not issue to correct errors or irregularities or control a court's judgment;¹³ nor after an act is completed or the proceedings below have run their course, in an effort to undo what has been done;¹⁴ but only to prevent an unlawful or unauthorized assumption of jurisdiction.¹⁵ But there has been some question whether the jurisdictional defect must appear from the face of the record; and whether the issuance of the writ is discretionary. In this connection it must be noted that "record" may be used in two senses; i. e. as meaning the final record below, or the record on appeal. By R. S. § 750¹⁶ the final record below includes process, pleadings, decree etc., but not the proofs. By R. S. § 698¹⁷ the record on appeal includes also the proofs. While the cases have sometimes asserted generally that prohibition will only issue for want of jurisdiction apparent on the record,¹⁸ it would seem that when sought prior to judgment or sentence in the district court, "record" includes

⁸Act Sept. 24, 1789, c. 20, § 13, 1 Stat. 80.

⁹*Marbury v. Madison*, 1 Cranch. 137, 2 L. ed. 60.

¹⁰*Ante*, § 35.

¹¹*Ante*, § 841[f]-[g].

¹²*In re Cooper*, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453. See *Smith v. Whitney*, 116 U. S. 174, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.

¹³*Ex parte Ferry Co.* 104 U. S. 520, 26 L. ed. 815; *Ex parte Slayton*, 105 U. S. 453, 26 L. ed. 1066; *In re Cooper*, 143 U. S. 72, 36 L. ed. 232, 12 Sup. Ct. Rep. 453; *Ex parte Pennsylvania*, 109 U. S. 176, 27 L. ed. 894, 3 Sup. Ct. Rep. 84; *In re New York, etc. S. Co.* 155 U. S. 531, 39 L. ed. 246, 15 Sup. Ct. Rep. 183.

¹⁴*United States v. Hoffman*, 4

Wall. 162, 18 L. ed. 354; *Ex parte Easton*, 95 U. S. 72, 24 L. ed. 373.

¹⁵*United States v. Peters*, 3 Dall. 129, 1 L. ed. 535; *Ex parte Gordon*, 104 U. S. 516, 26 L. ed. 814; *In re Morrison*, 147 U. S. 36, 37 L. ed. 60, 13 Sup. Ct. Rep. 246; *In re Fassett*, 142 U. S. 486, 35 L. ed. 1087, 12 Sup. Ct. Rep. 295. If the court has jurisdiction of the parties and the res prohibition will not issue. *Indiana v. Glover*, 155 U. S. 513, 39 L. ed. 243, 15 Sup. Ct. Rep. 186.

¹⁶Post § 1958 and see also post, § 1100.

¹⁷Post, § 1959.

¹⁸*Ex parte Easton*, 95 U. S. 77, 24 L. ed. 373; *Ex parte Phenix Ins. Co.* 118 U. S. 625, 30 L. ed. 274, 7 Sup. Ct. Rep. 25.

the evidence or proof and permits an examination thereof where necessary to decide the jurisdictional fact; but that after sentence or judgment only the final record below will be examined and not the proofs.¹⁹ The question of discretion in the granting of the writ has also given some difficulty, although the court has now declared comprehensively that "where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy²⁰ is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceeding."¹ Confiscation proceedings under act of 1862 are not admiralty proceedings within this section, although the practice therein is conformed to admiralty practice.²

[c] Prohibition by Supreme Court in other cases.

It has been said that the Supreme Court cannot issue prohibition except in admiralty,⁵ and undoubtedly it has not such power under R. S. § 688. But by R. S. § 716 it may issue the writ when necessary to the exercise of its jurisdiction and agreeable to the principles of law.⁶ There are no cases in which it has issued other than admiralty, although instances in which it has been applied for.⁷

[d] When Congress may authorize mandamus by Supreme Court.

The Constitution does not specifically grant to the Supreme Court original jurisdiction to issue any of the prerogative writs.⁹ As Congress is without power to enlarge the Supreme Court's original jurisdiction,¹⁰ it follows that its power to issue mandamus and the other writs as an exercise of original jurisdiction is confined to those cases in which the Constitution has

¹⁹See *In re Cooper*, 143 U. S. 505, L. ed. 552, 22 Sup. Ct. Rep. 455. See 36 L. ed. 243, 12 Sup. Ct. Rep. 461; also *Smith v. Whitney*, 116 U. S. 167, discussing earlier cases of *Ex parte City Bank*, 3 How. 292, 11 L. ed. 610; 570; *Ex parte Cooper*, 143 U. S. 495, 36 L. ed. 239, 12 Sup. Ct. Rep. 453. *United States v. Peters*, 3 Dall. 121, 1 L. ed. 535, etc. See also *In re Baiz*, 135 U. S. 430, 34 L. ed. 222, 10 Sup. Ct. Rep. 854. ²*Ex parte Graham*, 10 Wall. 543, 19 L. ed. 981.

²⁰See *In re New York S. S. Co.* 155 U. S. 531, 39 L. ed. 246, 15 Sup. Ct. Rep. 183. ⁵See *ex parte City Bank*, 3 How. 322, 11 L. ed. 603; *Ex parte Graham*, 10 Wall. 542, 19 L. ed. 981.

¹*In re Rice*, 155 U. S. 396, 402, 39 L. ed. 198, 201, 15 Sup. Ct. Rep. 149; *Ex parte Alix*, 166 U. S. 136, 41 L. ed. 948, 17 Sup. Ct. Rep. 522; *In re Huguley*, etc. Co. 184 U. S. 301, 46

⁶*Ante*, § 841[g].

⁷*Ante*, § 841[g].

⁹*United States v. Schurz*, 102 U. S. 395, 26 L. ed. 167.

¹⁰*Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60: *Ante*, § 35.

otherwise invested it with original jurisdiction;¹¹ and that in all other cases its issuance of mandamus must be in the nature of an exercise of appellate power.¹²

[e] Mandamus to inferior Federal courts.

The statute authorizes mandamus to inferior Federal courts, but not to State courts,¹⁶ when "warranted by the principles and usages of law,"¹⁷ and as that use of the writ is appellate¹⁸ in its nature, it is not invalid within the reasoning of *Marbury v. Madison*.¹⁹ The particular province of mandamus is to compel the performance of some clear legal duty where the party damaged by the neglect has no other adequate remedy.²⁰ The duty must be plain and positive.¹ The party to be coerced must have power to perform it. It is never granted in anticipation of an omission of duty.² When directed to inferior courts the principal uses of mandamus are to compel a court to take jurisdiction in a proper case,³ or having taken it, to proceed in its exercise,⁴ or having wrongfully taken jurisdiction or exceeded lawful bounds in its exercise, to set aside or rectify erroneous orders, decrees or other proceedings made therein.⁵ As has been said, it issues to inferior courts to restrain their excesses as well as quicken their diligence.⁶ When an inferior court refuses to act on a subject properly before it, mandamus is the only adequate mode of relief.⁷ Mandamus lies where the circuit court has improperly remanded a cause to a State court since the remanding order is not appealable;⁸ but not when that

¹¹*McCluney v. Silliman*, 2 Wheat. 370, 4 L. ed. 263; *Virginia v. Rives*, 100 U. S. 327, 25 L. ed. 672; *Riggs v. Johnson Co.* 6 Wall. 188, 18 L. ed. 774. Ante, § 35.

¹²See *United States v. Boutwell*, 17 Wall. 609, 21 L. ed. 721.

¹⁶See *In re Blake*, 175 U. S. 114, 44 L. ed. 94, 20 Sup. Ct. Rep. 42; *In re Green*, 141 U. S. 326, 35 L. ed. 765, 12 Sup. Ct. Rep. 11.

¹⁷See commenting on this phrase: *Virginia v. Rives*, 100 U. S. 324, 25 L. ed. 670; *Ex parte Newman*, 14 Wall. 165, 20 L. ed. 879.

¹⁸*Ex parte Crane*, 5 Pet. 200, 8 L. ed. 96; *Ex parte Newman*, 14 Wall. 165, 20 L. ed. 879; *Virginia v. Rives*, 100 U. S. 327, 25 L. ed. 672.

¹⁹*Oranch*, 137, 2 L. ed. 60.

²⁰*Board of Comr's. v. Aspinwall*, 24 How. 383, 16 L. ed. 735; *Bayard v. White*, 127 U. S. 250, 32 L. ed. 116, 8 Sup. Ct. Rep. 1223.

¹*Ex parte Cutting*, 94 U. S. 20, 24 L. ed. 49; *Northern Pac. R. R. v. Washington*, 142 U. S. 506, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283.

²*Commissioners of Brownsville v.*

Loague, 129 U. S. 501, 32 L. ed. 780, 9 Sup. Ct. Rep. 327; *Missouri ex rel. v. Murphy*, 170 U. S. 95, 42 L. ed. 955, 18 Sup. Ct. Rep. 505; *Wyle v. Cox*, 14 How. 3, 14 L. ed. 301.

³*Railroad Co. v. Wiswall*, 23 Wall. 508, 23 L. ed. 103; *In re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Ex parte Schollenberger*, 96 U. S. 378, 24 L. ed. 853.

⁴*Life & F. Ins. Co. v. Wilson*, 8 Pet. 303, 8 L. ed. 949; *Ex parte Parker*, 120 U. S. 743, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; *In re Atlantic City R. R.* 164 U. S. 635, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; *In re Pennsylvania Co.* 137 U. S. 452, 34 L. ed. 738, 11 Sup. Ct. Rep. 141.

⁵See *Ex parte Bradley*, 7 Wall. 376, 19 L. ed. 214.

⁶*Ex parte Crane*, 5 Pet. 192, 8 L. ed. 92.

⁷*Life & F. Ins. Co. v. Wilson*, 8 Pet. 303, 8 L. ed. 949.

⁸*Insurance Co. v. Comstock*, 16 Wall. 270, 21 L. ed. 498; *Railroad Co. v. Wiswall*, 23 Wall. 308, 23 L. ed. 103.

court refuses to remand, there being a remedy by appeal.⁹ It lies to compel a court to try a case;¹⁰ to compel the lower court to make up the record in a case, for appeal;¹¹ to compel entry of judgment;¹² to compel a judge to sign and settle a bill of exceptions;¹³ but not an improper one¹⁴ or to resettle one on affidavits of error.¹⁵ It may issue to compel a court to carry a judgment into effect;¹⁶ or to pass upon a motion for new trial;¹⁷ or to compel allowance of an appeal,¹⁸ though not if the application is irregular.¹⁹ In one case it issued to compel reinstatement of a disbarred attorney where the disbarment was in excess of jurisdiction.²⁰

[f] To compel compliance with appellate mandate.

Mandamus is sometimes a proper remedy in a case that has gone back to the trial court after appeal, where the lower court fails to give proper effect to the mandate;⁴ or disobeys it;⁵ or improvidently permits a new trial;⁶ and the delay incident to a second appeal makes that remedy inadequate.⁷ The writ may issue irrespective of the amount in dispute.⁸ But if the mandate on the appeal confers a discretion mandamus will not issue to control it.⁹ It is not a proper mode of enforcing

⁹Ex parte Hoard, 105 U. S. 579, 26 L. ed. 1176. See however, Ex parte Virginia, 100 U. S. 339, 25 L. ed. 671. Awarding mandamus where a criminal prosecution had been improvidently removed.

¹⁰Ex parte Schollenberger, 96 U. S. 378, 24 L. ed. 853.

¹¹Ex parte Bradstreet, 7 Pet. 634, 8 L. ed. 810.

¹²Life & F. Ins. Co. v. Wilson, 8 Pet. 291, 8 L. ed. 949.

¹³Ex parte Crane, 5 Pet. 190, 8 L. ed. 92. In re Chateaugay, etc. Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150.

¹⁴Bradstreet v. Thomas, 4 Pet. 102, 7 L. ed. 796.

¹⁵In re Streep, 156 U. S. 207, 39 L. ed. 399, 15 Sup. Ct. Rep. 358.

¹⁶Stafford v. Union Bank, 16 How. 135, 14 L. ed. 876; Stafford v. New Orleans, etc. Co. 17 How. 283, 15 L. ed. 102.

¹⁷Ex parte Roberts, 15 Wall. 387, 21 L. ed. 131; Ex parte United States, 16 Wall. 703, 21 L. ed. 507.

¹⁸United States v. Gomez, 3 Wall. 766, 18 L. ed. 212; Ex parte Russell, 13 Wall. 670, 20 L. ed. 632; Ex parte Cutting, 94 U. S. 21, 24 L. ed. 49; In re Farmers Loan, etc. Co. 129 U. S.

216, 32 L. ed. 656, 9 Sup. Ct. Rep. 265.

¹⁹Mussina v. Cavazos, 20 How. 280, 15 L. ed. 878.

²⁰Ex parte Bradley, 7 Wall. 376, 19 L. ed. 214.

⁴Ex parte Union S. Co. 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 904; In re Sanford, etc. Co. 160 U. S. 255, 40 L. ed. 414, 16 Sup. Ct. Rep. 201; Gaines v. Rugg, 148 U. S. 243, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; In re Blake, 175 U. S. 117, 44 L. ed. 94, 20 Sup. Ct. Rep. 42.

⁵Ex parte Sibbald, 12 Pet. 493, 9 L. ed. 1167; Stafford v. Union Bank, 17 How. 280, 15 L. ed. 101; In re City Nat. Bank, 153 U. S. 251, 38 L. ed. 705, 14 Sup. Ct. Rep. 804; United States v. Fossatt, 21 How. 446, 16 L. ed. 186.

⁶In re Potts, 166 U. S. 268, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Ex parte Dubuque, etc. R. R. 1 Wall. 69, 17 L. ed. 514.

⁷Gaines v. Rugg, 148 U. S. 243, 37 L. ed. 432, 13 Sup. Ct. Rep. 611.

⁸City Bank v. Hunter, 152 U. S. 515, 38 L. ed. 534, 14 Sup. Ct. Rep. 675.

⁹Ex parte Railway Co. 101 U. S. 711, 25 L. ed. 872.

compliance of a State court with mandate on writ of error, but in such cases a second writ of error is proper.¹⁰

[g] — absence of other adequate remedy.

It is a fundamental requirement in all cases that there be no other adequate remedy.¹² If an inferior court refuses to proceed according to equity practice,¹³ or improperly allows an appeal,¹⁴ or dismisses plaintiffs petition for want of jurisdiction,¹⁵ or refuses to dismiss¹⁶ or dismissed on appeal,¹⁷ or decides erroneously,¹⁸ there is ordinarily adequate remedy in the ordinary course of appellate proceedings and mandamus will not lie. The fact that the term of an office in dispute would expire before appeal could be heard has been held immaterial.¹⁹ But the right to a second appeal is not always deemed an adequate remedy for failure to follow the Supreme Court's mandate, and mandamus will sometimes issue to avoid the delay.²⁰ Mandamus cannot be used to perform the office of a writ of error.⁴ It cannot be used to review interlocutory orders and decrees in a cause depending below, and thus enable parties prematurely to invoke the supervisory power of the appellate court.⁵ Some cases assert that it cannot be made to perform the office of a writ of error, "even though no right of appeal or error is given by law."⁶ Yet this does not mean that absence of right of appeal may not often be a material factor in justifying resort to the writ where a proper case is otherwise made out.⁷ The statement would seem to mean that the court will not be drawn into the investigation of the record in a cause for the purpose of making

¹⁰In re Blake, 175 U. S. 114, 44 L. ed. 94, 20 Sup. Ct. Rep. 42.

¹²United States v. Addison, 22 How. 174, 16 L. ed. 304; Ex parte Newman, 14 Wall. 152, 20 L. ed. 877; Ex parte Cutting, 94 U. S. 20, 24 L. ed. 49.

¹³Ex parte Whitney, 13 Pet. 408, 10 L. ed. 221.

¹⁴Ex parte Russell, 13 Wall. 670, 20 L. ed. 632.

¹⁵Ex parte Newman, 14 Wall. 169, 20 L. ed. 877; Ex parte Railway Co. 103 U. S. 796, 26 L. ed. 461. But if there is no right of appeal mandamus should be allowed: In re Hohorst, 150 U. S. 654, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221.

¹⁶In re Huguley Mfg. Co. 184 U. S. 301, 46 L. ed. 549, 22 Sup. Ct. Rep. 455. See Ex parte Hoard, 105 U. S. 579, 26 L. ed. 1176.

¹⁷Ex parte Brown, 116 U. S. 402, 29 L. ed. 676, 6 Sup. Ct. Rep. 387; In re Atlantic City Ry. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208.

¹⁸Ex parte De Groot, 6 Wall. 497, 16 L. ed. 887.

¹⁹United States v. Addison, 22 How. 183, 16 L. ed. 304.

²⁰In re Potts, 166 U. S. 268, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Gaines v. Rugg, 148 U. S. 243, 37 L. ed. 432, 13 Sup. Ct. Rep. 611. But see Ex parte Sawyer, 21 Wall. 240, 22 L. ed. 617.

⁴Ex parte Schwab, 98 U. S. 241, 25 L. ed. 105; Ex parte Hoard, 105 U. S. 580, 26 L. ed. 1176; In re Pennsylvania Co. 137 U. S. 453, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; In re Blake, 175 U. S. 117, 44 L. ed. 94, 20 Sup. Ct. Rep. 42; In re Grossmayer, 177 U. S. 49, 44 L. ed. 666, 20 Sup. Ct. Rep. 535.

⁵Bank of Columbia v. Sweeney, 1 Pet. 569, 7 L. ed. 266; Amer. Con. Co. v. Jacksonville, etc. Ry. 148 U. S. 378, 37 L. ed. 489, 13 Sup. Ct. Rep. 758.

⁶In re Rice, 155 U. S. 403, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Amer. Con. Co. v. Jacksonville, etc. Ry. 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758.

⁷See Ex parte Bradley, 7 Wall.

out or ascertaining the existence of a proper case for the writ. That would be to compel the court to exercise the ordinary revisory powers of a court of review, in a case not reviewable. Error in proceedings or an erroneous judgment are to be remedied by appeal and not by mandamus.⁸

[i] —not allowable to control discretion.

While mandamus issues to compel a court to act, it will not be granted to control any legal discretion possessed by the lower court regarding the way in which it shall act.¹¹ A superior court cannot direct in what manner an inferior court shall exercise its discretion.¹² Mandamus lies to order a court to proceed to judgment, but not to direct it to enter a particular judgment when that would trespass upon the judicial discretion or function of the court.¹³ It lies to compel court to pass on motion for new trial;¹⁴ but not to control the discretion of a lower court in passing on motion for new trial.¹⁵ If the dismissal of a libel is in the exercise of discretion, it is not controllable by mandamus.¹⁶ Mandamus will not lie to compel a lower court to hear further argument,¹⁷ or to set aside default;¹⁸ or vacate an order setting aside a nonsuit;¹⁹ or stay execution of interlocutory injunction pending appeal;²⁰ or to accept or refuse an appeal bond offered;¹ or to fix the amount of bail;² or vacate an injunction;³ or issue warrant for a deserter where the judge deems the evidence insufficient.⁴ All these involve an exercise of judicial discretion.

376, 19 L. ed. 214; In re Washington R. R. 140 U. S. 95, 35 L. ed. 339, 11 Sup. Ct. Rep. 673.

⁸Ex parte Perry, 102 U. S. 183, 26 L. ed. 43; Bank v. Sweeney, 1 Pet. 567, 7 L. ed. 265; In re Parsons, 150 U. S. 150, 37 L. ed. 1035, 14 Sup. Ct. Rep. 50; Ex parte Hoyt, 13 Pet. 279, 10 L. ed. 161; Ex parte Burtis, 103 U. S. 238, 26 L. ed. 392; In re Humes, 149 U. S. 192, 37 L. ed. 699, 13 Sup. Ct. Rep. 836; Morrison v. District Court, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

¹¹Ex parte Sawyer, 21 Wall. 239, 22 L. ed. 617; Ex parte Burits, 103 U. S. 238, 26 L. ed. 392; Ex parte Brown, 116 U. S. 402, 29 L. ed. 676, 6 Sup. Ct. Rep. 387.

¹²Life & F. Ins. Co. v. Wilson, 8 Pet. 304, 8 L. ed. 949; Ex parte Bradley, 7 Wall. 377, 19 L. ed. 214; Ex parte Burtis, 103 U. S. 238, 26 L. ed. 392.

¹³Life & F. Ins. Co. v. Adams, 9 Pet. 604, 9 L. ed. 234; Ex parte Hoyt, 12 Pet. 290, 10 L. ed. 161; Ex parte Many, 14 How. 25, 14 L. ed. 311; Ex

parte Flippin, 94 U. S. 350, 24 L. ed. 194; Ex parte Grossmayer, 177 U. S. 49, 44 L. ed. 666, 20 Sup. Ct. Rep. 535.

¹⁴Ex parte Roberts, 15 Wall. 387, 21 L. ed. 131.

¹⁵Life & F. Ins. Co. v. Wilson, 8 Pet. 303, 8 L. ed. 949.

¹⁶Morrison v. District Court, 147 U. S. 26, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

¹⁷In re Rice, 155 U. S. 403, 39 L. ed. 198, 15 Sup. Ct. Rep. 149.

¹⁸Ex parte Roberts, 6 Pet. 217, 8 L. ed. 375.

¹⁹Ex parte Loring, 94 U. S. 419, 24 L. ed. 165.

²⁰In re Haberman Mfg. Co. 147 U. S. 530, 37 L. ed. 266, 13 Sup. Ct. Rep. 527.

¹Ex parte Milwaukee, etc. R. R. 5 Wall. 190, 18 L. ed. 676.

²Ex parte Taylor, 14 How. 12, 14 L. ed. 302.

³Ex parte Schwab, 98 U. S. 240, 25 L. ed. 105.

⁴United States v. Lawrence, 3 Dall. 45, 1 L. ed. 503.

[j] Practice on prohibition and mandamus.

Both mandamus and prohibition are common law writs,⁸ although the intervention of a jury is unnecessary.⁹ The proper proceeding for their issuance by the Supreme Court, is to apply *ex parte* for leave to file a verified petition¹⁰ praying for issuance of a rule to show cause why the writ should not issue.¹¹ addressed to the lower court, or to the judges thereof, or both.¹² The petition must make out a *prima facie* case¹³ it is said that in application for prohibition the plaintiff in the suit complained of may be joined as a defendant unless it be the government.¹⁴ The fact that the court is represented by a new judge does not affect the right to the writ.¹⁵ The rule to show cause may be dispensed with by consent.¹⁶ It was not issuable by the Chief Justice when holding the August term under an early law.¹⁷ Issuance of the rule on petition for prohibition may be accompanied with an order to proceed no further in the case until a decision in the premises.¹⁸ Although formerly a prerogative writ mandamus is now regarded as an action by the party upon whose relation it is granted.¹⁹

[k] Mandamus in exercise of original jurisdiction.

While Congress has power to authorize mandamus by the Supreme Court against government executive officers in those cases within its original jurisdiction,²⁰ there seems to be no cases in the reports where the jurisdiction has been exercised.

§ 845. Mandamus to judicial officers for returns of fees.

The circuit courts of the United States for the purposes of this act [an act requiring returns of fees and proof of accounts of clerks, etc., before the courts], shall have power to award the writ of mandamus, according to the course of the common law, upon motion of the Attorney General or the district attorney of the United

⁸Smith v. Whitney, 116 U. S. 174, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; In re Cooper, 143 U. S. 495, 36 L. ed. 232, 12 Sup. Ct. Rep. 453; United States v. Union Pac. R. R. 2 Dill. 527, Fed. Cas. No. 16,599.

⁹In re Delgado, 140 U. S. 588, 35 L. ed. 578, 580, 11 Sup. Ct. Rep. 874.

¹⁰Poultney v. La Fayette, 12 Pet. 474, 9 L. ed. 1161.

¹¹Postmaster Gen. v. Trigg, 11 Pet. 174, 9 L. ed. 676.

¹²In re Parker, 131 U. S. 226, 33 L. ed. 123, 9 Sup. Ct. Rep. 708.

¹³Ex parte Christy, 3 How. 308, 11 L. ed. 603; Postmaster Gen. v. Trigg, 11 Pet. 174, 9 L. ed. 676.

¹⁴Smith v. Whitney, 116 U. S. 176, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.

¹⁵In re Parker, 131 U. S. 226, 33 L. ed. 123, 9 Sup. Ct. Rep. 708.

¹⁶Life & F. Ins. Co. v. Adams, 9 Pet. 572, 9 L. ed. 233.

¹⁷Ex parte Hennen, 13 Pet. 229, 10 L. ed. 136.

¹⁸United States v. Hoffman, 4 Wall. 158, 18 L. ed. 354.

¹⁹Kendall v. Stokes, 3 How. 100, 11 L. ed. 513; Kentucky v. Dennison, 24 How. 97, 16 L. ed. 725; Hartman v. Greenhow, 102 U. S. 675, 26 L. ed. 273.

²⁰Virginia v. Rives, 100 U. S. 325, 25 L. ed. 672. Supra, note[e].

States, to any officer thereof, to compel him to make the returns and perform the duties in this act required.

§ 4, of act Feb. 22, 1875, c. 95, 18 Stat. 333, U. S. Comp. Stat. 1901, p. 649.

§ 846. Peremptory mandamus against carriers to compel equal facilities.

If any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ [i. e. the writ of mandamus sought by a shipper to compel equal facilities] is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact.

Part of § 23 added to act of Feb. 4, 1887, by act Mar. 2, 1889, c. 382, 25 Stat. 862, U. S. Comp. Stat. 1901, p. 3172.

The first part of the above section confers jurisdiction to issue mandamus.⁴ The last clause provides that the remedy given by mandamus is merely cumulative.⁵ Unjust discrimination is the gist of the offense and it must be pleaded and proved.⁶ Peremptory mandamus will not issue unless a case of unjust discrimination is made out.⁷ Plea in abatement to a second writ of mandamus will be sustained where between the same parties and where the gist of the unjust discrimination alleged, is the same.⁸

§ 847. — remedy by mandamus merely cumulative.

The remedy hereby given¹⁰ by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

Part of § 10 act Mar. 2, 1889, c. 382, 25 Stat. 862, U. S. Comp. Stat. 1901, p. 3172.

§ 848. Mandamus to compel carriers to publish rate schedules.

If any such common carrier [i. e., as is within the provisions of the interstate commerce acts] shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges as provided

⁴Ante, § 152.

⁵Post, § 847.

⁶United States v. Norfolk & W. Ry. 109 Fed. 836.

⁷United States v. Delaware, L. & W. R. R. 40 Fed. 101, 105.

⁸United States v. Norfolk & W. Ry. 114 Fed. 682.

¹⁰See ante, §§ 846, 152.

in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial district wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section.

Part of § 6 act Feb. 4, 1887, c. 104, 24 Stat. 380, as amended Mar. 2, 1889, c. 382, § 1, 25 Stat. 855, U. S. Comp. Stat. 1901, p. 3158.

§ 849. — form of its issuance and effect of non-compliance.

Such writ [i. e. as is mentioned in the preceding section]¹³ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt.

Part of § 6, act Feb. 4, 1887, c. 104, 24 Stat. 380, as amended Mar. 2, 1889, c. 382, § 1, 25 Stat. 855, U. S. Comp. Stat. 1901, p. 3158.

The Commission is also authorized to sue out injunction until schedules are published.¹⁴

§ 850. Bankruptcy courts' power to issue process.

The courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska . . . are hereby invested, within their respective territorial limits . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to . . . issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act[i. e. the bankruptcy law of 1898.]

Part of § 2, act July 1, 1898, c. 541, 30 Stat. 545, 546, U. S. Comp. Stat. 1901, p. 3420.

The above section is stated in full elsewhere.¹⁶

¹³Ante, § 848.

¹⁴Post, § 1347.

¹⁶Post § 2220. See also as to services of petition in involuntary bankruptcy, post § 2278.

§ 851. Statutory provisions as to place where process is returnable.

The statutes defining the Federal judicial districts in the various States, have sometimes created judicial divisions in districts by a declaration that all process against defendants residing in designated counties should be returnable to a given place, therein and providing for terms of court at that place. The statutes affecting divisions in the Texas districts have uniformly been so framed.¹⁹ Other statutes have in terms defined the boundaries of judicial divisions, but have further proceeded to declare that process against persons residing in such division be returned to the term of court held therein.²⁰ The legislation for other districts containing divisions has contained no provision as to return of process. In yet other cases, where there are no divisions of the judicial districts, though several designated places of holding court therein, the courts themselves have adopted rules providing as to the place to which process issued shall be returnable. In all of these cases it is necessary for the practitioner to advise himself as to the status of the law in any particular district or division.

Author's section.

§ 852. Provisions authorizing service of process throughout districts containing judicial divisions.

Some of the statutes creating judicial divisions in Federal judicial districts have contained specific provision as to service and execution of process in a district so divided. Thus acts dividing the districts of Alabama into divisions have provided that "all mesne and final process, subject to the provisions of this act, issued in either of said divisions, may be served and executed in either or both of the divisions."²¹ There is a similar provision for the divisions of the southern district of California²² for the divisions in the districts of Georgia;²³ for the divisions of the Idaho district;²⁴ of the eastern

¹⁹Ante, § 288.

²⁰See ante, §§ 405, 406, 414.

²¹Act May 2, 1884, c. 38, § 4, 23 Stat. 18, U. S. Comp. Stat. 1901, p. 319; Act March 3, 1905, c. 1419, § 7, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 79.

²²Act May 29, 1900, c. 594, § 6, 31 Stat. 220, U. S. Comp. Stat. 1901, p. 328.

²³Act April 12, 1900, c. 185, § 2, 31 Stat. 74, U. S. Comp. Stat. 1901, p. 340; Act June 30, 1902, c. 338, § 7, 32 Stat. 551, U. S. Comp. Stat. 1903, p. 58; Act March 3, 1905, c. 1431, 33 Stat. 1000, U. S. Comp. Stat. 1905, p. 88.

²⁴Act July 5, 1892, c. 145, § 4, 27 Stat. 73, U. S. Comp. Stat. 1901, p. 343.

district of Tennessee;⁷ of the districts of Missouri;⁸ the southern district of Iowa;⁹ for the divisions of the Kansas district¹¹ of the North Dakota district;¹³ of the Utah district;¹⁴ of the Washington district¹⁵ and the two districts of Ohio.¹⁶ The act of 1887 establishing divisions in the Missouri districts provided that "process issuing out of the courts of either division of said districts shall be directed to the marshal of the district in which the division is located, and may be executed by him or his deputies upon the party or parties against whom issued wherever found within his district."¹⁷ In addition to the provision above noted, for the western district of Missouri, there was an earlier general provision applicable to both districts, that "process issuing out of the courts of either division of said districts shall be directed to the marshal of the district in which the division is located, and may be executed by him or his deputies upon the party or parties against whom issued wherever found within his district."¹⁹ The purpose of these provisions is to guard against the inference that process issued in one division could not be served anywhere in that district. But failure to so enact would not justify the assumption that process could only be executed in the division wherein it was issued, in view of the general intent manifested by the legislation of Congress in that respect.²⁰ It seems safe to assert therefor, as a universal rule, that process may be executed and served anywhere within a district, from a division of which it may properly issue.

Author's section.

⁷Act February 7, 1900, c. 10, § 6, 31 Stat. 6, U. S. Comp. Stat. 1901, p. 419.

⁸Act January 24, 1901, c. 164, § 6, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 391; Act January 31, 1905, c. 287, § 6, 33 Stat. 627, U. S. Comp. Stat. 1905, p. 104.

⁹Act June 1, 1900, c. 601, § 2, 31 Stat. 249, U. S. Comp. Stat. 1901, p. 354.

¹¹Act May 3, 1892, c. 59, § 2, 27 Stat. 24, U. S. Comp. Stat. 1901, p. 357.

¹³Act June 29, 1906, c. 3595, 24 Stat. 609.

¹⁴Act March 2, 1897, c. 366, § 3, 29 Stat. 620, U. S. Comp. Stat. 1901, p. 435.

¹⁵Act April 5, 1890, c. 65, § 4, 26 Stat. 45, U. S. Comp. Stat. 1901, p. 439.

¹⁶Act June 8, 1878, c. 1069, § 6, 20 Stat. 102; Act Feb. 4, 1880, c. 18, § 7, 20 Stat. 64, U. S. Comp. Stat. 1901, p. 402, 404.

¹⁷Act Feb. 28, 1887, c. 271, § 5, 24 Stat. 426, U. S. Comp. Stat. 1901, p. 387.

¹⁹Act February 28, 1887, c. 271, § 5, 24 Stat. 425, U. S. Comp. Stat. 1901, p. 387.

²⁰E. g., see post, §§ 853-855; ante § 402. And see *Rosecrans v. United States*, 165 U. S. 260, 41 L. ed. 708, 17 Sup. Ct. Rep. 302.

§ 853. Place, mode and sufficiency of service.

Further than to prescribe that Federal process be served by the marshal, Congress has made no provision as to the manner in which process shall be served, nor as to sufficiency of service in actions against corporations, municipal bodies, etc. There are rules of court respecting service of process in equity,³ and admiralty,⁴ and in the Supreme Court.⁵ In common law causes the local state practice as to mere mode and sufficiency of service governs.^{[a]-[e]} But State laws permitting service by publication, or substituted service, or foreign attachment against persons outside the State, do not prevail in the Federal courts. On the contrary the general rule there is that process can only be served within the district wherein it is issued.^[d] The particular provisions in subsequent sections of this chapter as to substituted service and service in other districts, are in the nature of exceptions to the general rule

Author's section.

[a] State law governs.

The State law as to service of process in common law causes is part of the mode of proceeding and adopted by R. S. § 914;⁷ and State decisions construing such law will be followed.⁸ A State law declaring that service of summons is deemed the commencement of a suit is followed in common law causes.⁹ Where the statute prescribes the mode of service upon a municipality, it cannot be made in any other mode though another mode could have been permissible at common law.¹⁰ But a State law imposing a penalty for failure to serve a summons does not apply to the marshal.¹¹ The questions whether a Federal court acquired jurisdiction by service is one of Federal laws and not controlled by State decisions.¹²

[b] Sufficiency of service on foreign corporations.

The law as to when a foreign corporation is deemed "found" within a Federal judicial district for purposes of jurisdiction has already been considered.¹⁴ The general principle that the State law as to mode of service is adopted by the Federal courts in common-law causes, applies in suits

³Post, § 971.

⁴Post, § 1202.

⁵Post, § 858.

⁷Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; Perkins v. Watertown, 5 Biss. 320, Fed. Cas. No. 10,991.

⁸Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; Toledo C. S. Co. v. Computing Scale Co. 142 Fed. 919 —C. C. A. —.

⁹Michigan Ins. Bank v. Eldred, 130

U. S. 695, 32 L. ed. 1080, 9 Sup. Ct. Rep. 690. See also Ex parte Connaway, 178 U. E. 430, 44 L. ed. 1138, 20 Sup. Ct. Rep. 951.

¹⁰Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530. But see Elson v. Waterford, 135 Fed. 247.

¹¹Lowery v. Story, 31 Fed. 770.

¹²New Haven, etc. Co. v. Downington, etc. Co. 130 Fed. 605.

¹⁴Ante, § 401 [c] et seq.

against foreign corporations;¹⁵ although a Federal court is not bound by State practice requiring the sufficiency of service to be tried by a jury.¹⁶ The question of mode of service is not to be confused with the jurisdictional question as to when a corporation is "found" within a district. The former is a mere matter of procedure in which Congress has seen fit to require the Federal practice to conform to that of the States. The latter is a question of the power of Federal courts under Federal statutes, and the State laws and decisions cannot vary or affect the result.¹⁷ Before the question of mode or sufficiency of service can arise there must be presented a case where a corporation is deemed "found" for jurisdictional purposes. If so "found" then a State statute authorizing valid service against a statutory agent is available to a Federal suitor and he may have service upon such agent.¹⁸ So also a State statute applies in service of Federal process, which declares generally the class of officers and agents of a corporation that may be served with process.²⁰ Where service on a resident director, or financial agent¹ is valid by the State code, it suffices in the Federal court.² Other cases have relied upon the provisions of State law as to service on foreign corporations, in upholding service on the general agents of a railroad;³ on a station agent;⁴ on the manager of a subordinate company;⁵ on a locomotive engineer;⁶ on general agents of a railroad⁷; in setting aside service on traveling solicitor⁸ in holding that the statute as to service on resident agent was not exclusive of other service;⁹ in setting aside service on an occasional

¹⁵Van Dresser v. Oregon Ry. etc. Co. 48 Fed. 202.

¹⁶Wall v. Chesapeake, etc. Ry. 95 Fed. 398, 37 C. C. A. 129. See also Benton v. McIntosh, 96 Fed. 132.

¹⁷Ante, § 5. See Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

¹⁸Ex parte Schollenberg, 96 U. S. 369, 24 L. ed. 853; Brownell v. Troy R. R. 3 Fed. 761, 18 Blatchf. 243; Runkle v. Lamar, 2 Fed. 9; New England M. L. Ins. Co. v. Woodworth, 111 U. S. 138, 146, 28 L. ed. 382, 4 Sup. Ct. Rep. 364; Ehrman v. Teutonia Ins. Co. 1 Fed. 471, 1 McCrary, 173; Mutual, etc. Assn. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Carstairs v. Ins. Co. 13 Fed. 823.

²⁰Provident Sav. Soc. v. Ford, 114 U. S. 639, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; Connecticut M. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Société Foncière, etc. v. Milliken, 135 U. S. 307, 34 L. ed. 209, 10 Sup. Ct. Rep. 823; Mexican C. R. R. v. Pinkney, 149 U. S. 201, 37 L. ed. 702, 13 Sup.

Ct. Rep. 859; Barnes v. Western U. T. Co. 120 Fed. 550; Van Dresser v. Oregon Ry. etc. Co. 48 Fed. 202.

¹Meyer v. Penn. etc. Ins. Co. 108 Fed. 169; Reilly v. Philadelphia, etc. Co. 109 Fed. 349.

²Amer. Lock. Co. v. Dickson Mfg. Co. 117 Fed. 972.

³Denver, etc. Co. v. Roller, 100 Fed. 738, 49 L.R.A. 77.

⁴Hat-Sweat Mfg. Co. v. Davis, etc. Co. 31 Fed. 294; Dinzy v. Ill. Cent. R. R. 61 Fed. 49; Union Pac. R. R. v. Novak, 61 Fed. 573, 9 C. C. A. 629.

⁵Norton v. Atchison, etc. R. R. 61 Fed. 618.

⁶Devere v. Delaware, etc. R. R. 60 Fed. 886.

⁷Block v. Atchison, etc. R. R. 21 Fed. 529.

⁸N. K. Fairbank & Co. v. Cincinnati, etc. R. R. 54 Fed. 420, 4 C. C. A. 403, 38 L.R.A. 271; Wall v. Chesapeake, etc. Co. 95 Fed. 398, 37 C. C. A. 129; Maxwell v. Atchison, etc. R. R. 34 Fed. 286.

⁹Mutual R. F. Ins. Co. v. Cleveland, W. M. 82 Fed. 508, 27 C. C. A. 212.

correspondent of a news agency;¹⁰ and on a "distributing agent;"¹¹ and service by mail¹² in upholding service on the agent in the very transaction sued upon;¹³ upon a managing agent;¹⁴ in setting aside service upon a licensee of a telephone company because not a managing agent;¹⁵ in upholding service upon the general financial agents of a foreign steamship company.¹⁶ A State law permitting service on an employee in default of any designated statutory agent will be construed strictly.¹⁷

[c]—effect where no State law, or law inapplicable or prohibitive.

If there is no State law declaring the proper mode of serving foreign corporations, it would seem that a general statute as to service upon corporations would apply.² If the State law required that service against a foreign corporation be by attachment of its property, which is forbidden in Federal courts, then it is a case where literal conformity to the State practice would not be required under R. S. § 914, and service upon the President would be upheld.³ Certainly a suit cognizable in the Federal court of a district because within its jurisdictional power under the acts of Congress and decisions of the Federal courts, would not be allowed to be defeated because the State law did not indicate the mode of service of process. The practice conforms to State practice only "as near as may be." And it is equally true that if the Federal court of a district had no jurisdiction because a foreign corporation was not deemed "found" therein, the fact of service, though in the mode prescribed by the State law, would not be effective to confer jurisdiction.⁴ The statutes and decisions of some States do not permit service against the local representatives of a foreign corporation in a transitory cause of action arising outside the State, and some of the circuit courts have held that the Federal courts in such State were similarly disabled.⁵ But this is confusing the question

See *Johnon v. Hanover, etc. Ins. Co.* 15 Fed. 97, 11 Biss. 452; *Funk v. Anglo, etc. Ins. Co.* 27 Fed. 336.

¹⁰*Evansville C. Co. v. United Press*, 74 Fed. 918.

¹¹*Gottschalk Co. v. Distilling, etc. Co.* 50 Fed. 681.

¹²*Farmer v. National, etc. Asso.* 50 Fed. 829.

¹³*Estes v. Belford*, 22 Fed. 275, 23 Blatchf. 1.

¹⁴*Palmer v. Chicago Herald*, 70 Fed. 886; *Brewer v. George Knapp & Co.* 82 Fed. 694. But see contra: *Union Ass. P. Co. v. Trimes*, 84 Fed. 419.

¹⁵*United States v. American Bell T. Co.* 29 Fed. 17.

¹⁶*In re Hohorst*, 150 U. S. 663, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Barron, S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

¹⁷*New R. M. Co. v. Seeley*, 120 Fed. 193, 56 C. C. A. 505. See also *Sobrio v. Manhattan L. Ins.* 72 Fed. 566. Setting aside service for non-compliance. *Kiufek v. Merchants, etc. Co.* 11 Fed. 282, 3 McCrary, 547, where return did not show service on agent in charge of office.

²See *Wilson P. Co. v. Hunter*, 8 Biss. 429, Fed. Cas. No. 17,852.

³*Hayden v. Androscoggin Mills*, 1 Fed. 93.

⁴*St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. ed. 612, 11 Sup. Ct. Rep. 36; *Goldney v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

⁵See *United States v. Amer. Bell T. Co.* 29 Fed. 17; *Union Associated Press v. Times Printing Co.* 83 Fed.

of procedure with that of jurisdictional power. If the Federal courts deem a corporation "found" within a district and the cause of action is by them cognizable, the fact that, from whatever cause, the State court would not take jurisdiction, is immaterial.⁶

[d] General rule that process must be served within district.

The provision that civil suit must be brought in the district of defendant's residence or where he is found,⁹ has uniformly been construed to mean that valid judgment in the Federal courts cannot be rendered unless defendant has been served within the district or voluntarily appears.¹⁰ Circuit and district courts cannot issue process beyond the limits of their districts.¹¹ Process of attachment against a persons goods within a district to compel his appearance therein though not there found, is not permissible in Federal courts though authorized by the laws of many States.¹² So a State case permitting service upon an infants general guardian and requiring him to appear and defend will not apply in the Federal court to give it jurisdiction, when the infant is not in the district and the proceeding is not within the Federal law¹³ permitting service elsewhere.¹⁴ The Federal law as to service by publication is exclusive of State statutes upon the subject.¹⁵

§ 854. Process may run in another district of state if some defendants there.

When a State contains more than one district, every suit not of a local nature, in the circuit or district courts, thereof . . . if there are two or more defendants, residing in different districts of the State, . . . may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on

822; *Grover v. Amer. Exp. Co.* 11 Fed. 386.

⁶*Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Carstairs v. Ins. Co.* 13 Fed. 823; *Revans v. Southern M. R. R.* 114 Fed. 982. See *Block v. Atchison*, etc. Ry. 21 Fed. 529.

⁹*Ante*, § 402.

¹⁰*Levy v. Fitzpatrick*, 15 Pet. 171, 10 L. ed. 699; *Chaffee v. Hayward*, 20 How. 215, 15 L. ed. 851; *Insurance Co. v. Bangs*, 103 U. S. 439, 26 L. ed. 580.

¹¹*Toland v. Sprague*, 12 Pet. 330, 9 L. ed. 1093; *Herndon v. Ridgway*, 17 How. 425, 15 L. ed. 100; *United States v. Crawford*, 47 Fed. 561.

¹²*Toland v. Sprague*, 12 Pet. 330, 9 L. ed. 1093; *Chaffee v. Hayward*, 20 How. 215, 15 L. ed. 851.

¹³See post, § 856.

¹⁴*Insurance Co. v. Bangs*, 103 U. S. 439, 26 L. ed. 580.

¹⁵*Bracken v. Union P. Ry.* 56 Fed. 447, 5 C. C. A. 548.

as one suit; and upon any judgment or decree rendered therein, execution may be issued directed to the marshal of any district in the same State.

Part of R. S. § 740, U. S. Comp. Stat. 1901, p. 588.

The above section is set forth in full in the chapter on venue.¹⁸

§ 855. Process in local actions may run in another district of state.

In suits of a local nature, where the defendant resides in a different district in the same State from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

R. S. § 741, U. S. Comp. Stat. 1901, p. 588.

This section together with R. S. §§ 740¹ and 742 was originally enacted in 1858.² R. S. § 742 specifically empowers the court trying the cause, to issue the process.³ It has been doubted whether the three provisions taken from the act of 1858 are still in force in view of the act of 1875 forbidding suit "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;" but the better opinion is that they are not superseded.⁴

§ 856. Service by publication, etc., in suits to enforce liens, remove cloud, etc.

When in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to,^[c] or to remove any encumbrance or lien or cloud^{[d]-[e]} upon the title to real or personal property within the district where such suit is brought,^[f] one or more of the defendants therein shall not be an inhabitant of, or found within,^[g] the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served^[h] on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published^[h] in such manner

¹⁸Ante, § 403.

³Ante, § 404.

¹Ante, § 854.

⁴Ante, § 402.

²Act May 4, 1858, c. 27, § 1, 11 Stat. 272.

as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein,^[1] within such district, and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State:⁸ Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.^[1]

§ 8 of act Mar. 3, 1875, c. 137, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 513.

[a] History of section, and cross references.

Substituted service of process is often permitted in ancillary suits.⁹ This statute superseded R. S. § 738, which was originally enacted in 1872¹⁰ and was the first act of Congress permitting service by publication. Comparing the above provision of the act of 1875 with R. S. § 738, which was in general less elaborate and comprehensive in its terms, the following changes may be noted: (a) the old provision was restricted to suits in equity while this specifies "any suit." (b) The new provision is confined in terms to suits commenced in the circuit court¹¹ while R. S. § 738 made no reference to the forum or the place of commencement.

⁸See ante, § 404.

⁹Ante, § 3.

¹⁰Act June 1, 1872, c. 255, § 13, 17 Stat. 198.

¹¹See *Shainwald v. Lewis*, 5 Fed. 517, 6 Sawy. 585; *In re Waukesha W.*

While suits in equity to enforce liens or claims are in fact only cognizable in the circuit court; the wording of the new law excludes removed cases from its scope,¹² whereas the old one did not. (c) The old law referred to liens or claims "against" property within the district, the new law includes suits to enforce a "claim to" property which is a very different thing. (d) The class of cases in which substituted service is permitted is also further increased in the new law by the inclusion of suits "to remove any encumbrance or lien or cloud upon the title" to property.¹³ (e) The old law required the order served or published to state that the defendant appear "at" a certain day, the present law requires appearance "by" a certain day. (f) The present law prescribes the time of publication. (g) The specification of the property which may be affected by a judgment rendered is fuller in the new law, in the interests of precision, but probably without difference in legal effect. (h) The proviso as to the opening of judgment within a year is not found in the earlier law. These are also other merely verbal changes.

[b] The section in general.

It has been said that the provision does not permit substituted service on citizens of Territories or of the District of Columbia,¹⁴ but this is clearly not so where jurisdiction is founded on other than diverse citizenship.¹⁵ In fact service has been made under this section upon the District of Columbia itself in a case where a railroad property foreclosed was situated within the eastern district of Virginia and the cause arose under Federal laws.¹⁶ It does not of course change or abolish the requirement of diversity in cases where jurisdiction is dependent upon the citizenship of the parties.¹⁷ The cause must still be one of which the court has jurisdiction either by diverse citizenship or because of a Federal question.¹⁸ It merely creates an exception to the general rule limiting civil suits to the district wherein a person is inhabitant.¹ If a case is within its terms it is not necessary that either party be a resident of the district where suit is brought.² Indeed it is essential that the defendant to be served "shall not be an inhabitant of, or person within" the district. The section applies where there is only one defendant, as well as to cases where there are more.³

¹²Woolridge v. McKenna, 8 Fed. 650.

¹³See Jellenik v. Huron C. M. Co. 177 U. S. 10, 44 L. ed. 650, 20 Sup. Ct. Rep. 559.

¹⁴Horsford v. Gudger, 35 Fed. 392.

¹⁵Hay v. Alexandria, etc. Ry. 4 Hughes, 331, Fed. Cas. No. 6,254a.

¹⁶Hay v. Alexandria, etc. Ry. 4 Hughes, 331, Fed. Cas. No. 6,254a.

¹⁷Brigham v. Luddington, 12 Blatchf. 237, Fed. Cas. No. 1,874; Tug River C. & S. Co. v. Brigel, 67 Fed. 625, 14 C. C. A. 577.

¹⁸Brigham v. Luddington, 12 Blatchf. 237, Fed. Cas. No. 1,874.

¹Ante, § 402.

²Greeley v. Lowe, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; Seybert v. Shamokin, etc. Co. 110 Fed. 810; Kuhn v. Morrison, 75 Fed. 81; Single v. Scott P. Co. 55 Fed. 553; Spencer v. Kansas C. S. Yds. 56 Fed. 741; Ames v. Holdenbaum, 42 Fed. 341; American F. L. M. Co. v. Benson, 33 Fed. 456.

³Dick v. Foraker, 155 U. S. 404, 39 L. ed. 202, 15 Sup. Ct. Rep. 124; Deck v. Whitman, 96 Fed. 890; Wheelwright v. St. Louis, etc. Co. 50 Fed. 709.

It is the only general enactment of Congress permitting service by publication. It is exclusive, and State laws regarding publication have no application in the Federal courts.⁶ It must be strictly complied with;⁷ and if a case is not within its terms a judgment so procured is void.⁸ It has been held that the mere filing of bill in equity under this section, does not stop the statute of limitations from running, at least in a State where it is service of process that is declared to mark the commencement of a suit.⁹ The statute of 1887 and 1888, which revised other sections of the act of 1875 in important particulars, declared that no jurisdiction or right mentioned in the above section should be deemed to be repealed or affected by its provisions.¹⁰

[c] Suits to enforce legal or equitable liens or claims.

These words are broad enough to reach every case in which there is any sort of charge upon specific property capable of being enforced by a court of equity.¹¹ However there must be some sort of a preexisting lien or charge or claim against specific property¹² something more than the general right of a creditor to obtain satisfaction out of a debtors property by attachment.¹³ Mortgage foreclosure suits against realty within the district are plainly within its terms;¹⁴ and suits to enforce the terms of a deed of trust in the nature of a mortgage;¹⁵ or to foreclose an ordinary deed when in fact a mortgage.¹⁶ A suit to enforce liens upon a railroad is within the section;¹ and a suit to enforce a judgment lien.² A suit for partition is a suit to enforce a claim to real estate within this clause;³ so also is a suit in ejectment,⁴ and a lessees suit against a lessor to enforce rights under the provisions of an expired lease.⁵ A bondholders suit to restrain the trustee from paying over certain funds to the mortgagor is to enforce a lien or claim within this clause.⁷ A suit

⁶Insurance Co. v. Bangs, 103 U. S. 439, 26 L. ed. 580; Bracken v. Union Pac. Ry. 56 Fed. 447, 5 C. C. A. 548.

⁷Wooldridge v. McKenna, 8 Fed. 650; Batt v. Proctor, 45 Fed. 515; Bracken v. Union Pac. Ry. 56 Fed. 449, 5 C. C. A. 548.

⁸Beach v. Mosgrove, 16 Fed. 305, 4 McCrary, 50.

⁹Bisbee v. Evans, 17 Fed. 474.

¹⁰Act March 3, 1887, c. 375, § 5, 24 Stat. 555; act August 13, 1888, c. 866, § 5, 25 Stat. 436, U. S. Comp. Stat. 1901, p. 515. And see Jellenik v. Huron C. M. Co. 177 U. S. 10, 44 L. ed. 650, 20 Sup. Ct. Rep. 559.

¹¹Shainwald v. Lewis, 5 Fed. 517, 6 Sawy. 585.

¹²Shainwald v. Lewis, 5 Fed. 516, 6 Sawy. 585. It must not be a suit to create a lien: Jones v. Gould, 141 Fed. 698.

¹³Dormitzer v. Illinois, etc. B. Co. 6 Fed. 217.

¹⁴Hay v. Alexandria R. R. 4 Hughes, 331, Fed. Cas. No. 6,254a; Jackson, etc. Co. v. Burlington, etc. R. R. 29 Fed. 474; Ames v. Holdebaum, 42 Fed. 341; Kuhn v. Morrison, 75 Fed. 81; Deck v. Whitman, 96 Fed. 890.

¹⁵Black v. Scott, 9 Fed. 186.

¹⁶Merrihew v. Fort, 98 Fed. 899. ¹McBee v. Marietta, etc. R. R. 48 Fed. 243.

²De Hierapolis v. Lawrence, 99 Fed. 321.

³Greeley v. Lowe, 155 U. S. 73, 39 L. ed. 75, 15 Sup. Ct. Rep. 27.

⁴Spencer v. Stock Yds. Co. 56 Fed. 741.

⁵York, etc. Co. v. Abbot, 131 Fed. 980.

⁷Pollitz v. Farmers' L. & T. Co. 39 Fed. 707.

to restrain interference with fishery rights at a certain place is to enforce a claim to property;⁸ as also a suit to compel the transfer of corporate stock on the company's books,⁹ or to enforce a claim to a specific certificate of stock within the district.¹⁰ So a suit to determine adverse claims to land and annul a judicial sale is within the section.¹¹ It would seem clear that a contract to convey land creates an equitable claim to it within this clause, but the difficulty is that where a party seeks specific performance the decree must usually act in personam, and that is not possible where the jurisdiction over the vendor defendant is obtained only by publication. Where the local law provides that in the absence of such vendor, the court may make a deed or that its decree shall be the equivalent,¹² this section has been held to obviate the difficulty and service by publication has been made.¹⁴ On the other hand jurisdiction has been disclaimed in the absence of such local statute. A suit to cancel a note within a district for fraud is held one to enforce an equitable claim to property within the section.¹⁵

A stockholder's suit to set aside a sale of stock made by the corporation to directors is not to enforce a lien or claim.¹⁶ The same has been held as to a suit by heirs to reach assets of an estate in the executor's hands;¹⁹ and as to a suit for an accounting of lumber taken from demised premises and for damages;²⁰ and a suit to establish title to a patent right;¹ or for infringement of a patent² or to remove corporate shares not shown to be within the district.³ The fact that the property on which the lien exists is in the custody of a State court by prior suit, does not prevent the Federal court from taking jurisdiction and serving by publication for the purpose of adjudicating the claim.⁴ There is no jurisdiction of a suit as to property within a district where the decision on the merits might be such that it could not be made effective without personal judgment or decree against the defendant.⁵

⁸United States v. Winans, 73 Fed. 73, 76.

⁹Jewett v. Bradford S. Bank, 45 Fed. 801; Jellenik v. Huron Cop. Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559. Stock of a domestic corporation has been held to have a situs therein under this section: Jones v. Gould, 141 Fed. 698.

¹⁰Ryan v. Seaboard, etc. Ry. 83 Fed. 889; Jones v. Gould, 141 Fed. 698.

¹¹Hatch v. Ferguson, 57 Fed. 966.

¹²This the State may validly do; Hart v. Samson, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; United States v. Southern P. Co. 63 Fed. 485.

¹⁴Single v. Scott P. R. Co. 55 Fed. 553 and see Porter L. & W. Co. v. Baskin, 43 Fed. 328. The proceeding is then substantially in rem: Fed. Proc.—51.

Boswell v. Otis, 9 How. 336, 13 L. ed. 165; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557. See discussion infra note []. Municipal Ins. Co. v. Gardiner, 62 Fed. 954.

¹⁵Manning v. Berdan, 132 Fed. 382.

¹⁶Lengel v. American S. Co. 110 Fed. 22.

¹⁹Fayerweather v. Ritch, 89 Fed. 385.

²⁰Ellis v. Reynolds, 35 Fed. 394.

¹Non Magnetic Watch Co. v. Assoc. 44 Fed. 6.

²Webster Loom Co. v. Short, 10 O. G. 1019, Fed. Cas. No. 17,343.

³McKane v. Burke, 132 Fed. 688.

⁴Wheelwright v. St. Louis, etc. Co. 50 Fed. 709.

⁵York, etc. Bank v. Abbot, 139 Fed. 988.

[d] Suits to remove encumbrance, lien or cloud.

A suit to cancel a deed as a cloud upon complainants title comes⁸ within this clause;⁹ as also any other suit to remove a cloud from the title to lands.¹⁰ A widow's suit to set aside a release of interest in a husband's estate has been held a suit to remove a cloud.¹¹ A trust deed and chattel mortgage in favor of certain corporate creditors create a lien or encumbrance in their favor, and to the detriment of other creditors entitled to have the corporate assets dealt with as a trust fund for the benefit of all, so that suit by such general creditors to set them aside is to remove an encumbrance within this section.¹² Opinion has differed at circuit, as to the propriety of entertaining jurisdiction and permitting service by publication in suits to cancel a mortgage as a cloud on title,¹³ and in the modern statutory suits to quiet title.¹⁴ The doubt seems to result from the difficulty in granting adequate relief without a decree that would operate in personam.¹⁵

[e] Effect of inability to decree in personam.

Equity usually proceeds in personam and not in rem.¹⁷ But a decree against a person served only by publication or beyond the district can only operate in rem; and this practical obstacle to the granting of effective relief has occasionally been made the ground for declining jurisdiction in cases apparently within the terms of § 8 of the act of 1875. Thus a bill to cancel a mortgage as a cloud on title, or to quiet title,¹⁸ or to compel specific performance of a contract to convey¹⁹ would seem clearly within the jurisdiction conferred. But if there be mortgage notes negotiable in character in possession of a defendant outside the district;²⁰ or if the absent defendant against whom title should be quieted has the legal title and should convey,¹ or if the vendor who should make deed as agreed is beyond the reach of process,² it is important to inquire what the court shall do, and whether it is powerless to do anything. It seems to be settled that the States may meet such a difficulty so far as the title to State

⁸Cowell v. City W. S. Co. 96 Fed. 769. But it seems the mortgage notes must be within the district. Beach v. Mosgrove, 16 Fed. 307.

⁹Evans v. Charles Scribner's Sons, 58 Fed. 303; Morrison v. Marker, 93 Fed. 692.

¹⁰Dick v. Foraker, 155 U. S. 414, 39 L. ed. 204, 15 Sup. Ct. Rep. 127.

¹¹Castello v. Castello, 14 Fed. 207.

¹²Mellen v. Moline, M. I. Works, 131 U. S. 352, 33 L. ed. 183, 9 Sup. Ct. Rep. 781. See also Lancaster v. Asheville Ry. Co. 90 Fed. 132. It might also be held that an ordinary creditors bill against individual debtors would be to enforce an equitable claim to property.

¹³See Cowell v. City W. S. Co. 96

Fed. 770, sustaining the jurisdiction. Contra, Beach v. Mosgrove, 16 Fed. 307.

¹⁴See United States v. Southern P. Co. 63 Fed. 486, sustaining the jurisdiction. Contra Clark v. Hammett, 27 Fed. 340.

¹⁵Infra, note [e].

¹⁷Hart v. Samson, 110 U. S. 151, 28 L. ed. 102, 3 Sup. Ct. Rep. 586.

¹⁸See cases supra, note [d].

¹⁹See cases supra, note [c].

²⁰As in Beach v. Mosgrove, 16 Fed. 307.

¹See Hart v. Samson, 110 U. S. 151, 28 L. ed. 102, 3 Sup. Ct. Rep. 586.

²See Municipal Ins. Co. v. Gardiner, 62 Fed. 954.

lands is concerned by empowering their courts to direct a conveyance to be made for such absent party,³ or by enacting that the court's decree shall stand in lieu thereof,⁴ or in some other way. "A State may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court by publication."⁵ But what of the power of Federal courts of equity? It is said that such State statutory provisions come within the rule whereby the Federal courts administer an enlarged equitable remedy created by State law,⁷ and that if there be a State law declaring that the decree stand in lieu of a conveyance, the Federal court should take the jurisdiction granted by the act of 1875 over a suit for specific performance against an absent defendant.⁸ If that conclusion be correct, then the propriety of the Federal courts' entertaining suits against absent defendants for cancellation, or specific performance and the like, depends upon the existence of some State law which would enable them to decree effectively.

Undoubtedly Congress has power to provide for the enforcement of the decree's of Federal courts without reference to or regard for the laws of the various States.¹⁰ It has made State laws the measure of the power of Federal courts to execute their common-law judgments.¹¹ But it has never declared that their decrees in equity shall be enforceable only as State laws may direct. It is true that Federal courts in equity are bound to respect the substantive State law enacted within the proper scope of a State's law making powers, and hence to administer an enlargement of equitable rights and remedies, such as the modern suit to quiet title,¹² but the question still arises whether the manner in which a Federal equity decree is to be enforced is not a mere mode of procedure and entirely outside of that rule. It might plausibly be argued that, as the first portion of the above section gives the Federal court jurisdiction of a suit for cancellation of a mortgage or deed, the further direction to the court "to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant has been served with process within the said district" sufficiently empowers it to make a decree which would be final and effective so far as the land itself is concerned.

[f] Property within the district.

It has recently been settled that corporate stock in a domestic concern, declared by the local law to be personal property transferrable only on the books of the company, is personal property within the district where such corporation has its home office, regardless of the situs of any certificates of stock or of other stock transfer agencies; and that jurisdiction

³Hart v. Sansom, 110 U. S. 151, 28 L. ed. 102, 3 Sup. Ct. Rep. 586; Arndt v. Griggs, 134 U. S. 386, 33 L. ed. 918, 10 Sup. Ct. Rep. 557.

⁴Single v. Scott P. Co. 55 Fed. 553.

⁵Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. ed. 918.

⁷See ante, § 10 [aa].

⁸Single v. Scott P. Co. 55 Fed. 557.

¹⁰Ante, § 799.

¹¹R. S. § 914, post § 900.

¹²Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep.

495. Ante, § 10 [aa].

of a suit to prevent a transfer of the shares of certain stockholders is sustainable upon service by publication.¹⁵ At circuit, jurisdiction has been upheld where a claim was sought to be enforced against certain stock and the certificate therefor was in the custody of the corporation within the district.¹⁶ The franchise, good will, name and circulation of a newspaper are not specific articles of personal property having a situs within a district under this provision.¹⁷ A stock holders suit to set aside transfer of patents and corporate property is not sustainable where neither species of property was within the district.¹⁸ It has been suggested that in order to bring a suit for cancellation of a mortgage as a cloud, the mortgage notes as well as the property should be within the district.¹⁹

[g] Defendant must not be inhabitant nor found in district.

The District of Columbia has been treated as a non-inhabitant defendant under this clause.² The question when a corporation or other person is deemed "found" within a district has already been considered elsewhere.³ If a corporation has an agent and place of business in the district and is there "found," it cannot be served by publication.⁴

[h] Service and publication of warning order—procedure.

The order to appear and plead specified in this provision is sometimes called a "warning order."⁵ It is necessary that the procedure required by the statute be strictly complied with.⁷ Service of the ordinary process without the warning order is insufficient to give jurisdiction.⁸ The act recognizes the superiority of personal service over publication and requires that there be personal service "if practicable."⁹ Hence before an order for publication is made, proof should be submitted to the court satisfying him that after reasonably diligent effort the complainant is unable to ascertain the whereabouts of the absent defendants so as to permit of personal service.¹⁰ This proof may be in the form of affidavits of counsel and party stating facts and not conclusions.¹¹ Publication was refused in one case where the allegations were vague and the showing of diligence

¹⁵Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 651, 20 Sup. Ct. Rep. 559. And see Jewett v. Bradford Sav. Bank, 45 Fed. 801. Contra, see Kilgour v. New O. G. Co. 2 Woods, 144, Fed. Cas. No. 7,764.
¹⁶Ryan v. Seaboard, etc. R. R. 83 Fed. 889.

¹⁷Lawrence v. Times P. Co. 90 Fed. 24.

¹⁸Eldred v. American P. C. Co. 105 Fed. 455, 45 C. C. A. 1.

¹⁹Beach v. Mosgrove, 16 Fed. 307.

²Hay v. Alexandria R. R. 4 Hughes, 331, Fed. Cas. No. 6,254a.

³Amte, § 402.

⁴Spencer v. Kansas City Stock Yds. 56 Fed. 741.

⁵United States v. American L. Co. 80 Fed. 309.

⁷Bracken v. Union P. Ry. 56 Fed. 447, 5 C. C. A. 548. See Ellsworth T. Co. v. Parramore, 108 Fed. 906, 48 C. C. A. 132.

⁸United States v. American L. Co. 80 Fed. 309.

⁹Bronson v. Keokuk, 2 Dill. 498, Fed. Cas. No. 1,928.

¹⁰Bronson v. Keokuk, 2 Dill. 498, Fed. Cas. No. 1,928.

¹¹Bronson v. Keokuk, 2 Dill. 498, Fed. Cas. No. 1,928.

inadequate.¹² It is not necessary that the subpoena issue in the district and be returned "not found."¹³ If the order for publication finds the fact of non-residence in general terms it is not assailable collaterally.¹⁴

In an opinion rendered while R. S. § 738 was in force but which is still applicable, Judge Dillon declared that the proper practice is to aver the residence and citizenship of all defendants to let the subpoena issue against all; let the marshal return "not found" as to those outside the district; then if they do not voluntarily appear, to apply to the court for the warning order, making the necessary affidavits as to non-residence, etc. If the affidavit shows where the parties reside, the court may direct the marshal there to serve them, or perhaps make a special order directing or authorizing service by some other officer. If it satisfactorily appears that the residence of some or all cannot be ascertained an order for publication may then be made. "The practice under the act," he observed, "should be such as to secure personal service in all cases where the residence of the absent defendant is known or can be ascertained; and to substitute or resort to constructive service by publication only where the better mode is not practicable within a reasonable time, and by the exercise of reasonable diligence."¹⁷

[i] Decree can affect only property within district.

If an absent defendant appears, personal judgment can be rendered against him.¹ Otherwise the decree can only operate in rem, and against the property within the district² or within that and an adjoining district in the same State. This is in accordance with well-settled principles of law.³ Inability to decree in personam is sometimes a serious obstacle to adequate relief in equity cases and has been deemed ground for refusing jurisdiction.⁴

[j] Reopening judgment within a year.

It is reversible error to refuse to reopen a decree obtained on service by publication, within that time.⁶ The entering of an appearance within a year means a general appearance, hence a special appearance and filing of motion and demurrer for want of jurisdiction, will not give jurisdiction over the person of a nonresident defendant.⁷

§ 857. Service of process when marshal is party.

When the marshal or his deputy is a party in any cause, the writs

¹²Batt v. Proctor, 45 Fed. 515.

¹³Forsyth v. Pierson, 9 Fed. 803,

11 Biss. 133.

¹⁴Woods v. Woodson, 100 Fed. 515,

40 C. C. A. 525.

¹⁷Bronson v. Keokuk, 2 Dill. 498, Fed. Cas. No. 1,928.

¹White v. Ewing, 69 Fed. 451, 16 C. C. A. 296.

²Ingersoll v. Coram, 136 Fed. 690.

³Pennoyer v. Neff, 95 U. S. 714,

24 L. ed. 565; Swan, etc. Co. v.

Frank, 148 U. S. 603, 37 L. ed. 577,

13 Sup. Ct. Rep. 691.

⁴Supra, note [e].

⁶American F. L. M. Co. v. Thomas, 71 Fed. 782, 18 C. C. A. 327.

⁷York, etc. Bank v. Abbot, 139 Fed. 990.

and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.

R. S. § 922, U. S. Comp. Stat. 1901, p. 686.

This provision was originally § 28 of the judiciary act of 1789.¹⁰ The general rule in the Federal courts is that process must be served by the marshal and cannot be served by private persons.¹¹ The marshal must serve process when suit is in forma pauperis and without fee.¹² The admiralty rules provide for service of process by some discreet and disinterested person when the marshal is interested.¹³ The equity rules provide for service by the marshal or a special appointee of the court.¹⁴ The object of this provision, it is said, is to prevent the marshal or his deputy by making false return in a case against them, from depriving the adverse party of his day in court.¹⁵ Failure to have process against a marshal or his deputy served by some special appointee, may be waived by an appearance which can be construed as a submission to the court's jurisdiction,¹⁶ though not by an appearance strictly for the purpose of insisting upon the illegality.¹⁷ So service by a private person where the marshal is not interested, may be cured by appearance.¹⁸ It has been said that this section is not clearly applicable to contempt proceedings against a marshal so as to authorize process against the marshal to be directed to some one else.¹⁹

§ 858. Service of process in suit against a State.

When process at common law, or in equity, shall issue against a State, the same shall be served on the Governor, or chief executive magistrate and Attorney General, of such State.

Supreme Court rule 5, part 2.

This rule was originally promulgated August 12, 1796.² The jurisdiction of the Supreme Court in suits against States is elsewhere considered.³ The process should be directed to the State.⁴ Prior to the adoption of this

¹⁰Act September 24, 1789, c. 70, § 28, 1 Stat. 87.

¹¹Platt v. Manning, 34 Fed. 817; Deacon v. Sew. Mach. Co. 14 Rep. 43, Fed. Cas. No. 3,694a; Schwabacker v. Reilly, 2 Dill. 127, Fed. Cas. No. 12,501. Ante, § —.

¹²Ante, § 478.

¹³Post, § 1202.

¹⁴Post, § 973.

¹⁵Barnes v. Western U. T. Co. 120 Fed. 550.

¹⁶Knox v. Summers, 3 Cranch, 496,

2 L. ed. 510; Barnes v. Western U. T. Co. 120 Fed. 550.

¹⁷Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237.

¹⁸Platt v. Manning, 34 Fed. 817.

¹⁹Ex parte Benedict, 4 West L. M. 449, Fed. Cas. No. 1,292.

²See 3 Dall. 320, 3 Pet. 17.

³Ante, § 2 [].

⁴Florida v. Georgia, 11 How. 293, 13 L. ed. 702; Rhode Island v. Massachusetts, 7 Pet. 651, 8 L. ed. 816.

rule, service upon the Attorney General and Governor was declared sufficient.⁵ Service merely on one of those officials is insufficient.⁶

§ 859. Service on government in partition suits.

When such suit [i. e. suit for partition of lands in which United States are part owners] is brought by any person owning an undivided interest in such land, other than the United States, against the United States alone or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of the same by registered letter to the Attorney General of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service and of the mailing of such letter.

Part of § 2, act May 17, 1898, c. 339, 30 Stat. 416, U. S. Comp. Stat. 1901, p. 516.

The portion of the statute giving jurisdiction of such suits to the circuit courts is given elsewhere.⁸

§ 860. Appearance as cure for defective service or want thereof.

In deciding whether an appearance is general or special, its substantial purpose is considered, as well as the name applied to it by the party appearing; and the State law and practice will not always be allowed to determine the question even in common-law causes. If an appearance is in fact general, it waives a want of, or defective compliance with the various prerequisites to the exercise of jurisdiction over a party defendant, so far as the same are for defendants benefit and protection, and do not constitute limitations upon the power of the court itself. Hence defective service, or an entire failure to serve, is cured by general appearance, though that cannot give jurisdiction if there is a defect of jurisdictional power in the court. The time and mode of appearance in equity cases¹⁰ and on appeal,¹¹ are elsewhere considered.

Author's section.

⁵Chisholm v. Georgia, 2 Dall. 480, 1 L. ed. 440. And see Rhode Island v. Massachusetts, 12 Pet. 761, 9 L. ed. 1275; New Jersey v. New York, 3 Pet. 466, 7 L. ed. 743.

⁶New Jersey v. New York, 3 Pet. 461, 7 L. ed. 741.

⁸Ante, § 141.

¹⁰Post, § 978.

¹¹Post, § 1978.

[a] General and special appearance.

The making of formal appearance by praecipe to the clerk has largely fallen into desuetude.¹² In general the filing of an answer, or demurrer, or plea, constitutes an appearance;¹³ so also does the obtaining from the plaintiff want of an extension of time to plead.¹⁴ But an admission of service of process is not.¹⁵ Joining in a motion to set aside service¹⁶ has been held not an appearance; as also the assumption of the burden of the defense of the nominal defendant.¹⁷ While by general appearance, a defendant appears for all purposes of the suit, a special appearance is for the purpose of raising an objection to the courts power to proceed, based upon some defect in the service of process or mode of acquiring jurisdiction; and a party will not be permitted to make a special appearance for the purpose of interposing certain defenses on the merits.¹⁸ It may not be universally true that appearance will be treated as general unless specifically declared by the party to be special.¹⁹ Yet such is the general rule, and it is the proper as well as the safer practice for one desiring to appear specially to so declare in all cases.²⁰ Certainly he must in some manner manifest an intention to appear specially or he will be rigidly held to have appeared generally.¹ Furthermore an appearance declared to be special may amount in law to a general appearance, where the party takes any step that can only be taken by such appearance.² Thus an appearance by motion to dismiss becomes general, where the party sets up want of equity in the bill as an additional ground for dismissal.³ If, however, after overruling of the special objections to the jurisdiction, the party

¹²Romaine v. Union Ins. Co. 28 Fed. 625. But see equity rule 17, post § 975, Supreme Court rule 9, cl. 3, post, § 1978.

¹³French v. Hay, 22 Wall. 245, 22 L. ed. 854; Eldred v. Bank, 17 Wall. 551, 21 L. ed. 685.

¹⁴Hupfeld v. Automaton Co. 66 Fed. 788; Briggs v. Stroud, 58 Fed. 717.

¹⁵Butterworth v. Hill, 114 U. S. 132, 133, 29 L. ed. 119, 5 Sup. Ct. Rep. 796.

¹⁶Beck v. Wacker, 76 Fed. 10, 22 C. C. A. 11.

¹⁷Bidwell v. Toledo, etc. Ry. 72 Fed. 10.

¹⁸Nat. F. Co. v. Moline M. Works, 18 Fed. 864.

¹⁹But an appearance to petition for removal is not general though not expressly declared to be special: Wabash, etc. Ry. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126. See also Herndon v. Ridgway, 17 How. 424, 15 L. ed. 100. Where motion to dismiss and demurrer to jurisdiction were treated

as special appearance; Dorr v. Gibboney, 3 Hughes, 382, Fed. Cas. No. 4,006, where motion to quash was made after judgment rendered and it was held not such an appearance as would impart validity to the judgment. And see First Nat. Bank v. Cunningham, 48 Fed. 517.

²⁰See United States v. American B. T. Co. 29 Fed. 17; Goldey v. Morning News, 156 U. S. 525, 526, 39 L. ed. 520, 15 Sup. Ct. Rep. 559; McGillin v. Claflin, 52 Fed. 657; Hankinson v. Page, 31 Fed. 184, 24 Blatchf. 422.

¹Romaine v. Union Ins. Co. 28 Fed. 638.

²Romaine v. Union Ins. Co. 28 Fed. 638; Edgell v. Felder, 84 Fed. 69, 28 C. C. A. 382; Crawford v. Foster, 84 Fed. 939, 28 C. C. A. 576; Moch v. Virginia, etc. Ins. Co. 10 Fed. 696, 4 Hughes, 61.

³Jones v. Andrews, 10 Wall. 332, 19 L. ed. 935. And see United States v. American B. Tel. Co. 29 Fed. 17; Lowry v. Tile, etc. Co. 98 Fed. 817.

then raises a question upon the merits, that is not a waiver of his original objection to the jurisdiction.⁴ It has been said that leave to appear specially should first be obtained from the court.⁵ Parties have been permitted to change a general into a special appearance,⁶ though not after the close of the term.⁷ An appearance to deny jurisdiction over the person must be confined to that and an attack on the jurisdiction over the subject matter as well has been held a general appearance.⁸ Where a special appearance is withdrawn by leave of the court, the case is left as though there had been no appearance at all.⁹ A general appearance entered by attorneys although unauthorized has been held ratified by failure of client to disclaim within four months.¹⁰ It has been authoritatively decided that an appearance in a State court for the purpose of asking a removal is not a general appearance such as could waive question of defective service.¹³ This is as true where the appearance to petition for removal is general in terms,¹⁴ as where expressly declared to be special.¹⁵ Appearance in a State court suit commenced by foreign attachment and removal to the Federal court constitutes a submission to the court's jurisdiction.¹⁶ While the State law as to mode of appearance and as to what constitutes a special appearance is in general the guide of Federal courts in action at law,¹⁷ yet, a Texas statute declaring that every special appearance shall be treated as general, although not invalid,¹⁸ will not be followed by the Federal courts there sitting, because the conformity clause does not contemplate the adoption of State laws which

⁴Harkness v. Hyde, 98 U. S. 479, Ct. Rep. 126; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559. The question had been variously decided at circuit. See Bentlif v. London, etc. Co. 44 Fed. 667, 668, and cases cited.
⁵Wabash W. Ry. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; Cady v. Assoc. Col. 119 Fed. 423; Peterson v. Morris, 98 Fed. 48.

⁶Romaine v. Union Ins. Co. 28 Fed. 638.

⁷But see Nat. F. Co. v. Moline M. Works, 18 Fed. 864. See Hohorst v. Hamburg & A. P. Co. 38 Fed. 273; Jenkins v. York C. I. Co. 110 Fed. 807.

⁸United States v. Armejo, 131 U. S. LXXXII, 18 L. ed. 247.

⁹Mahr v. Union Pacific R. R. 140 Fed. 921.

¹⁰Graham v. Spencer, 14 Fed. 603.

¹¹Raymondville, etc. Co. v. Lum-ber Co. 140 Fed. 965.

¹²Pike v. Gregory, 94 Fed. 373, 36 C. C. A. 299.

¹³Wabash, W. Ry. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup.

¹⁴Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

¹⁵Irvine v. Lowry, 14 Pet. 299, 10 L. ed. 462. But if the appearance for removal is special there is no submission of defendant's person to the Federal courts jurisdiction, and it can decree only against the property seized on the state attachment: Clark v. Wells, 203 U. S. 171, 51 L. ed. —.

¹⁶See Lung Chung v. Northern P. R. R. 19 Fed. 256.

¹⁷York v. Texas, 137 U. S. 20, 34 L. ed. 604, 11 Sup. Ct. Rep. 10; Kauffman v. Wootters, 138 U. S. 287, 34 L. ed. 962, 11 Sup. Ct. Rep. 298.

really constitute a regulation of their jurisdiction.¹⁹ So, the question whether an appearance in a State court for the purpose of asking a removal, was general, has been decided by the Supreme Court without regard to the local statutes.²⁰ In so far as a jurisdictional question or the construction of Federal statutes is involved in such an inquiry it is plain that the local practice is of small moment.

[b] General appearance as waiver of defective service.

If an appearance is merely special, it does not constitute a submission to the court's jurisdiction or waiver of defective service.⁵ But if it is general, it waives any defect of jurisdiction which relates only to the person.⁶ It waives objection to the manner of bringing defendant into court, but not objections affecting the power of the court over person or subject matter.⁷ Jurisdiction may be acquired by voluntary appearance as effectually as by proper service.⁸ The entering of an appearance is an admission of due and effectual service.⁹ Obtaining leave to withdraw a motion to set aside service and for time to answer is held a waiver of objection to jurisdiction of person.¹⁰ While the Federal statutes permit suit against a person only in the district where an inhabitant is found,¹¹ and while process can in general only be served within the district where issued,¹² yet these regulations are not in the nature of limitations upon the powers of the court, but are privileges and immunities of the parties themselves.¹³ It is well settled that they may be and are waived by a general appearance in an action brought elsewhere than in such district.¹⁴ But there is no waiver in such a case, where, a demurrer for want of jurisdiction

¹⁹*Mexican C. Ry. v. Pinkney*, 149 U. S. 209, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *Galveston, etc. Ry. v. Gonzales*, 151 U. S. 499, 38 L. ed. 248, 14 Sup. Ct. Rep. 401.

²⁰*Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

⁵*Ex parte Shaw*, 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Romaine v. Union Ins. Co.* 28 Fed. 626; *United States v. American, B. T. Co.* 29 Fed. 45; *Ellsworth T. Co. v. Parramore*, 108 Fed. 906, 48 C. A. 132.

⁶*Voorhees v. Jackson*, 10 Pet. 473, 9 L. ed. 490; *Texas, etc. Ry. v. Cox*, 145 U. S. 603, 36 L. ed. 832, 12 Sup. Ct. Rep. 905.

⁷*Rhode Island v. Massachusetts*, 12 Pet. 719, 9 L. ed. 1233; *Creighton v. Kerr*, 20 Wall. 12, 22 L. ed. 309.

⁸*Bowdoin Coll. v. Merritt*, 59 Fed. 6; *Cooper v. Reynolds*, 10 Wall. 316, 19 L. ed. 931.

⁹*Logan v. Patrick*, 5 Cranch, 288, 3 L. ed. 103; *Toland v. Sprague*, 12

Pet. 331, 9 L. ed. 1093; *Hill v. Mendenhall*, 21 Wall. 454, 22 L. ed. 616; *Henderson v. Carbondale, etc. Co.* 140 U. S. 40, 35 L. ed. 332, 11 Sup. Ct. Rep. 691.

¹⁰*Lebensberger v. Scofield*, 139 Fed. 380, (C. C. A.)

¹¹*Ante*, § 402.

¹²*Ante*, § 853.

¹³*Kendall v. United States*, 12 Pet. 623, 9 L. ed. 1181.

¹⁴*Gracie v. Palmer*, 8 Wheat. 700, 5 L. ed. 719; *Taylor v. Longworth*, 14 Pet. 174, 10 L. ed. 405; *Shields v. Thomas*, 18 How. 259, 15 L. ed. 368; *In re Keasbey, etc. Co.* 160 U. S. 229, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *Central T. Co. v. McGeorge*, 151 U. S. 133, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; *Southern Exp. Co. v. Todd*, 56 Fed. 104, 5 C. C. A. 432; *Wahr v. Union Pac. R. R.* 140 Fed. 921. But general appearance made in justifiable ignorance that suit was in wrong district was held no waiver in *Crown C. M. v. Turner*, 82 Fed. 337.

being on file, the defendant participates in the taking of depositions.¹⁵ While foreign attachment is not a proper mode of securing jurisdiction in the Federal courts, yet if a party makes general appearance in a case so commenced, he waives the informality.¹⁶ A national bank waives its exemption from suit in other districts, by a general appearance.¹⁷ Objection to the regularity of proceedings to enforce appearance are waived by appearance and pleading to the merits.¹⁸ If a subpoena erroneously describes a defendant his appearance without objection on that ground cures the defect.¹⁹ General appearance and pleading to the merits also cure a defect arising from the fact that service was fraudulently procured;²⁰ or by an unauthorized person.¹ After voluntary appearance and answer a party cannot object to the regularity of the order making him party.² Where a party sued by process of foreign attachment in a State court, appears and removes the cause to the Federal court, he thereby admits its jurisdiction.³ General appearance does not waive a lack of jurisdiction in the court as respects the subject matter.⁴

§ 861. Process against foreign ministers and their domestics void.

Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

R. S. § 4063, U. S. Comp. Stat. 1901, p. 2760.

This section and the two following sections were carried into the Revised Statutes from an act of 1790.⁷ The exclusive jurisdiction over proceedings against ambassadors and other public ministers is vested in the Supreme Court.⁸

§ 862. — penalty for suing out and executing such process.

Whenever any writ or process is sued out in violation of the pre-

¹⁵Stonega, etc. Co. v. Louisville, S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. etc. R. R. 139 Fed. 271.

¹⁶Fife v. Bohlen, 22 Fed. 878; but see Noyes v. Canada, 30 Fed. 665.

¹⁷Charlotte F. Nat. Bank v. Morgan, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37.

¹⁸Knox v. Summers, 3 Cranch, 498, 2 L. ed. 610; The Merino, 9 Wheat. 401, 6 L. ed. 118.

¹⁹Johnson v. Waters, 111 U. S. 673, 28 L. ed. 547, 4 Sup. Ct. Rep. 619.

²⁰Fitzgerald v. Fitzgerald, 137 U.

S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36.

¹Platt v. Manning, 34 Fed. 817.

²Henderson v. Carbondate, etc. Co. 140 U. S. 40, 35 L. ed. 332, 11 Sup. Ct. Rep. 691.

³Irwin v. Lowry, 14 Pet. 299, 10 L. ed. 462; see Purdy v. Wallace, 81 Fed. 513.

⁴Lackett v. Rumbaugh, 45 Fed. 23.

⁷Act April 30, 1790, c. 9, §§ 25-27, 1 Stat. 117.

⁸Ante, § 35.

ceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court.

R. S. § 4064, U. S. Comp. Stat. 1901, p. 2761.

§ 863. — when process may be issued against persons in service of ministers.

The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place, in his office.

R. S. § 4065, U. S. Comp. Stat. 1901, p. 2761.

§ 864. Issuance of prohibition by circuit courts of appeals in admiralty.

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below, when circumstances require.

12th admiralty rule of the second and ninth circuits.

CHAPTER 23.

TIME FOR COMMENCEMENT OF ACTION OR PROSECUTION.

- § 869. Cross references.
- § 870. Statutes of limitation applicable in Federal courts.
- § 871. Limitations of actions in copyright cases.
- § 872. —in actions for negligently failing to prevent conspiracy against civil rights.
- § 873. —in actions upon claims against United States.
- § 874. —earlier statute—persons under disability.
- § 875. Settlements for customs duties conclusive after one year.
- § 876. Limitation of suits for recovery of taxes wrongfully collected
- § 877. —of time for appeal to commissioner.
- § 878. Limitation of actions to annul land patents.
- § 879. —to annual patents under railway or wagon road grant.
- § 880. Limitation of actions for lands patented to Indians.
- § 881. —of actions for penalties and forfeitures under Federal laws.
- § 882. —of actions for penalties and forfeitures under customs revenue laws.
- § 883. —of forfeiture proceedings for false claims against United States.
- § 884. Time for indictment for capital offenses.
- § 885. —for offenses not capital.
- § 886. —exception of persons fleeing from justice.
- § 887. Exception of parties beyond reach of process during rebellion.
- § 888. Time for prosecution of crimes under revenue and slave laws.
- § 889. —of crimes under internal revenue laws.
- § 890. —of offense of seduction of female passenger.
- § 891. —of prosecutions for violations of naturalization laws.
- § 892. —of suits against carriers under Employers Liability Act of 1906.

§ 869. Cross references.

Provisions of law respecting the time within which an appeal must be taken are given elsewhere;¹ also provisions as to the time for taking various proceedings in bankruptcy.² The provision as to limitation of actions in a marshal's bond is contained in a preceding chapter.³

Author's Section.

¹Post, §§ 1902, et seq.

²Ante, §§ 2364, 2365.

³Ante, § 631.

§ 870. Statutes of limitation applicable in Federal courts.

While Congress might validly have prescribed the time within which all actions or controversies should be cognizable in Federal courts, independently of the State laws,⁴ it has chosen instead to require the Federal courts to apply State statutes of limitations in common law causes unless some Federal statute otherwise requires in a particular case.⁵ In equity the Federal courts are not strictly bound by any statutory provisions though they will usually follow the analogy of the statute at law.⁶ In Federal criminal prosecutions and in suits for penalties and forfeitures under Federal laws, Congress has provided the period within which proceedings must be taken.⁷

Author's section.

§ 871. Limitations of actions in copyright cases.

No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen.

R. S. § 4968, U. S. Comp. Stat. 1901, p. 3416.

This provision was enacted in 1870.¹⁰ It does not apply to an equity suit for injunction against an infringer, and for damages, but only to suits for penalty or forfeiture.¹¹ But the damages which an infringer shall "forfeit and pay" under R. S. § 4964 come within this section.¹² Every new printing for sale is a new cause of action within the meaning of a statute of limitations.¹³

§ 872. — in actions for negligently failing to prevent conspiracy against civil rights.

No action under the provisions of this section [giving a right of action to the injured party, against one who having knowledge of a conspiracy against civil rights, negligently fails to prevent same] shall be sustained which is not commenced within one year after the cause of action has accrued.

Part of R. S. § 1981, U. S. Comp. Stat. 1901, p. 1263.

This provision is from the civil rights act of 1871.¹⁵

⁴Ante, § 799.

⁵Ante, § 10 [m].

⁶Ante, § 10 [m].

⁷Post, §§ 881 to 890.

¹⁰Act July 8, 1870, c. 230, 16 Stat. 215.

¹¹Patterson v. J. S. Oglivie Co. 119 Fed. 451, 453.

¹²Wheeler v. Cobbey, 70 Fed. 487.

¹³Reed v. Carusi, Taney, 72 Fed. Cas. No. 11,642.

¹⁵Act April 20, 1871, c. 22, 17 Stat. 15.

§ 873. — in actions upon claims against United States.

No suit against the government of the United States, shall be allowed under this act [the general statute of 1887 giving the Court of Claims jurisdiction of various classes of claims] unless the same shall have been brought within six years after the right accrued for which the claim is made.

Part of § 1, act Mar. 3, 1887, c. 359, 24 Stat. 505, Act July 1, 1898, c. 546, § 3, 30 Stat. 597, U. S. Comp. Stat. 1901, p. 753.

This provision of the "Tucker" act, is a re-enactment of the first portion of R. S. § 1069¹⁷ which established six years as the period of limitation. However the phraseology is different and so far as that alters the legal meaning or effect of R. S. § 1069 it must be deemed to have been superseded by the above.¹⁸ But the last portion of R. S. § 1069, respecting persons under disability, is not affected or repealed.¹⁹

§ 874. — earlier statute—persons under disability.

Every claim against the United States, cognizable by the Court of Claims, shall be forever barred,^{[a]-[b]} unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the clerk of the House of Representatives, as provided by law,^[c] within six years after the claim first accrues: Provided, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.^{[d]-[e]}

R. S. § 1069, U. S. Comp. Stat. 1901, p. 740.

[a] Subsequent statutory limitations upon actions on special classes of claims.

The above provision of the Revised Statutes was originally enacted in 1863.² Several later statutes have contained special and temporary provisions limiting the time for bringing of actions, or waiving such limitations or guarding against a waiver, as respects particular classes of claims.

¹⁷Post, § 875.

¹⁸See note to § 875.

¹⁹United States v. Greathouse, 166

U. S. 605, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701.

²Act March 3, 1863, c. 92, § 10, 12 Stat. 767.

Thus the Bowman act of 1883 declared that the court should not have jurisdiction of claims then barred.³ The French Spoliation Claims act of 1885 provided that "all claims not finally presented to said court within the period of two years limited by this act shall be forever barred."⁴ The Indian Depredation Claims act of 1891 waived the statute as to such claims generally, but provided "no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed, or has been or is pending, prior to the passage of this act, before the Secretary of the interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner, authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein, and provided further, that all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred; and provided, further, that no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof."⁵ The Spanish War claims act of 1901 required the filing of all claims before the claims commission within six months unless satisfactory reason for delay was shown.⁶

The provision of the general statute of 1887, known as the Tucker act, is more general and permanent in character, and has already been given.⁷

[b] General scope and construction of the section.

The section comprehensively embraces all claims cognizable by the Court of Claims.¹⁰ No exception not found in the statute can be engrafted.¹¹ A patentee's claim for compensation for use of his invention is included, and the general statutes as to infringement suits does not apply.¹² The section applies to a suit by a disbursing officer for relief after having been obliged to account for moneys stolen from him.¹³ It includes a State's claim against the five per cent fund.¹⁴ A claim is barred unless filed within six years.¹⁵ The fact that it is consolidated with others

³§ 3, act March 3, 1883, c. 115, 22 Stat. 485, U. S. Comp. Stat. 1901, p. 748; see *Dennis v. United States*, 23 Ct. Cl. 324.

⁴§ 6, act Jan. 20, 1885, c. 25, 23 Stat. 284, U. S. Comp. Stat. 1901, p. 751.

⁵Act March 3, 1891, c. 538, § 3, 26 Stat. 852, U. S. Comp. Stat. 1901, p. 760.

⁶Act March 2, 1901, c. 800, § 9, 31 Stat. 879, U. S. Comp. Stat. 1901, p. 2797.

⁷Ante, § 874.

¹⁰*United States v. Taylor*, 104 U. S. 221, 26 L. ed. 723.

¹¹*Cross v. United States*, 4 Ct. Cl. 271.

¹²*Hartman v. United States*, 35 Ct. Cl. 106.

¹³*United States v. Smith*, 105 U. S. 620, 26 L. ed. 1191, explaining *United States v. Clark*, 96 U. S. 37, 24 L. ed. 696, on which *Smith's Case*, 14 Ct. Cl. 114, was decided.

¹⁴*United States v. Louisiana*, 127 U. S. 182, 32 L. ed. 66, 8 Sup. Ct. Rep. 1047.

¹⁵*Bell v. United States*, 20 Wall. 179, 22 L. ed. 339; *McKnight v. Carter*, 98 U. S. 179, 25 L. ed. 115; *Carter v. United States*, 6 Ct. Cl. 31; *Bulkeley v. United States*, 8 Ct. Cl. 517; *Campbell v. United States*, 13 Ct. Cl. 108.

not barred, will not save it;¹⁶ nor the fact that claimant has been misled by erroneous rulings of accounting officers.¹⁷

As the government permits suit only within six years, it is a jurisdictional requirement that the party show by his pleading, an accrual of his right within that time. A judgment for a claim which the record or evidence showed to be barred, would be erroneous.¹⁸ It is not necessary that the statute be pleaded as the court is bound to notice such a defect.¹⁹ It seems, however, that the petition may be amended after the lapse of six years if filed in time;²⁰ and there is a rule of the Court of Claims protecting a party in such amendment where inability to examine executive records has prevented his filing a full and specific petition in time.¹ And a widow has been permitted to amend after six years, so as to sue as administratrix.² It is of course competent for Congress again to authorize suit on a claim which has become barred.³

[c] —effect of presentation to department.

When a claim is of such a character that it may be allowed and settled by an executive department, or may in the exercise of discretion, be referred by it to the Court of Claims for final determination, a claim if so presented to an executive department, within six years is not barred if not entered in the Court of Claims until after six years. The filing of the petition then relates back to the presentation of the claim to the department.⁶ The presentation must be to the proper department and the claim must be of the class which a department may allow and settle, or, in its discretion, transmit to the court.⁷ The running of the statute is not stopped as respects other claims by the fact of their presentation to, and rejection by the department;⁸ and the statute is of course a bar in six years after an adjudication by the proper department against a claim.⁹

¹⁶Central P. R. R. v. United States, 24 Ct. Cl. 145.

¹⁷Lisle v. United States, 23 Ct. Cl. 270.

¹⁸Finn v. United States, 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. Rep. 82; United States v. Connor, 138 U. S. 66, 34 L. ed. 862, 11 Sup. Ct. Rep. 231; United States v. Wardwell, 172 U. S. 48, 52, 43 L. ed. 360, 19 Sup. Ct. Rep. 88; Baltimore, etc. R. R. v. United States, 14 Ct. Cl. 484.

¹⁹Kendall v. United States, 14 Ct. Cl. 122; Finn v. United States, 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. Rep. 82; De Armand v. United States, 151 U. S. 495, 38 L. ed. 247, 248, 14 Sup. Ct. Rep. 374.

²⁰Griffin v. United States, 13 Ct. Cl. 257; Devlin v. United States, 12 Ct. Cl. 266.

¹See Hillborn v. United States, 27 Ct. Cl. 547.

²Skelly v. United States, 32 Ct. Cl. 227.

³Wray v. United States, 19 Ct. Cl. 154; Cross v. United States, 4 Ct. Cl. 271.

⁶United States v. Lippitt, 100 U. S. 663, 668, 25 L. ed. 749; Finn v. United States, 123 U. S. 232, 31 L. ed. 130, 8 Sup. Ct. Rep. 82; United States v. New York, 160 U. S. 618, 40 L. ed. 557, 16 Sup. Ct. Rep. 402.

⁷McClure v. United States, 19 Ct. Cl. 18; Alexandria, etc. R. R. v. United States, 26 Ct. Cl. 327; Savage v. United States, 23 Ct. Cl. 255.

⁸See Battelle v. United States, 7 Ct. Cl. 297; Ravesies v. United States, 21 Ct. Cl. 247; Curtis v. United States, 24 Ct. Cl. 1.

⁹United States v. Connor, 138 U. S. 61, 67, 34 L. ed. 861, 862, 11 Sup. Ct. Rep. 229.

[d] When claim is deemed to accrue.

The clause of the act of 1887 makes the limitation run from the time the "right accrued for which the claim is made,"¹¹ though this change in phraseology was probably not intended to carry with it any change in legal effect. A disbursing officers claim for relief where moneys have been stolen from him, only accrues when an account is stated holding him for the loss, and not at the time of the loss.¹² A collector of customs claim for salary accrues at the end of each fiscal year.¹³ The payment of money into the Treasury or equivalent act, such as the disallowance of a claim in an account, marks accrual of officer's claim that he was entitled to retain it.¹⁴ The claim of the holder of a draft to the issuance of a warrant under R. S. § 308 does not begin to run until claimants application is refused.¹⁵ The refusal of the Secretary of the Treasury to pay money claimed, marks the accrual of the right to sue therefor.¹⁶ It has been decided that the statute does not begin to run against claims of a naval contractor for various extras until the completion of the contract work.¹⁷ On a contract for the sale of goods the statute runs from the time the amount is payable.¹⁸ A patentees claim for compensation accrues when his invention is embodied in a manufactured article;¹⁹ or his device is used by the government.²⁰ An action by a State for receipts from the sale of swamp lands is not barred until six years after the amount is ascertained by the commissioner of the General Land Office.¹ If a statutory right is the basis of a claim, it first accrues where an appropriation thereunder becomes available;² and a claim under a special act accrues from its passage.³ In brief a claim first accrues within this provision, upon the day when suit might first be

¹¹Ante, § 874.¹²United States v. Clark, 96 U. S. 37, 24 L. ed. 696; United States v. Smith, 105 U. S. 620, 26 L. ed. 1191; Hobbs Case, 17 Ct. Cl. 189; Wood v. United States, 25 Ct. Cl. 98; Scott v. United States, 18 Ct. Cl. 1.¹³Bachelor v. United States, 8 Ct. Cl. 235; Ellsworth v. United States, 14 Ct. Cl. 582.¹⁴Smith v. United States, 14 Ct. Cl. 114; Lawson v. United States, 14 Ct. Cl. 332; Clark v. United States, 99 U. S. 493, 25 L. ed. 481; United States v. Clark, 96 U. S. 37, 24 L. ed. 696.¹⁵United States v. Wardwell, 172 U. S. 48, 43 L. ed. 360, 19 Sup. Ct. Rep. 86.¹⁶United States v. Lawton, 110 U. S. 146, 28 L. ed. 100, 3 Sup. Ct. Rep. 545; United States v. Taylor, 104 U. S. 216, 26 L. ed. 721; Taylor v. United States, 14 Ct. Cl. 339.¹⁷Myerle v. United States, 31 Ct. Cl. 105.¹⁸Batelle v. United States, 7 Ct. Cl. 397.¹⁹Hartman v. United States, 35 Ct. Cl. 106.²⁰United States v. Berdan, etc. Co. 156 U. S. 570, 39 L. ed. 530, 15 Sup. Ct. Rep. 420.¹United States v. Louisiana, 123 U. S. 32, 31 L. ed. 69, 8 Sup. Ct. Rep. 17.²Bernard v. United States, 26 Ct. Cl. 312.³Rice v. United States, 21 Ct. Cl. 413, where the statute directs a mere ministerial act by an accounting officer the period of limitations runs from the act's passage, not from the accounting; Indiana v. United States, 26 Ct. Cl. 583.

brought on it;⁴ and not until suit might so be brought.⁵ So where a contractor died before his claim accrued, the statute was held not to run until an administrator was appointed who could sue thereon.⁶ Where the United States was trustee of a fund the statute was held not to run until some disavowal of the trust.⁷ And where a treasury warrant issued in payment of an audited account, it is suable within six years though the original account would be barred.⁸

[e] **Disabilities, acknowledgment and part payment.**

Payment of the only part of a claim conceded to be due, is of course not an acknowledgment of the controverted balance.¹² But Congress may be an unqualified acknowledgment that a debt is due take a case from the bar of the statute.¹³ The disabilities mentioned in the provision must have existed when the right accrued and subsequent disability such as departure beyond seas,¹⁴ or insanity¹⁵ will not arrest the statute. A second departure beyond seas will not arrest the statute which has commenced to run upon return from the original absence.¹⁶ The Tucker act of 1887 did not repeal the portion of R. S. § 1069 relating to persons under disability.¹⁸

§ 875. Settlements for customs duties conclusive after one year.

Whenever any goods, wares and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent or consignee, be final and conclusive upon all parties.

§ 21 of act June 22, 1874, c. 391, 18 Stat. 186, U. S. Comp. Stat. 1901, p. 1986.

⁴Harrison v. United States, 20 Ct. Cl. 175; Rice v. United States, 21 Ct. Cl. 413; Patterson v. United States, 21 Ct. Cl. 322; Curtis v. United States, 34 Ct. Cl. 1; Hartman v. United States, 35 Ct. Cl. 108.

⁵United States v. Cooper, 120 U. S. 124, 30 L. ed. 606, 7 Sup. Ct. Rep. 459; United States v. Taylor, 104 U. S. 216, 26 L. ed. 721.

⁶Fulenweider's Case, 9 Ct. Cl. 403.

⁷Harrison v. United States, 20 Ct. Cl. 175; Louisiana v. United States, 23 Ct. Cl. 53.

⁸Buffalo B. R. Case, 16 Ct. Cl. 238.

¹²United States v. Wilder, 13 Wall. 254, 20 L. ed. 681.

¹³Cross v. United States, 4 Ct. Cl. 271.

¹⁴De Armand v. United States, 151 U. S. 495, 496, 38 L. ed. 247, 248, 14 Sup. Ct. Rep. 374.

¹⁵Leonard v. United States, 18 Ct. Cl. 382.

¹⁶Savage v. United States, 23 Ct. Cl. 255.

¹⁸United States v. Greathouse, 166 U. S. 605, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701.

Plaintiff suing to recover an excess of taxes paid must show protest, appeal and suit within the prescribed time.² This section is in the nature of a statute of limitations as respects the government's right to reliquidate duties.³ It is binding on the government as well as the parties.⁴ The year runs from the time of entry and not from the first liquidation.⁵

§ 876. Limitation of suits for recovery of taxes wrongfully collected.

No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: Provided, That actions for such claims which accrued prior to June 6, 1872, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

R. S. § 3227, U. S. Comp. Stat. 1901, p. 2039.

This provision was enacted in 1872.⁸ The act of 1866⁹ forbade suit until after appeal to the Commissioner of internal revenue and required suit to be brought within six months¹⁰ after his decision, or within twelve months after the appeal, if his decision was delayed beyond six months. The provision as to appeal to the commissioner is preserved in R. S. § 3226; but a party now has in every instance, two years after his decision in which to sue, with an option of suing, without waiting for the Commissioner's decision, within two years from the time of taking the appeal in case the decision is delayed beyond six months.¹¹ The appeal to the commissioner must be had within two years after the cause of action accrues.¹² The "two years next after the cause of action accrued" in R. S. § 3227, respecting suit in court, obviously means after the proceed-

²Beard v. Porter, 124 U. S. 443, 31 L. ed. 492, 8 Sup. Ct. Rep. 556.

³United States v. Leng, 18 Fed. 15; United States v. Campbell, 10 Fed. 822.

⁴United States v. Phelps, 17 Blatchf. 316, Fed. Cas. No. 16,039.

⁵United States v. Frazer, 10 Ben. 347, Fed. Cas. No. 15,161.

⁸Act June 6, 1872, c. 315, § 14, 17 Stat. 257.

⁹Act July 13, 1866, c. 184, 14 Stat. 152.

¹⁰Cheatham v. United States, 92 U. S. 86, 23 L. ed. 561.

¹¹James v. Hicks, 110 U. S. 275, 28 L. ed. 144, 4 Sup. Ct. Rep. 6.

¹²Post, § 877; Kings Co. Sav. Ins. v. Blair 116 U. S. 205, 206, 29 L. ed. 657, 6 Sup. Ct. Rep. 353.

ings before the commissioner provided in R. S. §§ 3226, 3228.¹³ The party under legal disability to sue during the time.¹⁴ The rejection of an appeal to the commissioner for mere informality does not start the statute where he afterwards entertains an appeal in due form.¹⁵ If the commissioners decision is delayed beyond two years and the party has not meantime sued, the option to sue without waiting for it, is lost.¹⁶ A statute relieving a claimant from the bar of R. S. § 3226 as to appeal to the commissioner, will be construed as removing the bar to subsequent suit under R. S. § 3237.¹⁷ The period of limitations provided by these sections applies only to suits by the individual for taxes paid and not government suits, for taxes, to which he is defendant.¹⁸ The gist of the action referred to by this section is wrongful conduct of an internal revenue officer and it does not apply to a claim upon a draft duly issued by the revenue department in rectification of an error.¹⁹

§ 877. — of time for appeal to commissioner.

All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: Provided, That claims which accrued prior to June 6, 1872, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.

R. S. § 3228, U. S. Comp. Stat. 1901, p. 2089.

This provision is from an act of 1872.³ The presentation of a claim for refund to the Commissioner is a condition upon which alone the government consents to litigate the lawfulness of the original tax. The collector may not be sued unless the tax payer has first applied for relief to the

¹³Wright v. Blakeslee, 101 U. S. 174, 25 L. ed. 1048; Cheatham v. United States, 92 U. S. 85, 23 L. ed. 561.

¹⁴Braun v. Sauerwein, 10 Wall. 223, 19 L. ed. 895. The party cannot sue without first appealing to the Commissioner: Collector v. Hubbard, 12 Wall. 15, 20 L. ed. 272; United States v. Savings Bank, 104 U. S. 734, 26 L. ed. 908; Stewart v. Barnes, 153 U. S. 458, 38 L. ed. 781, 14 Sup. Ct. Rep. 849.

¹⁵James v. Hicks, 110 U. S. 275, 28 L. ed. 144, 4 Sup. Ct. Rep. 6.

¹⁶James v. Hicks, 110 U. S. 275, 28 L. ed. 144, 4 Sup. Ct. Rep. 6.

¹⁷Commissioners, etc. v. Buckner, 48 Fed. 536.

¹⁸Clinkenbeard v. United States, 21 Wall. 70, 22 L. ed. 477; United States v. Nebraska D. Co. 80 Fed. 285, 25 C. C. A. 418.

¹⁹Ray v. United States, 50 Fed. 166.

³Act June 6, 1872, c. 315, § 44, 17 Stat. 257.

Commissioner within the time and in the manner pointed out by law and has been denied relief.⁴

§ 878. Limitation of actions to annul land patents.

Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

Part of § 8, act Mar. 3, 1891, c. 561, 26 Stat. 1099, U. S. Comp. Stat. 1901, p. 1521.

Prior to this enactment the right of the government to sue for the cancellation of patents on grounds of fraud, etc., was well settled,⁵ but subject to no limitations, except such as a court of equity, recognizes in the defense of laches.⁷ This enactment relieves patent, after six years, from that element of uncertainty. However, it does not apply to the limited class of cases in which individuals are permitted to sue for cancellation.⁸

§ 879. — to annul patents under railway or wagon road grant.

Suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight⁹ of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to.

Part of § 1, act Mar. 2, 1896, c. 39, 29 Stat. 42, U. S. Comp. Stat. 1901, p. 1603.

§ 880. Limitation of actions for lands patented to Indians.

In all actions brought in any State court or United States court

⁴King Co. Sav. Ins. v. Blair, 116 U. S. 200, 206, 29 L. ed. 657, 659, 6 Sup. Ct. Rep. 353; Louisville Comrs. v. Buckner, 48 Fed. 535.

⁵United States v. Hughes, 11 How. 568, 13 L. ed. 809; Garland v. Wynn, 20 How. 8, 15 L. ed. 801; United States v. Stone, 2 Wall. 535, 17 L. ed. 765. See also statutes authorizing such suits, referred to in United States v. Southern Pac. Co. 117 Fed. 544.

⁷United States v. Throckmorton, 98 U. S. 64, 25 L. ed. 93; United States v. Beebe, 127 U. S. 348, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; United States v. Chicago, etc. Ry. 116 Fed. 969, 54 C. C. A. 545; United States v. McGrau, 12 Fed. 449, 8 Sawy. 156.

⁸Peabody G. M. Co. v. Gold Hill M. Co. 106 Fed. 241.

⁹Ante, § 878.

by any patentee, his heirs, grantees or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians.

§ 1 of act May 31, 1902, c. 946, 32 Stat. 284.

§ 881. — of actions for penalties and forfeitures under Federal laws.

No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: Provided, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property.

R. S. § 1047, U. S. Comp. Stat. 1901, p. 727.

This provision of the Revised Statutes is drawn from several earlier statutes.¹⁰ An early case held that an action of debt for a penalty under the slave laws was governed by the period of limitations prescribed by an act of 1790¹¹ limiting criminal prosecution under the penal statutes.¹² But such actions would now clearly be covered by R. S. § 1047,¹³ rather than by section limiting penal prosecutions. If a case is within either section the State statute of limitations will not apply.¹⁴ A penalty may be

¹⁰Act March 2, 1799, c. 22, § 89, 1 Stat. 695. Act. March 26, 1804, c. 40, § 3, 2 Stat. 290. Act April 20, 1818, c. 91, § 9, 3 Stat. 452. Act Feb. 28, 1839, c. 36, § 4, 5 Stat. 322. Act March 3, 1863, c. 76, § 14, 12 Stat. 741. Act July 25, 1868, c. 236, § 1, 15 Stat. 183.

¹¹Substantially the same as §§ 884, 885 post.

¹²Adams v. Woods, 2 Cranch, 336, 2 L. ed. 297. Followed though somewhat doubted by Story, J. in United States v. Mayo, 1 Gall. 396, Fed. Cas. No. 15,755.

¹³United States v. Platt, 27 Fed. Cas. 549.

¹⁴McGlinchy v. United States, 4 Cliff. 312, Fed. Cas. No. 8,803; United States v. Banister, 70 Fed. 44.

recovered either by civil action in debt, or by criminal prosecution.¹⁵ But no civil suit would probably be regarded as for a penalty within this clause unless instigated by the government or *qui tam* by an informer for his moiety.¹⁶ While the government is not usually within the application of statutes of limitation in civil cases, it is within this section.¹⁷ In other words the section does not embrace a suit which is essentially a civil remedy for a private injury, compensatory in its purpose and effect.¹⁸ The distinguishing characteristics of suits for penalties have been considered by the Supreme Court in several cases.¹⁹ Suits for statutory damages for copyright infringement²⁰ or violation of the anti-trust act,¹ or for damages for negligence of a national bank president,² or to enforce bank directors' liability,³ are not suits for penalties within this section, but are governed by the State statutes of limitations. So an action of debt on an official bond is not for a penalty.⁴ But a libel of a vessel under R. S. § 4409 to recover statutory penalties for overcrowding is within this section.⁵ The extent to which R. S. § 1047 and the earlier statutes on which it is based, are applicable to criminal prosecutions is not extensively discussed by the authorities. However, a prosecution for a crime for which defendant may be imprisoned or hanged, is not a prosecution or a penalty, pecuniary or otherwise.⁶

§ 882. — of actions for penalties and forfeitures under customs revenue laws.

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued: Provided, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

¹⁵*Adams v. Woods*, 2 Cranch, 342, 2 L. ed. 297; *Lees v. United States*, 150 U. S. 479, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; *United States v. Stocking*, 87 Fed. 857.

¹⁶*Atlanta v. Chattanooga, etc. Co.* 101 Fed. 900.

¹⁷*United States Maillard*, 4 Ben. 459, Fed. Cas. No. 15,709.

¹⁸*Atlanta v. Chattanooga, etc. Co.* 101 Fed. 900.

¹⁹See *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Brady v. Daly*, 175 U. S. 148, 44 L. ed. 110, 20 Sup. Ct. Rep. 62.

²⁰*Brady v. Daly*, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62.

¹*Atlanta v. Chattanooga, etc. Co.* 101 Fed. 900. See on appeal, 203 U. S. —, 51 L. ed. (p. 65 of advance op.)

²*Stearns v. Lawrence*, 83 Fed. 738, 28 C. C. A. 66.

³*Welles v. Graves*, 41 Fed. 459.

⁴*Raymond v. United States*, 14 Blachf. 51, Fed. Cas. No. 11,596.

⁵*Hatch v. The Boston*, 3 Fed. 810.

⁶*United States v. Brown*, 2 Low. 267, Fed. Cas. No. 14,665.

§ 22 of act June 22, 1874, c. 391, 18 Stat. 190, U. S. Comp. Stat. 1901, p. 727.

Section 21 of the same act provides that settlements as to duties shall, in the absence of fraud or protest, after the expiration of one year, be final and conclusive upon all parties.

§ 883. — of forfeiture proceedings for false claims against United States.

Every such suit [i. e. forfeiture and damages against persons making false claims against the United States] shall be commenced within six years from the commission of the act, and not afterward.

R. S. § 3494, U. S. Comp. Stat. 1901, p. 2329.

§ 884. Time for indictment for capital offenses.

No person shall be prosecuted, tried or punished for treason or other capital offense, wilful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed.

R. S. § 1043, U. S. Comp. Stat. 1901, p. 725.

This provision was first enacted in 1790.⁹ The term "wilful murder" is used in a technical and not a popular sense. Wilful murder is not committed by a seaman who shoots another on board ship where the victim dies ashore and within a foreign jurisdiction, even though by R. S. § 5339 the offense is punishable by death.¹⁰

§ 885. — for offenses not capital.

No persons shall be prosecuted, tried or punished for any offense not capital, except as provided in section one thousand and forty-six^[b] [i. e., of the revised statutes¹²], unless the indictment is found, or the information is instituted^[c] within three years next after such offense shall have been committed.^[d] But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws.^{[a]-[e]}

R. S. § 1044, U. S. Comp. Stat. 1901, p. 725.

[a] The section in general.

As originally enacted¹³ the time of prosecution was limited to two years.

⁹Act April 30, 1790, c. 9, 1 Stat. 119. ¹²Post, § 887.

¹³Act April 30, 1790, c. 9, § 32, 1

¹⁰United States v. Hewecker, 79 Stat. 119. Fed. 59.

An act of 1876 increased it to three.¹⁴ The original act was declared as applicable to offenses after its passage as before;¹⁵ and to include misdemeanors in the District of Columbia.¹⁶ Where evidence of other offenses is admissible to show criminal intent, the fact that these others are prior and barred by the statute does not render them inadmissible.¹⁷

[b] Exceptions to the statute.

The fact that the offender's guilt was not known¹ or that he was absent, e. g., on a whaling voyage,² will not prevent the statutes from running. But if a party flees from the district within the time limited for his prosecution, then the statute does not apply at all.³

[c] Indictment or information necessary to stop statute.

Filing of complaint in a commissioners court will not stop the running of the statute;⁶ neither will the finding of an informal presentment.⁷ A second indictment after the time limit is bad, where the first though found in due time was non-prossed.⁸ The time of filing the indictment will appear from the caption.⁹

[d] When statute begins to run.

A conspiracy under R. S. § 5440 is completed when the overt act is committed in pursuance thereof, and the statute then begins to run, subsequent acts thereunder do not render it a continuing crime.¹¹ But a conspiracy to defraud the United States by unlawful entries of public lands has been declared not severable as to each overt act into separate offenses.¹² The offense of withholding pension money is not continuing, but is perfect upon refusal to pay the pensioner, and barred in the statutory time thereafter.¹³ So polygamy within the act of 1882 consists in the unlawful marriage and is barred in three years,¹⁴ though the unlawful cohabitation may also be an offense.

¹⁴Act April 13, 1876, c. 56, 19 Stat. 32.

¹⁵*Adams v. Woods*, 2 Cranch 342, 2 L. ed. 297; *United States v. Ballard*, 3 McLean, 470, Fed. Cas. No. 14,507; *Johnson v. United States*, 3 McLean, 89, Fed. Cas. No. 7,418.

¹⁶*United States v. Porter*, 2 Cranch C. C. 60, Fed. Cas. No. 16,072.

¹⁷*Dow v. United States*, 82 Fed. 904, 27 C. C. A. 140; *Wolfson v. United States*, 101 Fed. 430, 102 Fed. 134, 41 C. C. A. 422.

¹*United States v. White*, 5 Cranch C. C. 38, 73, Fed. Cas. Nos. 16,675, 16,676.

²*United States v. Brown*, 2 Low. 267, Fed. Cas. No. 14,665.

³*United States v. White*, 5 Cranch, 116, Fed. Cas. No. 16,677. A conspir-

acy to commit an offense against the United States has been held not within this section: *United States v. Francis*, 144 Fed. 250.

⁶*Ex parte Lacey*, 6 Okla. 4, 37 Pac. 1095.

⁷*United States v. Slacum*, 1 Cranch C. C. 485, Fed. Cas. No. 16,311.

⁸*United States v. Ballard*, 3 McLean, 469, Fed. Cas. No. 14,507.

⁹*United States v. Watkins*, 3 Cranch C. C. 441, Fed. Cas. No. 16,649.

¹¹*United States v. Owen*, 32 Fed. 534, 13 Sawy. 53.

¹²*United States v. McCord*, 72 Fed. 159.

¹³*United States v. Irvine*, 98 U. S. 450, 25 L. ed. 193.

¹⁴*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

[e] How pleaded or raised.

Defendant cannot by demurrer set up the statute of limitation when the complainant fails to negative that defense; non constat but that at the trial it may appear he was fleeing from justice.¹⁶ But he may give evidence touching it at the trial, or may raise it by special plea.¹⁷ If he plead specially the government may reply that he was fleeing from justice.¹⁸ Demurrer has, however, been sustained where the prosecutor admitted that the case was within no exception to the running of the statute.¹⁹

§ 886. — exception of persons fleeing from justice.

Nothing in the two preceding sections² shall extend to any person fleeing from justice.

R. S. § 1045, U. S. Comp. Stat. 1901, p. 726.

This provision is also from the crimes act of 1790.³ Fleeing from justice involves either leaving one's home, residence or place of abode within a district or a concealment therein to avoid detection or punishment.⁴ Departure from the district of the offense to offender's usual place of abode where to avoid punishment, is a fleeing from justice.⁵ A person who takes himself out of the jurisdiction to avoid being brought to justice is a person fleeing from justice.⁶ It is none the less so though prosecution has not yet begun, and though the party is really fleeing from the justice of the State having jurisdiction over the same place and act.⁷ It is not necessary that the accused be found within the limit of another jurisdiction.⁸ But continuing on a whaling cruise after an offense is not a fleeing from justice;⁹ neither is involuntary imprisonment in a foreign jail, where the offense was on board ship and the offender never within the district having jurisdiction to try him.¹⁰ A party cannot demur to an indictment showing an

¹⁶United States v. Cook, 17 Wall. 168, 21 L. ed. 538; United States v. White, 5 Cranch, C. C. 116, Fed. Cas. No. 16,675, 16,677; United States v. Brown, 2 Low. 268, Fed. Cas. No. 14,665. See 12 Am. Law Reg. (N. S.) 682 note. But see United States v. Watkins, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649; United States v. Shorey, 9 Int. Rev. 201, Fed. Cas. No. 16,280.

¹⁷Ibid.

¹⁸See Judge Dillon's note to United States v. O'Brian, 3 Dill, 381, Fed. Cas. No. 15,908. See also United States v. Shorey, 9 Int. Rev. 201, Fed. Cas. No. 16,280.

¹⁹United States v. Owen, 13 Sawyer, 57, 32 Fed. 536. A general verdict of guilty after plea of not guilty will be deemed to include a finding that

the offense was committed within the statutory period: United States v. Francis, 144 Fed. 520.

²Ante, §§ 884, 885.

³Act April 30, 1790, c. 9, § 32, 1 Stat. 119.

⁴United States v. O'Brian, 3 Dill. 381, Fed. Cas. No. 15,908.

⁵United States v. White, 5 Cranch C. C. 116, Fed. Cas. No. 16,677.

⁶Streep v. United States, 160 U. S. 133, 40 L. ed. 365, 16 Sup. Ct. Rep. 244.

⁷Ibid.

⁸Porter v. United States, 91 Fed. 494, 33 C. C. A. 652.

⁹United States v. Brown, 2 Low. 267, Fed. Cas. No. 14,665.

¹⁰United States v. Hewecker, 79 Fed. 60.

offense three years old, since it may be within the exception stated in the above provision.¹¹

§ 887. Exception of parties beyond reach of process during Rebellion.

In all cases where, during the late rebellion, any person could not, by reason of resistance to the execution of the laws of the United States, or of the interruption of the ordinary course of judicial proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action.

R. S. § 1048, U. S. Comp. Stat. 1901, p. 728.

This provision was enacted in 1864,¹² and is in accordance with the general principle of law which declares statutes of limitation suspended during war.¹³ Being applicable in terms only to the civil war, it is now obsolete.

§ 888. Time for prosecution of crimes under revenue and slave laws.

No person shall be prosecuted, tried or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime.

R. S. § 1046, U. S. Comp. Stat. 1901, p. 726.

This provision is from enactments of 1804 and 1818.¹⁵ It no longer applies to crimes under the internal revenue laws.¹⁶ Revenue laws are those made for direct and avowed purposes of creating revenue or public funds for services of government.¹⁷ The act establishing the postal money order system is not such an act and embezzlement forbidden by the 11th section thereof is within R. S. § 1044, and not this section.¹⁸ Counterfeiting is not a crime against the revenue laws.¹⁹ But an embezzlement

¹¹United States v. Brace, 143 Fed. 703.

¹²Act June 11, 1864, c. 118, 13 Stat. 123.

¹³Hanger v. Abbott, 6 Wall. 542. 18 L. ed. 939. See also Levy v. Stewart, 11 Wall. 254, 20 L. ed. 86; Stewart v. Kahn, 11 Wall. 506, 20 L. ed. 176; United States v. Wiley, 11 Wall. 515, 20 L. ed. 211.

¹⁵Act March 26, 1804, c. 40, § 3, 2 Stat. 200; act April 20, 1818, c. 91, § 9, 3 Stat. 452.

¹⁶Post § 888. Formerly it did. See 14 Op. Atty. Gen. 81; and United States v. Wright, 3 Pittsburg 192, Fed. Cas. No. 16,770, where offense was illicit distilling.

¹⁷United States v. Norton, 91 U. S. 569, 23 L. ed. 454.

¹⁸United States v. Norton, 91 U. S. 569, 23 L. ed. 454.

¹⁹United States v. Shorey, 9 Int. Rev. 202, Fed. Cas. No. 16,281.

indictment under an act of 1846 for the collection, safe keeping, etc., of the public revenue is within this provision.²⁰ So also smuggling is clearly an offense against the revenue laws.¹ And while a prosecution for false entry at the custom house under R. S. § 5445, is an offense against the revenue laws,² a conspiracy under R. S. § 5440 to defraud the customs by such false entry within R. S. § 5445, is not so regarded.³

§ 889. — of crimes under internal revenue laws.

No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases: Provided, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings; Provided further, that the provisions of this act shall not apply to offenses committed prior to its passage; and provided further, that where a complaint shall be instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district; and provided further, that this act shall not apply to offenses committed by officers of the United States.

§ 1 of act July 5, 1884, c. 225, 23 Stat. 122, U. S. Comp. Stat. 1901, p 726.

Prior to this enactment R. S. § 1046⁶ applied.⁷ Since the date of filing complaint before a commissioner becomes material under this section, it is proper for a clerk making up the final record in such a case to embody such a paper and charge therefor.⁸

§ 890. — of offense of seduction of female passenger.

No conviction shall be had [for seduction of a female passenger by the master officer, seaman or other employee on a vessel] . . .

²⁰Collier's Case, 6 Op. Atty. Gen. States v. Dustin, 15 Int. Rev. 30 Fed. 103. Cas. No. 15,012; United States v.

¹United States v. Shorey, 9 Int. Fehrenback, 2 Woods, 175, Fed. Cas. Rev. 202, Fed. Cas. No. 16,282. No. 15,083.

²United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539. ⁶Ante, § 887.

³United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539; United States v. ⁷Taylor v. United States 45 Fed. 541.

Owen, 32 Fed. 534; contra, see United ⁸Taylor v. United States, 45 Fed. 541.

unless the indictment is found within one year after the arrival of the vessel on which the offense was committed at the port for which it was destined.

R. S. § 5351, U. S. Comp. Stat. 1901, p. 3633.

The section also provides that no conviction shall be had solely on the testimony of the seduced female.

§ 891. — of prosecutions for violations of naturalization law.

No person shall be prosecuted, tried or punished for any crime arising under the provisions of this act unless the indictment is found or the information is filed within five years next after the commission of such crime.

§ 24 act June 29, 1906, c. 3592, 34 Stat. 606.

§ 892. — of suits against carriers under Employers Liability Act of 1906.

No action shall be maintained under this act [i. e., act making carrier liable for negligence notwithstanding contributory negligence of employee], unless commenced within one year from the time the cause of action accrued.

§ 4 of act June 11, 1906, c. 3073, 34 Stat. 232.

§ 893. — of infringement suits.

Prior to July 8, 1870,¹ Congress made no provision regarding the time within which suits for infringement of patents must be brought, other than the general provision making State laws the rule of decision in cases where they applied.² The provision enacted in 1870 was omitted from the Revised Statutes, and it was not until an act of March 3, 1897, amending R. S. § 4921, that a uniform Federal rule upon the subject again came into operation.³ In the interim State statutes of limitation applied, and still apply to suits for infringement of copyright.

Author's section.

There was a conflict among the Federal cases at circuit regarding the applicability of State statutes of limitation to actions at law for infringement of patent, some holding that they did not apply, and that there was

¹Act July 8, 1870, c. 230, § 55, 16 Stat. 206. March 3, 1897, c. 391, § 6, 29 Stat. 692. This went into effect Jan. 1,

²Ante, § 12.

1898; U. S. Comp. Stat. 1901, p. 2385,

³R. S. § 4921, as amended act 3395. See post, § 1170.

no period of limitation at all,⁴ and others maintaining that the State law governed.⁵ The latter view was finally established by a Supreme Court decision.⁶ In equity the State law did not apply and the only bar recognized was the ordinary equity rule of laches.⁷ R. S. § 4921 now governs as to patents, both at law and in equity.⁸ Actions for infringements of copyrights, when not regarded as suits to recover a penalty or forfeiture are governed by State statutes of limitation.⁹

⁴See *Anthony v. Carroll*, 2 Ban. & A. 195, Fed. Cas. No. 487; *Wood v. Cleveland R. M. Co.* 4 Fish Pat. Cas. 550, Fed. Cas. No. 17,941; *Collins v. Peebles*, 2 Fish. Pat. Cas. 541, Fed. Cas. No. 3,017; *Brickill v. Hartford*, 49 Fed. 372; *California A. S. P. Co. v. Starr*, 48 Fed. 560.

⁵*Rich v. Ricketts*, 7 Blatchf. 230, Fed. Cas. No. 11,762; *Parker v. Hallock*, 2 Fish Pat. Cas. 543, Fed. Cas. No. 10,735; *Hayden v. Oriental Mills*, 15 Fed. 605.

⁶*Campbell v. Haverhill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217.

⁷*Leggett v. Standard O. Co.* 149 U. S. 294, 37 L. ed. 737, 13 Sup. Ct. Rep. 902; *Lane, etc. Co. v. Locke*, 150 U. S. 200, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78; *Keyes v. Eureka M. Co.* 158 U. S. 153, 39 L. ed. 929, 15 Sup. Ct. Rep. 772; *Richardson v. Osborne*, 93 Fed. 828, 36 C. C. A. 610; *Boston, etc. Ry. v. Bemis C. B. Co.* 98 Fed. 121, 38 C. C. A. 661.

⁸Post, § 1170. *American P. T. Co. v. Pratt*, 106 Fed. 229.

⁹*Brady v. Daly*, 175 U. S. 158, 44 L. ed. 109, 20 Sup. Ct. Rep. 66.

CHAPTER 24.

PROCEDURE IN COMMON LAW CAUSES.

- § 900. Federal procedure in common law causes to conform to State procedure.
- § 901. Writs and process in common law causes.
- § 902. Parties in common law cause.
- § 903. Pleading in common law causes.
- § 904. Provisional and other remedies in general.
- § 905. —remedies by attachment and garnishment the same as in State courts.
- § 906. —State law as to dissolution of attachment applies.
- § 907. —attachment against national banks.
- § 908. —replevin and statutory substitutes therefor.
- § 909. Ejectment and statutory substitutes therefor.
- § 910. Right of trial by jury guaranteed.
- § 911. Issues of fact in district court triable by jury.
- § 912. Issues of fact in circuit court triable by jury.
- § 913. Certain issues of fact in Supreme Court triable by jury.
- § 914. Waiver of jury in circuit court.
- § 915. Reference of questions of fact.
- § 916. Impaneling of jury.
- § 917. Mode of proof in common law actions.
- § 918. Direction of verdict and demurrer to evidence.
- § 919. Continuance, dismissal and non-suit.
- § 920. Instructions and verdict.
- § 921. Judgment and costs.
- § 922. The taking of objections and exceptions.
- § 923. Power to grant new trial in jury cases.
- § 924. Stay of execution on new trial—new trial where jury waived.
- § 925. Remedies on Federal judgments by execution, etc., furnished by State laws.
- § 900. Federal procedure in common law causes to conform to state procedure.

The practice, pleadings and forms and modes of proceeding^{[a]-[e]} in civil causes, other than equity and admiralty causes,^[c] in the circuit and district courts, shall conform, as near as may be,^{[f]-[g]} to the practice, pleadings and forms and modes of proceeding exist-

ing at the time in like causes^[1] in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.^[1]

R. S. § 914, U. S. Comp. Stat. 1901, p. 684.

R. S. § 914, U. S. Comp. Stat. 1901, p. —.

[a] History and general effect of the successive conformity provisions.

The temporary process act of 1789¹ declared that "until farther provision shall be made, and except where by this act, or other statutes of the United States, it is otherwise provided, the forms of writs and executions, except their style, and modes of process, in the circuit and district courts in suits at common law, shall be the same in each State, respectively, as are now used in the supreme courts of the same." This provision was continued by an act of 1790² and made permanent by an act of 1792.³ The act of 1792, however, substituted for the words "and modes of process," the words "and the forms and modes of proceeding;" and added a proviso making the adoption of the State law "subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." The Supreme Court in two leading cases⁴ sustained the power of Congress to delegate this quasi legislative power to the courts and declared it proper for the Federal courts thereunder, to adopt by rule, changes in the State law subsequent to the passage of the process act; and even changes in the state law as to exemptions from execution.⁵ The act of 1792 was not broad enough however to apply to States subsequently admitted to the Union. There was a special act of 1824 which applied to the State of Louisiana;⁶ and a general act of 1828⁷ which applied to all States admitted to the Union after 1789 and which adopted their practice as existing in 1828, with power in the Supreme and circuit and district courts to vary the same by rule. This law of 1828 was reenacted in 1842.⁸ It made no prospective provision for States subsequently to be admitted; but a provision in a later admission act that "all the laws of the United States which are not locally inapplicable, shall have the same force and effect" within the new State as in the old ones, was declared effective to adopt this process act.⁹

¹Act Sept. 29, 1789, c. 21.

²Act May 26, 1790.

³Act May 8, 1792, c. 137.

⁴Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Bank of U. S. v. Halstead, 10 Wheat. 51, 6 L. ed. 264.

⁵Bank of U. S. v. Halstead, 10 Wheat. 51, 6 L. ed. 264.

⁶Act May 26, 1824, c. 181; see Parsons v. Bedford, 3 Pet. 444, 7 L. ed.

736; Moncre v. Zunts, 11 Wall. 421, 422, 20 L. ed. 181.

⁷May 19, 1828, § 1, c. 68, 4 Stat. 278; see Beers v. Haughton, 9 Pet. 361, 9 L. ed. 157.

⁸Act Aug. 1, 1842, c. —, 5 Stat.

499. ⁹Smith v. Cockrill, 6 Wall. 756, 18 L. ed. 973, 974.

[aa] Changes wrought by present law and their object.

The next and last general enactment upon the subject was contained in the law of 1872,¹² and is still in force as R. S. § 914, *supra*. The earlier laws all adopted the State practice as existing at a designated time, and although the courts had a discretion to make changes therein to conform to later laws such later enactments were not in force unless so adopted.¹³ The law of 1872 was the first to require Federal procedure to conform to the State procedure "existing at the time in like causes in the courts of record of the State." A change in State procedure is now operative in the Federal courts immediately if at all;¹⁴ and the power to make rules is thus restricted.¹⁵ In the main R. S. 914 is obligatory¹⁶ and peremptory.¹⁷ Its manifest purpose was to secure a stricter conformity; and it was especially effective to that end in the older States where the Federal courts had often resisted the innovations of the reformed procedure and thus compelled practitioners to study two distinct systems of remedial law.¹⁸ The effect of R. S. § 914, upon various phases of a proceeding at common law is considered in subsequent sections of the code. There is a provision of law requiring procedure in condemnation suits brought by the United States to conform to the local practice.¹⁹ Under R. S. § 914, the Federal courts take judicial notice of the local State law of procedure and of decisions.²⁰

[b] Validity and general scope.

The power of Congress to prescribe the procedure in Federal courts, is well settled and very broad.³ And while the method of delegating to the courts themselves a partial exercise of the power, is unusual, it has been amply sustained and cannot be regarded as open to question.⁴ State laws as to procedure cannot, in and of themselves, have any force or vigor in Federal courts.⁵ They are only operative when adopted by Congress or by rules of the courts themselves.⁶ And the Federal courts do not consider themselves absolutely bound by State decisions construing procedure laws;⁷

¹² Act June 1, 1872, c. 255, 17 Stat. 197.

¹³ *Bronson v. Kinzie*, 1 How. 315, 11 L. ed. 143; *Riggs v. Johnson Co.* 6 Wall. 191, 195, 18 L. ed. 768.

¹⁴ *Rosenbach v. Dreyfuss*, 2 Fed. 23; *Hudson v. Parker*, 156 U. S. 281, 39 L. ed. 425, 15 Sup. Ct. Rep. 452; *Osborne v. Detroit*, 28 Fed. 385.

¹⁵ *Ante*, § 805[a]; *infra*, note [i].

¹⁶ *Indianapolis, etc. R. R. v. Horst*, 93 U. S. 300, 23 L. ed. 898.

¹⁷ *Amy v. Watertown*, 130 U. S. 304, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; but see *infra*, note [g].

¹⁸ See *Nudd v. Barrows*, 91 U. S. 441, 442, 23 L. ed. 289, 290; *Baltimore & O. R. v. Hamilton*, 16 Fed. 183; *Carlisle v. Cooper*, 64 Fed. 475, 12 C. C. A. 235; *Republic Ins. Co. v. Wil-*

liams, 3 Biss. 370, Fed. Cas. No. 11,707.

¹⁹ *Post*, § 1380.

²⁰ *Wilder v. United States*, 143 Fed. 433, (C. C. A.)

³ *Ante*, § 799.

⁴ *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Bank of U. S. v. Halstead*, 10 Wheat. 51, 6 L. ed. 264; *Beers v. Haughton*, 9 Pet. 359, 9 L. ed. 145.

⁵ *Parsons v. Bedford*, 3 Pet. 444, 7 L. ed. 736; *Bronson v. Kinzie*, 1 How. 314, 11 L. ed. 143; see also *ante*, § 5 [a].

⁶ *Beers v. Haughton*, 9 Pet. 359, 9 L. ed. 145.

⁷ See *Lafayette B. Co. v. Streator*, 105 Fed. 729; *Van Doren v. Pennsylvania R. R.* 93 Fed. 260, 35 C. C.

nor by State decisions interpreting common-law remedies.⁸ Furthermore this section requires conformity only in procedure.⁹ It does not require conformity to State practice when the essential question is one of jurisdiction and not of procedure;¹⁰ nor does it apply to the mode of obtaining jurisdiction of the person.¹¹ It does not require Federal courts to renounce jurisdiction lawfully conferred by Congress.¹² It applies only if the court has jurisdiction.¹³ It does not attempt to prescribe the substantive rules of law which are to control the court's decisions.¹⁴ That is governed by another provision and by other principles and is elsewhere considered.¹⁵

[c] **Applicable only to civil causes other than of equity or admiralty.**

The earlier process acts required conformity in "common-law causes" *eo nomine*.¹⁶ It does not seem that the present law was intended to include any causes other than those of a common-law character.¹⁷ The substitution of the phrase "in civil causes other than equity and admiralty" is effective to include causes of a common law character which might strictly not be deemed common law causes because in fact not existent at common law. Thus suits for penalties and other rights of action based upon Federal statutes are within R. S. § 914, although they did not exist at common law.¹⁸

The distinction between law and equity is fundamental in Federal practice³ and numerous cases have affirmed the inapplicability in Federal courts, of State laws as to equity procedure.⁴ State laws as to criminal procedure⁵ and as to practice in admiralty, would be equally inapplicable.⁶ Both in equity and admiralty the practice and procedure of Federal courts are uniform throughout the United States.⁷ The fact that a State has

A. 282; *Wall v. Chesapeake R. R.* 95, Fed. Cas. 398, 37 C. C. A. 129; ante, § 10 [1] et seq.

⁸*Sanford v. Portsmouth*, 2 Flipp. 105, 108, Fed. Cas. No. 12,315; but see *Taylor v. Brigham*, 3 Woods, 377, Fed. Cas. No. 13,781.

⁹*Wells v. Clark*, 136 Fed. 464.

¹⁰Compare ante, § 853[b].

¹¹*Weils v. Clark*, 136 Fed. 462.

¹²*Phelps v. Oaks*, 117 U. S. 239, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; *Coffey v. United States* 116 U. S. 427, 29 L. ed. 681, 6 Sup. Ct. Rep. 432.

¹³*Goldey v. Morning News*, 156 U. S. 524, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

¹⁴*Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Fitch v. Creighton*, 24 How. 162, 16 L. ed. 596.

¹⁵Ante, §§ 10-12.

¹⁶*Supra*, note[a].

¹⁷*The Blanche Page*, 16 Blatchf. 5, Fed. Cas. No. 1,524; *Steam S. C. v.*

Sears, 9 Fed. 9, 20 Blatchf. 23; *Sanford v. Portsmouth*, 2 Flipp. 105, 6 Cent. L. J. 147, Fed. Cas. No. 12,315.

¹*Campbell v. Haverhill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; *Edmunds v. Illinois Cent. R.* 80 Fed. 78, 85.

²Ante, § 800.

³*Boyle v. Zacharie*, 6 Pet. 658, 8 L. ed. 527; *Story v. Livingston*, 13 Pet. 368, 369, 10 L. ed. 200; *Russell v. Southard*, 12 How. 147, 13 L. ed. 927; *Betts v. Lewis*, 19 How. 73, 15 L. ed. 576; *Davis v. Davis*, 72 Fed. 84, 18 C. C. A. 438.

⁴*United States v. Wallace*, 46 Fed. 570; *United States v. Gardiner*, 18 Int. Rev. 46, Fed. Cas. No. 15,187.

⁵*Laidlaw v. O. R. & N. Co.* 81 Fed. 876, 879, 26 C. C. A. 665, and cases cited; *The Chusan*, 2 Story, 455 Fed. Cas. No. 2,717.

⁶Ante, § 5 [b].

adopted the reformed procedure, abolishing the distinction between law and equity, does not permit any such blending of legal and equitable proceedings in the Federal courts.⁸ The distinction persists in the Federal courts, which will conform to the State reform procedure only in actions upon the law side. Various other consequences of the fact that conformity is required only as the law side are elsewhere discussed.⁹

[d] —inapplicable to procedure for obtaining review.

The mode of appealing a case in the Federal court is not required to conform to the State practice upon that subject.¹² The manner and time of taking the proceedings which constitute the foundation of the right of review are regulated by Congress and are not governed by the local practice.¹³ The bill of exceptions in the Federal court should conform to the Federal,¹⁴ and not to the local State practice.¹⁵ The State law as to the time for filing the bill has no application;¹⁶ nor as to the mode of settling it.¹⁷ It seems, however, that the Federal court may adopt the local practice as to time of signing a bill of exceptions.¹⁸ Where jury has been waived, the mode of securing review is not governed by the State law.¹⁹ The right of review is not governed by State law and a rule adopting a State law denying the right in a given case is void.²⁰ The Federal courts determine for themselves whether a judgment is final for purposes of appeal regardless of the local practice.¹ Nor are they bound by the local law respecting the proper time and mode for taking exceptions, but follow their own rules upon that subject.² So the procedure on motion for new trial is not re-

⁸See ante, § 5[b].

⁹Ante, § 800[a], [b].

¹²*Bayard v. Lombard*, 9 How. 551, 13 L. ed. 245; *Graham v. Bayne*, 18 How. 61, 15 L. ed. 265; *Hudgins v. Kemp*, 18 How. 537, 15 L. ed. 514; *Fleitas v. Richardson*, 147 U. S. 545, 37 L. ed. 272, 13 Sup. Ct. Rep. 429; *Hudson v. Parker*, 156 U. S. 281, 39 L. ed. 424, 15 Sup. Ct. Rep. 450; *West v. East C. Cedar Co.* 113 Fed. 741, 51 C. C. A. 411.

¹³*In re Chateaugay, etc. Co.* 128 U. S. 533, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; *Andes v. Slauson*, 130 U. S. 438, 32 L. ed. 991, 9 Sup. Ct. Rep. 574; *Lees v. United States*, 150 U. S. 482, 37 L. ed. 1152, 14 Sup. Ct. Rep. 165; *Shipman v. Ohio C. Ex.* 70 Fed. 654, 17 C. C. A. 313.

¹⁴See post, § 1932.

¹⁵See *Lees v. United States*, 150 U. S. 482, 37 L. ed. 1152, 14 Sup. Ct. Rep. 165; *Manning v. German Ins. Co.* 107 Fed. 55, 46 C. C. A. 144; *Preble v. Bates*, 40 Fed. 746; *Tullis v. Lake Erie Co.* 105 Fed. 557, 44 C. C. A. 597; *Prichard v. Budd*, 76 Fed.

717, 44 C. C. A. 597; *Van Stone, v. Stilwell*, 142 U. S. 133, 35 L. ed. 961, 12 Sup. Ct. Rep. 181; *United States v. Indian Grave Dist.* 85 Fed. 930, 29 C. C. A. 578.

¹⁶See *Richmond, etc. R. R. v. McGee*, 50 Fed. 907, 2 C. C. A. 81; *New York, etc. R. R. v. Hyde*, 56 Fed. 189, 190, 5 C. C. A. 461.

¹⁷*In re Chateaugay Iron Co.* 128 U. S. 553, 32 L. ed. 508, 9 Sup. Ct. Rep. 150.

¹⁸See *United States v. Breitling*, 20 How. 253, 254, 15 L. ed. 900.

¹⁹*Kentucky Ins. Co. v. Hamilton*, 63 Fed. 98, 11 C. C. A. 42.

²⁰*Amis v. Smith*, 16 Pet. 314, 10 L. ed. 973. The Missouri rule that filing of amended petition in compliance with an erroneous order, waives the error, is not binding; *Williamson v. Liverpool, etc. Ins. Co.* 141 Fed. 54 (C. C. A.)

¹*Elder v. McClaskey*, 70 Fed. 556, 17 C. C. A. 251.

²*St. Clair v. United States*, 154 U. S. 153, 38 L. ed. 943, 14 Sup. Ct. Rep. 1010; *Lowry v. Mt. Adams, etc.*

quired to conform to the State practice,⁴ although a state law giving an absolute right to new trial in ejectment, is binding on the Federal courts because a rule of property and not a mere mode of procedure.⁵ The established Federal rule that the granting or refusing of new trial rests in the sound discretion of the court, is not affected by the conformity provision.⁶

[e]—inapplicable to personal conduct and administration of judge.

The personal conduct and administration of the judge in the discharge of his separate functions is neither practice, pleading, nor a form nor mode of proceeding within this section.⁹ It was not intended to fetter a judge in the personal discharge of his accustomed duties, or to trench upon common law powers with which in that respect he is clothed.¹⁰ The meaning of these declarations of the Supreme Court can perhaps be best ascertained from the cases to which they have been applied. Thus the first case asserting the principle, declined to hold a Federal judge bound by a State law forbidding oral instructions to a jury or any comment on the facts by the court in the giving of instructions.¹¹ Since then many cases have followed this rule, and it is the general practice in Federal courts for the judge to comment upon the evidence in the charge to the jury.¹² So the Federal court is not bound by a State law respecting the giving of special instructions;¹³ or requiring the jury to take the instructions with them to the jury room.¹⁴

[f] Conformity not required where inconsistent with other Federal provisions or principles.

Conformity is not required where the consequence would be a violation of specific Federal constitutional or statutory provision.¹⁹ Congress requires

Ry. 68 Fed. 829; Consumers, etc. Co. v. Ashburn, 81 Fed. 334, 26 C. C. A. 436.

⁴Indianapolis, etc. R. R. v. Horst, 93 U. S. 291, 301, 23 L. ed. 898; Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085; Missouri Pac. Ry. v. Chicago, etc. Ry. 132 U. S. 191, 33 L. ed. 309, 10 Sup. Ct. Rep. 65.

⁵Equator Co. v. Hall, 106 U. S. 88, 27 L. ed. 114, 1 Sup. Ct. Rep. 128; Fishburn v. Chicago, etc. Ry. 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8; Smale v. Mitchell, 143 U. S. 107, 36 L. ed. 90, 12 Sup. Ct. Rep. 353.

⁶Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085.

⁹Nudd v. Barrows, 91 U. S. 442, 23 L. ed. 289, 290; United States Mut. Acci. Assoc. v. Barry, 131 U. S. 120, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

¹⁰United States Mut. etc. Assoc. v. Barry, 131 U. S. 120, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

¹¹Nudd v. Barrows, 91 U. S. 441, 23 L. ed. 289.

¹²Vicksburg, etc. Ry. v. Vickers, 118 U. S. 553, 30 L. ed. 258, 7 Sup. Ct. Rep. 2 S⁺. Louis, etc. Ry. v. Vickers, 122 U. S. 363, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1216.

¹³Indianapolis, etc. R. R. v. Horst, 93 U. S. 299, 23 L. ed. 901; United States, etc. Assoc. v. Barry, 131 U. S. 120, 33 L. ed. 66, 9 Sup. Ct. Rep. 761; McElwee v. Metropolitan, etc. Co. 69 Fed. 319, 16 C. C. A. 232; Aetna, etc. Co. v. Vandecar, 86 Fed. 290, 30 C. C. A. 48.

¹⁴Nudd v. Barrows, 91 U. S. 426, 23 L. ed. 286; Western U. T. Co. v. Burgess, 108 Fed. 32, 47 C. C. A. 168.

¹⁹Swift, etc. Co. v. Jones, 145 Fed. 489; Indianapolis, etc. R. R. v. Horst, 93 U. S. 291, 23 L. ed. 898; In re Chateaugay Iron Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; Southern Pac. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct.

for instance, that Federal process be signed and sealed by the clerk; hence State practice under which the attorney signs, issues and serves the summons, cannot be followed in that respect.²⁰ Again, the adoption of a local mode of proceeding might sometimes deprive a party of the right to jury trial guaranteed by the Federal Constitution and laws, and if so, it cannot be followed.¹ Adoption of a local statute giving a special appearance the effect of a general one might practically operate in such a way as to affect or regulate the court's jurisdiction and if so, R. S. § 914 does not require it to be followed.² So, the requirement of Federal practice that a party plead specially to the jurisdiction on penalty of waiver of the alleged defect, has been held to be unaffected by the requirement of conformity.³ In fact the conformity provision is invariably to be interpreted in strict subordination to the principle that State laws cannot be permitted to restrain or affect the jurisdiction of Federal courts.⁴ The State practice is adopted with reference to the jurisdiction of the circuit and district courts as declared by Congress, and not with a view to limiting that jurisdiction,⁵ or to enlarging it.⁶ The State law as to costs will not be deemed adopted in so far as such adoption would violate the accepted principle of Federal jurisprudence that costs shall not be imposed against the United States without the consent of Congress.⁸ The State law requiring security for costs from a nonresident plaintiff has been applied.⁹ But the plaintiff has been allowed in lieu thereof to file a certificate bringing the case under R. S. 1001.¹⁰

The conformity clause must be harmonized with other provisions of the Federal law. Thus, R. S. § 918 gives the Federal courts a considerable power of making rules;¹⁴ and this indicates an intent to permit them to regulate the details of business before them, unaffected by the conformity provision.¹⁵ So far as R. S. § 812, and subsequent laws provide for the summoning of Federal jurors, Congress plainly did not intend to make the State laws applicable by virtue of R. S. § 914.¹⁶ The existence of Federal statutes respecting waiver of jury and mode of trial without jury,

Rep. 44; *Luxton v. North R. B. Co.* 147 U. S. 337, 37 L. ed. 195, 13 Sup. Ct. Rep. 356; *Paine v. Warren*, 33 Fed. 358; *Sulzer v. Watson*, 39 Fed. 415; *Allnut v. Lancaster*, 76 Fed. 134.

²⁰Ante, § 836: *Martin v. Criscuolo*, 10 Blatchf. 211, Fed. Cas. No. 9,159.

¹Bank of Hamilton v. Dudley, 2 Pet. 526, 7 L. ed. 496; *Howe Mach. Co. v. Edwards*, 15 Blatchf. 402, Fed. Cas. No. 6,784, as to reference to referee: *Sulzer v. Watson*, 39 Fed. 414, as to reference to auditors.

²*See* *an*, etc. *Ry. v. Pinkney*, 149 U. S. 206, 37 L. ed. 704, 13 Sup. Ct. Rep. 864; *Southern Pac. Co. v. Denton*, 146 U. S. 209, 36 L. ed. 945, 13 Sup. Ct. Rep. 47.

³*Cuthbert v. Galloway*, 35 Fed. 469.

⁴*See* ante, § 5; see also supra, note[b].

⁵*Massingill v. Downs*, 7 How. 766, 12 L. ed. 906; see *O'Connell v. Reed*, 56 Fed. 531, 5 C. C. A. 586.

⁶*Bath Co. v. Amy*, 13 Wall. 250, 20 L. ed. 539.

⁸*Carlisle v. Cooper*, 64 Fed. 474, 12 C. C. A. 235.

⁹*Schofield v. Palmer*, 134 Fed. 754.

¹⁰*Ibid.*

¹⁴Ante, § 805.

¹⁵*Ewing v. Burnham*, 74 Fed. 384; see *Osborne v. Detroit*, 28 Fed. 385.

¹⁶*Walker v. Collins*, 50 Fed. 739, 1 C. C. A. 642.

precludes State statutes upon the same subject from being applicable.¹⁷ The same is true as to the Federal laws respecting the production and inspection of books, etc., before trial;¹⁸ and respecting the right to proceed notwithstanding certain proper parties are beyond the jurisdiction¹⁹ and the right to amend process or pleading;²⁰ and the competency of witnesses.¹ Federal statutes providing the party in whose name an infringement suit shall be maintained;² or the mode of procuring and producing testimony in an infringement suit³ or the form of action,⁴ or mode of pleading⁵ exclude any applicability of local statutes upon those subjects. So a State law permitting the examination by deposition, of a party to a suit prior to trial, is inconsistent with the Federal law declaring the mode of proof to be by oral examination in open court,⁶ and hence cannot be followed.⁷ This same section also renders generally inapplicable, state laws as to the taking and admissibility of depositions.⁸ It also forbids an order for the examination of a plaintiff suing for personal injuries, in advance of trial.⁹ The conformity provision is also to be construed in connection with R. S. § 954¹⁰ permitting amendments and directing Federal courts to disregard mere defects of form.¹¹ A proceeding to restore a lost record is sui generis, and is governed by act of Congress.¹²

[g] Effect of clause "as near as may be."

The earlier conformity laws conferred an express discretion upon the Federal courts to vary the State laws adopted for their guidance.¹⁶ "As near as may be" first appears in the conformity law enacted in 1872 and still in force. Somewhat conflicting views of the exact meaning of this

¹⁷United States v. Arnold, 69 Fed. 992, 16 C. C. A. 575; United States v. Indian G. D. 85 Fed. 930, 29 C. C. A. 578.

¹⁸Easton v. Hodges, 7 Biss. 324, Fed. Cas. No. 4,258; Paine v. Warren, 33 Fed. 358; Kirkpatrick v. Pope Mfg. Co. 61 Fed. 46.

¹⁹Allnut v. Lancaster, 76 Fed. 131.

²⁰Van Doren v. Pennsylvania R. R. 93 Fed. 268, 35 C. C. A. 282; North C. St. Ry. Co. v. Burnham, 102 Fed. 671, 42 C. C. A. 584; Booth v. Denike, 65 Fed. 47; Lange v. Union P. R. R. 126 Fed. 340, 62 C. C. A. 48; Kent v. Bay State G. Co. 93 Fed. 887; see also ante, § 813[b].

¹Whitford v. Clark Co. 119 U. S. 525, 30 L. ed. 501, 7 Sup. Ct. Rep. 308; Morris v. Norton, 75 Fed. 922, 21 C. C. A. 553.

²Webb v. Goldsmith, 127 Fed. 572.

³Marvin v. Autman, 46 Fed. 339.

⁴Myers v. Cunningham, 44 Fed. 346; Cottier v. Stimson, 18 Fed. 689, 9 Sawy. 435.

⁵Kulp v. Snyder, 94 Fed. 613.

⁶Post, § 917.

⁷Beardsley v. Littell, 14 Blatchf. 102, Fed. Cas. No. 1,185; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

⁸Tabor v. Indianapolis etc. Co. 66 Fed. 423; Despeaux v. Pennsylvania R. R. 81 Fed. 898; Shellabarger v. Oliver, 64 Fed. 307, 308; United States v. Pings, 4 Fed. 714; Seeley v. Kansas C. S. Co. 71 Fed. 555; United States v. Fifty Boxes, 92 Fed. 601, National Cash, etc. Co. v. Leland, 94 Fed. 503, 37 C. C. A. 372; Turner v. Shackman, 27 Fed. 184.

⁹Union Pac. Ry. v. Botsford, 141 U. S. 257, 35 L. ed. 739, 11 Sup. Ct. Rep. 1003. See also Denver, etc. Co. v. Norton, 141 Fed. 599 (C. C. A.)

¹⁰Ante, § 813.

¹¹Kent v. Bay S. G. Co. 93 Fed. 889.

¹²Turner v. Newman, 3 Biss. 307, Fed. Cas. No. 14,262.

¹⁶Supra, note[a].

clause have been expressed. It has been said that the statute is peremptory in character¹⁷ and means as near as may be practicable;¹⁸ that is, as near as possible in view of those things which stand in the way of absolute conformity, such as conflicting Federal statutes or peculiarities resulting from the nature of the Federal courts and their jurisdiction.¹⁹ And there is much to be said in favor of the theory that Congress intended to require harmony where possible, and to leave nothing to an individual judge's motion of the propriety of any particular feature of State practice so long as it could in fact be adapted to the remedial processes of the Federal courts. But this view does not seem to have prevailed. "The conformity," observed the Supreme Court, per Swaine, J., in one of its earliest decisions upon the clause, "is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolves upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."¹ While uniformity of procedure is intended by R. S. § 914, Congress expects it to be attained "largely through the discretion of the Federal courts, exercised in the form of general rules."² Since the existence of this ampler discretion is recognized, the customary presumption will be indulged that it was properly exercised by the lower court in a given case of variation from the State practice.³ Variations from State practice will be noted in the discussion of the different phases of procedure in subsequent sections of the text.

[h] Necessary that there be "like causes."

As it is the procedure in "like causes" that is adopted, it is said that conformity is not required where there are no similar cases in the State practice. Upon this ground it has been said that proceedings in rem for

¹⁷*Amy v. Watertown*, 130 U. S. 426, 23 L. ed. 286; *In re Chateaugay* 304, 32 L. ed. 947, 9 Sup. Ct. Rep. 530; *Nederland Ins. Co. v. Hall*, 84 Fed. 279, 27 C. C. A. 390.

¹⁸See *Republic Ins. Co. v. Williams*, 3 Biss. 370, Fed. Cas. No. 11,707; *Lewis v. Gould*, 13 Blatchf. 216, Fed. Cas. No. 8,324; *Edmunds v. Illinois Cent. R. R.* 80 Fed. 78, 85; *Chicago, etc. Ry. v. Metalstaff*, 101 Fed. 770, 41 C. C. A. 669; *United States v. Davis*, 103 Fed. 465; *Mutual, etc. Bank v. Bossieux*, 1 Hughes, 386, Fed. Cas. No. 9,977.

¹⁹See *supra*, note [f].

¹*Indianapolis, etc. R. R. v. Horst*, 93 U. S. 300, 23 L. ed. 898.

²*Shepard v. Adams*, 168 U. S. 623, 42 L. ed. 604, 18 Sup. Ct. Rep. 214. And see *Nudd v. Burrows*, 91 U. S.

³*Shepard v. Adams*, 168 U. S. 623,

42 L. ed. 604, 18 Sup. Ct. Rep. 214.

forfeiture under the revenue laws being *sui generis*, need not conform to State practice.⁵ A proceeding to restore lost records is *sui generis* and governed by the act of Congress.⁶ And it has been argued that the same is true of patent infringement suits.⁷ Nevertheless, other patent infringement suits at law have recognized State practice upon matters where there was no Federal statute to the contrary;⁸ so also have copyright suits.⁹ And in an action for a Federal statutory penalty where Congress had not prescribed the procedure it has been held that R. S. § 914 required substantial conformity to the State practice.¹⁰

[i] **Effect of conformity clause upon power to make rules.**

The power of the circuit and district courts to make rules and the effect of the concluding clause of R. S. § 914 thereon, have already been considered.¹³ R. S. § 914 undoubtedly diminishes the very broad power possessed by those courts under earlier process acts;¹⁴ although it does not affect the power to adopt by rule the State laws on attachment and execution conferred by R. S. §§ 915 and 916.¹⁵ The wording of R. S. § 914 is such that any change in State law upon a matter of procedure raises the question whether an existing rule of the Federal court upon the same subject is not repealed thereby. If the Federal Court adheres to its own rule of practice notwithstanding such change, the Supreme Court will presume that this was in the proper exercise of its discretion.¹⁶

§ 901. Writs and process in common-law causes.

Federal courts derive their power to issue the common-law writs from R. S. § 911,¹⁹ empowering them generally to issue writs, and from R. S. §§ 915 and 916²⁰ empowering them to issue attachment garnishment and execution. The form and general style of Federal writs are also prescribed by Congress.¹ So that the conformity re-

⁵Coffey v. United States, 117 U. S. 34 Fed. 745.

S. 235, 29 L. ed. 892, 6 Sup. Ct. Rep. 717; United States v. Fifty Boxes, 92 Fed. 602; United States v. Molloy, 31 Fed. 23.

⁶Turner v. Newman, 3 Biss. 307, Fed. Cas. No. 14,262.

⁷Marvin v. Aultman, 46 Fed. 339.

There are of course many special Federal provisions on the subject of infringement which preclude the operation of State laws: New York etc. Co. v. Sullivan, 111 Fed. 181; Myers v. Cunningham, 44 Fed. 346; Kulp v. Snyder, 94 Fed. 613; Webb v. Goldsmith, 127 Fed. 572.

⁸See May v. Mercer, 30 Fed. 246; Cottier v. Stimson, 18 Fed. 689, 9 Sawy. 435, verification of plea; Celluloid Mfg. Co. v. American, etc. Co.

⁹Johnston v. Klopsch, 88 Fed. 692.

¹⁰United States v. Elliott, 25 Int. Rev. 319, Fed. Cas. No. 15,043; see also United States v. Rose, 14 Fed. 681; United States v. O'Brien, 120 Fed. 446; United States v. Banister, 70 Fed. 44.

¹³§ 805[a].

¹⁴Supra, note[a].

¹⁵Post, §§ 905, 925; see Lamaster v. Keeler, 123 U. S. 376, 31 L. ed. 238, 8 Sup. Ct. Rep. 197.

¹⁶Shepard v. Adams, 168 U. S. 623, 42 L. ed. 604, 18 Sup. Ct. Rep. 214.

¹⁹Ante, § 841.

²⁰Post, §§ 905, 925.

¹Ante, § 836.

quirement of R. S. § 914 has little or no application to Federal writs. The conformity law applies, however, to process in common-law causes, except as regards form and style, which Congress has prescribed,² and as respects service, it being provided that Federal process shall be served by the marshal, and in general only within the district where it is issued.³ These requirements as to form and service forbid adoption in the Federal courts of the New York and Wisconsin practice is so far as it permits plaintiffs' attorney to issue and serve the summons.⁴ But the state law regarding sufficiency of service upon corporations, etc., is followed.⁵ The proper mode of procedure as respects the issue of summons in New York is considered in several cases.⁶ The State law as to endorsement upon the summons has been followed in the Federal courts,⁷ even in actions for penalties, brought by the United States.⁸ The State practice on *fieri facias* has been followed.⁹

Author's section.

§ 902. Parties in common-law causes.

R. S. § 914¹² imposes upon the Federal courts in common-law causes the general duty of following the local law respecting the proper parties plaintiff or defendant, and the joinder, substitution and misjoinder of parties.^[a] However, this general requirement of conformity is subordinate to several rules respecting parties which are peculiar to Federal practice and which being jurisdictional in character, are not subject to infringement or modification¹³ by provisions of State law. Thus the Federal law forbids abatement for want of necessary parties.¹⁴ It provides as to the effect of death of parties;¹⁵ and the effect of death or expiration of term, in cases of suit against officers.¹⁶ There are peculiar Federal rules respecting suits by assignees.¹⁷ The Federal courts have their own classification of parties as formal, necessary and indispensable.

²Ante, § 836.

³Ante, § 853.

⁴Ante, § 836[a].

⁵Ante, § 836.

⁶Johnson v. Healy, 9 Ben. 318, Fed. Cas. No. 7,389; Martin v. Criscuola, 10 Blatchf. 211, Fed. Cas. No. 9,159.

⁷Miller v. Gages, 4 McLean, 436, Fed. Cas. No. 9,571.

⁸United States v. Rose, 14 Fed. 681.

⁹Brown v. Chesapeake & O. C. Co. 4 Fed. 770; 4 Hughes, 584; see ante, § 841. [aa]

¹²Ante, § 900.

¹³Ante, § 5.

¹⁴Ante, § 817.

¹⁵Ante, §§ 814, 815.

¹⁶Ante, § 816.

¹⁷Ante, § 23.

ble,¹⁸ and will under certain circumstances proceed without necessary parties regardless of the State practice.^[b]

Author's section.

[a] **Conformity to State law respecting parties.**

The conformity requirements of R. S. § 914 apply to parties.¹ A state law authorizing a person with whom or in whose name a contract is made, to sue thereon in his own name is in force in the Federal court.² The Federal court in Missouri properly permitted a landlord to be joined as party to defend his tenants possession in accordance with the Missouri law.³ A State statute permitting an assignee of a contract to sue thereon in his own name applies in the Federal court there;⁴ and in States where the ancient rule forbidding suit by an assignee in his own name prevails, the Federal court there sitting, follows it.⁵ So where the State court permits a landlord to sue a subtenant upon the latter's agreement with tenant to assume the rent charge the Federal court will do the same.⁶ So the State law as to the right of a wife to sue without joining her husband⁷ is in force in the Federal court. And State laws as to the joinder of parties in a suit upon a bond;⁸ or in a suit against corporate stockholders;⁹ or in a suit on a contract on which several are liable,¹⁰ will be followed. A State law forbidding abatement for improper joinder has been followed;¹¹ and a State law permitting substitution of one defendant for another.¹² The question of the competency of an assignee to sue is determined by the law of the State where suit is brought, and not the law of the State where the contract is made;¹³ though the statutory right of a married woman to

¹⁸Ante, § 817[b].

¹Pritchard v. Norton, 106 U. S. 124, 130, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; Albany, etc. Co. v. Lundberg, 121 U. S. 451, 454, 30 L. ed. 982, 7 Sup. Ct. Rep. 958; Hale v. Tyler, 104 Fed. 761.

²Albany, etc. Co. v. Lundberg, 121 U. S. 451, 30 L. ed. 982, 7 Sup. Ct. Rep. 958.

³Phelps v. Oaks, 117 U. S. 241, 29 L. ed. 888, 6 Sup. Ct. Rep. 714.

⁴Arkansas S. Co. v. Belden Co. 127 U. S. 387, 32 L. ed. 248, 8 Sup. Ct. Rep. 1309; Delaware Co. v. Diebold, etc. Co. 133 U. S. 488, 33 L. ed. 674, 10 Sup. Ct. Rep. 399; Dexter H. Co. v. Sayward, 51 Fed. 729.

⁵Nederland L. I. Co. v. Hall, 84 Fed. 278, 27 C. C. A. 390.

⁶Adams v. Shirk, 105 Fed. 659, 44 C. C. A. 653.

⁷Morning J. Assn. v. Smith, 56 Fed. 141, 4 C. C. A. 8; Texas, etc. Ry. v. Humble, 181 U. S. 61, 45 L. ed. 750, 21 Sup. Ct. Rep. 526.

⁸St. Louis B. Assoc. v. Hayes, 97 Fed. 859, 38 C. C. A. 449.

⁹Borland v. Haven, 37 Fed. 394, 13 Sawy. 551.

¹⁰Atlantic & P. R. R. v. Laird, 164 U. S. 400, 41 L. ed. 488, 17 Sup. Ct. Rep. 120; Sawin v. Kenny, 93 U. S. 290, 23 L. ed. 926; United States v. Tracy, 8 Ben. 1, Fed. Cas. No. 16,536; United States v. Lawrence, 14 Blatchf. 231, Fed. Cas. No. 15,574; see also Lewis v. Marshal, 5 Pet. 474, 8 L. ed. 195, following the Kentucky law as to joinder of parties.

¹¹Perry v. Mechanics' M. I. Co. 11 Fed. 478.

¹²Harris v. Hess, 10 Fed. 263, 20 Blatchf. 253.

¹³Nederlands L. I. Co. v. Hall, 84 Fed. 278, 27 C. C. A. 390; Glenn v. Marbury, 145 U. S. 508, 36 L. ed. 794, 12 Sup. Ct. Rep. 917; Edmunds v. Illinois Cent. R. R. 80 Fed. 84; see Osborn v. First Nat. Bank, 175 Pa. St. 497, 498, 34 Atl. 858.

sue in her own name for personal injuries, is governed by the law of the State where the injury occurred.¹⁴

[b] Local law not followed if in conflict with Federal.

A State statute permitting joinder of parties cannot be followed for the purpose of aggregating claims large enough to reach the jurisdictional amount requisite in the Federal courts;¹⁷ or where the Federal statute as to suits by assignees forbids.¹⁸ The State law as to necessary parties cannot apply where by R. S. § 737, the court is permitted to dispense with parties who cannot be served.¹⁹ The joinder of the survivor of one of several co-obligors, as defendant, is governed by Federal and not State law.²⁰ So, also the Federal statute and not State law is controlling upon the question who is proper party plaintiff in a patent infringement suit.¹

§ 903. Pleading in common law causes.

The forms and modes of pleading in civil cases other than of equity and admiralty must conform to those prevailing in the courts of the State where the Federal court is sitting. Indeed the conformity requirements of R. S. § 914⁴ apply with especial force to the forms and modes of pleading, and uniformity in that respect was one of the chief objects of the enactment of the present law.⁵ While Congress has laid down the rules to govern amendment of pleadings,⁶ there are no other general enactments tending to prevent the attainment of entire uniformity between Federal and State courts in that respect, although there are a few Federal requirements as to pleading in patent cases and in some other special actions and proceedings.⁷ The conformity in the matter of pleading does not, however, permit the pleading of equitable defenses in actions at law or the blending of legal and equitable causes of action, or suit on the law side by virtue of a State statute declaring the remedy to be at law, where by Federal standards it is in equity.^{[a]-[e]}⁸ The right to plead a set-off or counter claim conferred by modern statutes represents a blending of law and equity, and such statutes are not adopted in the Federal courts in so far as permitting equitable defenses in actions at law.^[a]

Author's section.

¹⁴Texas, etc. Ry. v. Humble, 181 U. S. 61, 45 L. ed. 750, 21 Sup. Ct. Rep. 526.

¹⁷Holt v. Bergevin, 60 Fed. 1.

¹⁸See Dromgoole v. Farmers, etc. Bank, 2 How. 243, 11 L. ed. 252; Keary v. Farmers, etc. Bank, 16 Pet. 95, 10 L. ed. 897.

¹⁹Allnut v. Lancaster, 76 Fed. 131.

²⁰United States v. Bullard, 103 Fed. 259.

¹New York, etc. Co. v. Sullivan, 111 Fed. 181.

⁴Ante, § 900.

⁵Ante, § 900 [aa].

⁶Ante, § 813.

⁷See ante, § 900[h]; post, § 1167 et seq.

⁸Ante, § 800.

[a] Adoption of State forms of pleading.

The conformity law applies to the pleadings in common-law cases.¹⁰ If the State adheres to the old common forms and rules of pleading the Federal court there sitting will do the same;¹¹ and if it has discarded them in favor of a simple petition or complaint, and one or two subsequent pleadings designed to raise all issues of law or fact, this practice is equally obligatory.¹² If the State law repeals anomalous special proceeding, the repeal is equally effective in the Federal court.¹³ Conformity to State pleadings includes the form and order of pleading;¹⁴ the right to file supplemental pleadings;¹⁵ the time of pleading;¹⁶ the sufficiency of a pleading to sustain a verdict; and the sufficiency of the denials in an answer.¹⁷ It involves adoption of the State rules respecting the construction of pleadings;¹⁸ testing their sufficiency and scope;¹⁹ respecting the necessity for specially averring the defense of contributory negligence;²⁰ the necessity for reply to new matter in the answer;¹ the scope of a general demurrer;² the rule that only ultimate facts be stated;³ the rule as to leave to plead over after demurrer;⁴ as to demurrer to answer.⁵ Federal pleading must conform in the matter of verification;⁶ and this has been required even in a patent

¹⁰*Taylor v. Brigham*, 3 Woods, 377, Fed. Cas. No. 13,781; *Lewis v. Gould*, 13 Blatchf. 216, Fed. Cas. No. 8,324; *Merchants, etc. Bank v. Wheeler*, 13 Blatchf. 218, Fed. Cas. No. 9,439; *Oscanyan v. Winchester, etc. Co.* 15 Blatchf. 79, Fed. Cas. No. 10,600; *Saunders v. Short*, 86 Fed. 229, 30 C. C. A. 462.

¹¹*Phillips, etc. Co. v. Seymour*, 91 U. S. 655, 23 L. ed. 345.

¹²*Indianapolis, etc. R. R. v. Horst*, 93 U. S. 300, 23 L. ed. 901; *Muser v. Robertson*, 17 Fed. 500, 21 Blatchf. 368.

¹³*Harvey v. Virginia*, 20 Fed. 411.

¹⁴*Southern P. Co. v. Denton*, 146 U. S. 209, 36 L. ed. 942, 13 Sup. Ct. Rep. 44.

¹⁵*Merrill v. Rokes*, 54 Fed. 452, 4 C. C. A. 433.

¹⁶*Ricard v. New P. T. P.* 5 Fed. 433; *Wertheim v. Continental, etc. R. R.* 11 Fed. 689, 20 Blatchf. 508; *Phoenix Ins. Co. v. Charleston B.* 65 Fed. 628, 13 C. C. A. 58.

¹⁷*Bond v. Dustin*, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 296.

¹⁸*Robertson v. Perkins*, 129 U. S. 235, 32 L. ed. 688, 9 Sup. Ct. Rep. 279.

¹⁹*United States v. Parker*, 120 U. S. 94, 30 L. ed. 604, 7 Sup. Ct. Rep. 454; *Northern P. R. R. v. Paine*, 119 U. S. 561, 30 L. ed. 531, 7 Sup. Ct.

Rep. 323; *Sommer v. Carbon H. Coal Co.* 89 Fed. 60, 32 C. C. A. 156; *Glenn v. Sumner*, 132 U. S. 156, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; *Rush v. Newman*, 58 Fed. 158, 7 C. C. A. 136; *Austin v. Seligan*, 18 Fed. 519, 21 Blatchf. 506, applying the State rule that relief may be granted regardless of the form, whether ex contractu or ex delicto. *United States v. Tilton*, 7 Ben. 306, Fed. Cas. No. 16,525, as to sufficiency of plea.

²⁰*Gaddoneux v. New Orleans Ry.* 128 Fed. 806.

¹*Burlington Ins. Co. v. Miller*, 60 Fed. 254, 8 C. C. A. 612.

²*Van Doren v. Pennsylvania R. R.* 93 Fed. 262, 35 C. C. A. 282; see also *General Electric Co. v. Westinghouse, etc.*, Co. 144 Fed. 458.

³*Muser v. Robertson*, 17 Fed. 500, 21 Blatchf. 368.

⁴*Green v. Underwood*, 86 Fed. 427, 30 C. C. A. 162.

⁵*Kester v. Western U. T. Co.* 108 Fed. 926.

⁶*St. Louis, etc. R. R. v. Knight*, 122 U. S. 96, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1132; *Ralls Co. v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *In re Findlay*, 5 Biss. 480, Fed. Cas. No. 4,789; *United States v. Bryant*, 111 U. S. 503, 28 L. ed. 498, 4 Sup. Ct. Rep. 601.

infringement suit where the practice is largely regulated by Congress.⁷ So the mode of pleading the general issue in a copyright infringement suit has been required to conform to the State practice.⁸ A State law forbidding the filing of a fourth petition where three have been held defective on demurrer, is obligatory on the Federal courts.⁹ A pleading which is unauthorized by the State practice will be set aside on motion.¹⁰ If a defense may be specially pleaded in the State court, the same rule holds in the Federal tribunal.¹¹ The State law as to what causes of action may be joined in one suit will usually be followed,¹² although the conformity has been refused where having the effect to oust the court's jurisdiction.¹³ So the State law requiring the filing of deeds with the complaint in ejectment is followed.¹⁴ If by the State law demurrer is the proper mode of raising the defense of limitations, this rule applies in the Federal court;¹⁵ as also the rule as to the mode of noticing a demurrer for hearing.¹⁶

Where the State practice requires a jurisdictional issue to be raised by answer and not by plea the Federal court will follow this rule²⁰ although it will require a separate finding by the jury upon such issue;¹ and in the absence of any finding upon the jurisdictional issue the case will be reversed.² The act of 1875 requiring dismissal at any time want of jurisdiction appear³ tends somewhat to prevent strict conformity with the State practice, where a question of the court's jurisdiction is involved.⁴

[c] State rules as to proof not adopted.

Where a State rule is not one of pleading but of proof the Federal courts need not conform thereto; hence though the New York courts require the original debt to be proved in an action to enforce a stockholder's liability, the Federal court there will not require it to be alleged and proved in a suit governed by the Kansas stockholders law.⁶

⁷Cottier v. Stimson, 18 Fed. 689, 9 Sawy. 435.

⁸Johnston v. Klopsch, 88 Fed. 692.

⁹Woodward v. Gould, 28 Fed. 736.

¹⁰Lewis v. Gould, 13 Blatchf. 216, Fed. Cas. No. 8,324. However, it does not matter what name the party gives a pleading; Jones v. Rowley, 73 Fed. 286.

¹¹Preferred Ac. Co. v. Barker, 93 Fed. 158, 35 C. C. A. 250; English v. Ralston, 112 Fed. 273.

¹²Judson v. Macon Co. 2 Dill. 213, Fed. Cas. No. 7,568; Castro v. De Uriarte, 12 Fed. 255.

¹³O'Connell v. Reed, 56 Fed. 531, 5 C. C. A. 586.

¹⁴Alexander v. Gordon, 101 Fed. 91, 41 C. C. A. 228.

¹⁵Chemung v. Lowery, 93 U. S. 76, 23 L. ed. 806. But see Theroux v. Northern Pac. R. R. 64 Fed. 84, 12

C. C. A. 52. The Federal courts also follow a State rule that demurrer is not the proper mode: Barnes v. Union P. Ry. 54 Fed. 87, 4 C. C. A. 199.

¹⁶Rosenbach v. Dreyfuss, 2 Fed. 23.

²⁰Roberts v. Lewis, 144 U. S. 659, 36 L. ed. 579, 12 Sup. Ct. Rep. 781; Draper v. Springport, 15 Fed. 328, 21 Blatchf. 240.

¹Greene v. Tacoma, 53 Fed. 562; Roberts v. Langenbach, 119 Fed. 349, 56 C. C. A. 253; Ashley v. Board, 60 Fed. 55, 8 C. C. A. 455; see Jones v. Rowley, 73 Fed. 286.

²Roberts v. Lewis, 144 U. S. 659, 36 L. ed. 579, 12 Sup. Ct. 781.

³Ante, § 818.

⁴See Jones v. Rowley, 73 Fed. 286.

⁶American, etc. Co. v. Woodworth, 79 Fed. 952.

[d] Right to plead set-off or counterclaim.

The modern right of set off and counterclaim represents both the old equitable right of set-off, and the set-off and recoupment allowed in courts of common law. So far as a State statute permits the set off or recoupment that was allowable at common law, or enlarges the right of thus pleading some matter of a legal and not equitable character, the Federal courts should recognize and conform to its requirements.⁸ But equitable defenses are not pleadable at law in the Federal courts.⁹ Hence a matter within the modern set-off or counterclaim statutes, that is nevertheless equitable in character cannot be pleaded in a Federal action at law.¹⁰ A recent case at circuit goes further than this and declares that it is only when a set-off or counterclaim is the equivalent of the common-law recoupment that it is allowable at law in the Federal courts, ignoring the fact that a statutory set-off was recognized in actions at law prior to the time of American independence.¹¹ The case declared that a set-off seeking an affirmative judgment against plaintiff was formerly only allowable in courts of equity, and hence was an equitable defense, though the claim was in fact legal in character, being an ordinary claim for damages *ex contractu*.¹²

§ 904. Provisional and other remedies in general.

In general the same legal remedies are open to a party in the Federal as in the State courts, by virtue of the adoption of the State practice under R. S. § 914.¹⁶ Provisional remedies by way of attachment, and arrest and bail are governed, however, by specific statutory provisions;¹⁷ and the same is true of remedies after judgment by execution supplementary proceedings, etc.¹⁸ Other remedies, however, such as ejectment or replevin and their statutory equivalents, are within the conformity requirements of R. S. § 914.

⁸Patridge v. Insurance Co. 15 Wall. 580, 21 L. ed. 229; Frank v. Chetwood, 9 Rep. 6, Fed. Cas. No. 5, 051; Bull v. First, etc. Bank, 14 Fed. 614; Frick v. Clements, 31 Fed. 542; Adams v. Spokane D. Co. 57 Fed. 889, 23 L.R.A. 334; Wheeling B. Co. v. Cochran, 68 Fed. 141, 15 C. C. A. 321; Charnley v. Sibley, 73 Fed. 982, 20 C. C. A. 157; Dexter H. Co. v. Sayward, 51 Fed. 729; Fidelity Ins. Co. v. Mechanics' S. Bank, 97 Fed. 303, 38 C. C. A. 193; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696. It is also true that so far as a State law of counterclaim enlarges equitable rights, it will be followed by the Federal court: Iowa, etc. Co. v. Temeseal W. Co. 95 Fed. 320.

⁹Ante, § 800.

¹⁰Church v. Spiegelburg, 31 Fed. 601; Herklotz v. Chase, 32 Fed. 433; Snyder v. Pharo, 25 Fed. 398.

¹¹Statute, 2 Geo. II. c. 22, § 13, 8 Geo. II. c. 24, § 5; Pomeroy Code, Rem. § 729.

¹²Jewett Car Co. v. Kirkpatrick C. Co. 107 Fed. 622. But even if a legal claim was formerly only allowable in set off in a court of equity, a statute admitting it in law merely enlarges a legal and not an equitable right. See Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. 696, where counterclaim seeking affirmative judgment for defendant was allowed in an action at law.

¹⁶Ante, § 900.

¹⁷Post, §§ 905, 1537 et seq.

¹⁸Post, § 925.

In the matter of extraordinary relief through the agency of various common-law writs, the power of the Federal courts is derived from R. S. § 911¹⁹ and is neither restricted nor enlarged by State laws.

Author's section.

The local remedies are in force in the circuit court.²⁰ This applies to partition,³ and ejectment.⁴ But a provision of State law that no lis pendens shall bind bona fide purchaser, unless recorded in a specified way is not operative in the Federal Courts.⁵

§ 905. — remedies by attachment and garnishment the same as in State courts.

In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment^{[a]-[d]} or other process,^[e] against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws^[f] as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy.

R. S. § 915, U. S. Comp. Stat. 1901, p. 684.

[a] History of section and cross-references.

The right of attachment is also specifically conferred upon the United States in actions under the postal laws, against postmasters, their bondsmen, etc.⁸ There are also special provisions respecting garnishment in suits by the United States.⁹ The above provision is from a law of 1872.¹⁰ Prior thereto the general conformity provision in the process acts applied both to attachments and execution;¹¹ and power to adopt the State attachment laws by rule, was well settled.¹² As early as 1848, however, there was a specific Federal statute adopting the State laws as to dissolu-

¹⁹Ante, 841.

²⁰Strachen v. Clybourn, 3 McLean, 174, Fed. Cas. No. 13,520.

³Ex parte Biddle, 2 Mason, 472, Fed. Cas. No. 1,391.

⁴Fraser v. Weller, 6 McLean, 11, Fed. Cas. No. 5,064; see post, § 909.

⁵King v. Davis, 137 Fed. 223.

⁸Post, §§ 1399, et seq.

⁹Post, §§ 1412-1414.

¹⁰Act June 1, 1872, c. 255, § 6, 17 Stat. 197.

¹¹Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Bank of U. S. v. Halstead, 10 Wheat. 51, 6 L. ed. 264.

¹²Ely v. Hanks, 1 W. L. M. 107, Fed. Cas. No. 4,430; see also Clafin v. Steinberg, 2 Dill. 324, Fed. Cas. No. 2,777. If there was no State attachment law, the remedy was not available in the Federal court. Binns v. Williams, 4 McLean, 580, Fed. Cas. No. 1,423.

tion of an attachment.¹³ So also the removal laws have from the first made provision respecting the efficacy after removal of an attachment procured in the State court.¹⁴ The conformity requirements of this section relate primarily to questions of procedure and not of jurisdiction, and error in its construction or application would not, ordinarily, at least,¹⁵ involve a jurisdictional question.¹⁶ It is at most mere error and not a jurisdictional defect, where the affidavit is claimed to be insufficient;¹⁷ or where a party is permitted to attach for a claim not yet due.¹⁸

[b]Scope and extent of power to adopt State attachment law.

In general the State attachment laws are in force in and followed by the Federal courts.² So the State decisions construing a State attachment law will ordinarily be followed by the Federal courts.³ The State law as to the furnishing of security applies.⁴ The State law directing the method of determining questions of priority⁵ or the rights of successive attaching creditors,⁶ and are properly followed. Where property has by attachment of the marshal passed into the custody of the Federal court, other creditors and parties interested may come before it for adjudication of their rights though in their case there would be no diverse citizenship, nor value in dispute sufficient to give the court jurisdiction.⁷ Such a proceeding is ancillary.⁸ Suit upon the attachment bond is similarly ancillary, and maintainable regardless of citizenship.⁹ Since R. S. § 985¹⁰ empowers the Federal court to issue execution operative in other judicial districts of a State, it is proper so to issue the writ of attachment where the State law permits attachment to run in any county of the State.¹¹

¹³Post, § 906; see *Ely v. Hanks*, 1 W. L. M. 107, Fed. Cas. No. 4,430.

¹⁴See judiciary act Sept. 24, 1789, § 12, 1 Stat. 79, 80; *New E. S. Co. v. Bliven*, 3 Blatchf. 240, Fed. Cas. No. 10,156; see post, § 1153.

¹⁵But it would seem that a holding that process of foreign attachment was permissible in Federal courts would raise a jurisdictional question.

¹⁶*Schunk v. Moline, etc. Co.* 147 U. S. 507, 37 L. ed. 255, 13 Sup. Ct. Rep. 416.

¹⁷*Erstein v. Rothschild*, 22 Fed. 61; see *Ely v. Hanks*, 1 W. L. M. 107, Fed. Cas. No. 4,430.

¹⁸*Schunk v. Moline, etc. Co.* 147 U. S. 507, 37 L. ed. 255, 13 Sup. Ct. Rep. 416.

²*Rothschild v. Knight*, 184 U. S. 341, 46 L. ed. 580, 22 Sup. Ct. Rep. 391; *Lehman v. Berdin*, 5 Dill. 340, Fed. Cas. No. 8,215; *Mather v. Nesbit*, 13 Fed. 872, 4 McCrary, 505; *Bates v. Days*, 17 Fed. 170, 5 McCrary, 342; *Lafolloye v. Carriere*, 24 Fed. 346; *Brooks v. Fry*, 45 Fed. 776.

Fed. Proc.—54.

³*Third Nat. Bank v. Teal*, 5 Fed. 507, 4 Hughes, 572; *Peoples' S. Bank v. Batchelder*, 51 Fed. 134, 2 C. C. A. 126; *Rich v. Adler Co.* 71 Fed. 151, 18 C. C. A. 15; *Lehman v. Berdin*, 5 Dill. 340, Fed. Cas. No. 8,215; *Fleitas v. Cockrem*, 101 U. S. 301, 25 L. ed. 954.

⁴*Singer Mfg. Co. v. Mason*, 5 Dill. 488, Fed. Cas. No. 12,903. See *Fleitas v. Cockrem*, 101 U. S. 301, 25 L. ed. 954.

⁵*Bates v. Days*, 17 Fed. 167, 5 McCrary, 342.

⁶*Bankers, etc. Co. v. Chicago C. Co.* 28 Fed. 398.

⁷*Krippendorf v. Hyde*, 110 U. S. 284, 28 L. ed. 149, 4 Sup. Ct. Rep. 27; *Gumbel v. Pitkin*, 124 U. S. 155, 31 L. ed. 382, 8 Sup. Ct. Rep. 379; *Rice v. Adler G. Co.* 71 Fed. 151, 18 C. C. A. 15.

⁸See ante, § 3.

⁹*Files v. Davis*, 118 Fed. 465.

¹⁰Post, § 1865.

¹¹*Treadwell v. Seymour*, 41 Fed.

579.

But the State law as to arrest in civil cases is not adopted by this section;¹⁴ and the matter of attachment against a national bank, is affected by another provision.¹⁵ This section has no reference to attachment in equity and does not negative the existence of the writ in Federal courts of equity.¹⁶ An attachment has been held valid under R. S. § 918, and a Federal court rule, though it was not made returnable as provided by State law.¹⁷

[c] Limitations upon power to adopt State law, and variations from State law.

There are general Federal statutes regarding amendments¹⁹ which are applicable to attachment proceedings.²⁰ So that while amendments are often allowed in conformity to State statutes regarding amendment, the absence of such State law will not prevent a Federal court amending a defective affidavit on attachment under the power conferred by the Federal statute.¹ The State practice permitting dissolution of attachment by a judge in vacation has been deemed inapplicable in the Federal court and inconsistent with the Federal laws.²

[d] —no power of foreign attachment.

Where the State law authorizes attachment as a means of compelling appearance by one without the jurisdiction, such practice is not adopted for the Federal courts by virtue of this section;⁴ either originally or on removal.⁵ Federal process must be served personally upon a defendant within the district,⁶ except in a few specific cases.⁷ It would seem however that as defendant may waive proper service by appearance,⁸ improper issuance of attachment would be cured by such appearance.

[e] Garnishment.

There are special Federal provisions regarding garnishment in suits by

¹⁴United States v. Griswold, 5 796, 26 L. ed. 462; Nazro v. Cragin, 3 Dill. 474, Fed. Cas. No. 10,062; Anderson v. Shaffer, 10 Fed. 266; Lackett v. Rumbaugh, 45 Fed. 23, 30; Cent. T. Co. v. Chattanooga Ry. Co. 68 Fed. 685; Dormitzer v. Ill. Bridge Co. 6 Fed. 218; Harland v. United Lines Tel. Co. 40 Fed. 308, 6 L.R.A. 252; Chittenden v. Darden, 2 Woods, 437, Fed. Cas. No. 2,688; Butterworth v. Hill, 114 U. S. 128, 29 L. ed. 119, 5 Sup. Ct. Rep. 796. Contra, see Guil-lou v. Fontain, 32 Leg. Int. 362, Fed. Cas. No. 5,861.

¹⁵Post, § 907.

¹⁶Steam S. C. Co. v. Sears, 20 Blatchf. 23, 9 Fed. 8. See ante, § 841 [c].

¹⁷Yokey v. Boston, etc R. R. 130 Fed. 992.

¹⁹Ante, § 813.

²⁰Tilton v. Cofield, 93 U. S. 167, 23 L. ed. 860; Rothchild v. Knight, 184 U. S. 341, 46 L. ed. 580, 22 Sup. Ct. Rep. 391; Matthews v. Densmore, 109 U. S. 219, 27 L. ed. 913, 3 Sup. Ct. Rep. 126; Wolf v. Cook, 40 Fed. 432; Peoples Sav. Bank v. Batchelder, 51 Fed. 130, 2 C. C. A. 126.

¹Erstein v. Rothschild, 22 Fed. 61.

²Claffin v. Steinberg, 2 Dill. 326, Fed. Cas. No. 2,777.

⁴Ex parte Railway Co. 103 U. S.

⁵Lackett v. Rumbaugh, 45 Fed. 23.

⁶Ante, § 853, Erstein v. Rothschild, 22 Fed. 61, 2 C. C. A. 126.

⁷See § 856.

⁸Toland v. Sprague, 12 Pet. 330, 331, 9 L. ed. 1106. Ante, § 860.

the United States.⁹ But in other respects local laws as to garnishment comes within the phrase "attachment or other process," of R. S. § 915, and are in force in the Federal courts.¹⁰ Where a State law authorizes garnishment in aid of an execution, such remedy is also available in the Federal courts under R. S. § 916 adopting State execution laws.¹¹

[f] Adoption of State attachment laws by rule.

While the act of 1872 limited the power to make rules previously existing under the general conformity enactment,¹² it still left the Federal courts this larger discretion in the matter of attachments. They are not obliged, as under R. S. § 914, to adopt existing remedies in the matter of attachment. The cases show, however, that the general tendency of the courts is to keep abreast of the State laws in that respect and to adopt changes therein, as soon as made. So well recognized is this tendency to the stricter conformity imposed in other matters of practice by R. S. § 914, that upon appeal "in the absence of convincing evidence to the contrary the presumption of the appellate court is that the remedial statutes in force in the States at the time when proceedings under them were taken in the Federal courts had been adopted by those courts, either by written rule or by general practice."¹⁴ In this respect written rule is no more necessary than it was under the early conformity laws; but uniform practice and judicial decisions in conformity therewith, are sufficient evidence of the de facto adoption of a rule.¹⁵

§ 906. — State law as to dissolution of attachment applies.

An attachment of property, upon process instituted in any court in the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections [i. e., relating to attachment in suits by the United States against postmasters, etc.¹⁸] shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State: Provided, That nothing herein contained shall interfere with any priority of the United States in the payment of debts.

R. S. § 933, U. S. Comp. Stat. 1901, p. 689.

This provision was originally enacted in 1848.¹⁹ State insolvency laws

⁹Post, §§ 1412-1414.

¹⁰Wile v. Cohn, 63 Fed. 759; Randolph v. Tandy, 98 Fed. 939, 39 C. C. A. 351; Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658, 101 Fed. 654, 41 C. C. A. 573.

¹¹Canal, etc. Co. v. Hart, 114 U. S. 654, 29 L. ed. 226, 5 Sup. Ct. Rep. 1127. See post, § 925.

¹²Ante, § 900 [a].

¹⁴Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658. See also Citizens Bank v. Farwell, 56 Fed. 570, 6 C. C. A. 24. Ante, § 805 [c].

¹⁵Ante, § 805 [c].

¹⁸See post, §§ 1399 et seq.

¹⁹Act March 14, 1848, c. 18, § 9 Stat. 213. See also Act February 23, 1865,

very commonly provide for dissolution of an attachment upon cession of the bankrupts property.²⁰ The State practice upon motion for release or dissolution of attachment has also been followed.² But the Federal court has refused to conform to a State law permitting dissolution by a judge during vacation, because inconsistent with Federal laws as to the powers of a Federal judge.³ So also the State law as to appeal from an interlocutory order on motion to dissolve attachment, has no application to the Federal practice,⁴ as the conformity provisions do not apply to proceedings for review.⁵

§ 907. — attachment against national banks.

No attachment . . . shall be issued against such association [a National bank] or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Part of R. S. § 5242, U. S. Comp. Stat. 1901, p. 3517.

This enactment also declared invalid, transfers in contemplation of insolvency and forbids injunction,⁷ and execution,⁸ as well as attachment prior to final judgment. The proviso forbidding attachment execution and injunction was first enacted in 1873⁹ and was incorporated in R. S. § 5242 by the revision of 1875.¹⁰ Since R. S. § 915¹¹ empowers Federal courts to issue attachment only where the remedy is available in the State court, this section indirectly disables the Federal courts as well at the State tribunals, from issuing attachment against a national bank in advance of final judgment.¹² The provision is not to be construed as applying only where a bank is insolvent, nor is it affected by the later act of 1882¹³ restricting the jurisdiction of Federal courts over suits by and against national banks.¹⁴

c. 47, 13 Stat. 434. As to the purpose of the act of 1848, see Ely v. Hanks, 1 W. L. M. 107, Fed. Cas. No. 4,430.

²⁰Tua v. Carriere, 117 U. S. 201, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; Shwartz v. Claffin, 60 Fed. 676, 9 C. C. A. 204. See also Muser v. Kern, 55 Fed. 916; Heath, etc. Co. v. Union Oil Co. 83 Fed. 776; Sloane v. Chiniquy, 22 Fed. 213.

²Glidden v. Whittier, 46 Fed. 437; Feurer v. Stewart, 82 Fed. 294; Jenks v. Richardson, 71 Fed. 365.

³Claffin v. Steinberg, 2 Dill. 324, Fed. Cas. No. 2,777.

⁴Logan v. Goodwin, 101 Fed. 654, 41 C. C. A. 573.

⁵See ante, § 900 [d].

⁷See post, § 1118.

⁸See post, § 1874.

⁹Act March 3, 1873, c. 269, § 2, 17 Stat. 603.

¹⁰Act February 18, 1875, c. 80, 18 Stat. 316, 320.

¹¹Ante, § 905.

¹²Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718; Garner v. Second Nat. Bank, 66 Fed. 369. But the same is not true of injunction in the Federal court: Hower v. Weiss M. & E. Co. 55 Fed. 359, 5 C. C. A. 129.

¹³Ante, § 24.

¹⁴Van Reed v. Peoples Nat. Bank, 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. Rep. 775.

§ 908. — replevin and statutory substitutes therefor.

State laws giving a remedy by replevin for securing possession of personal property, or providing statutory substitutes therefor, such as the remedy by "claim and delivery," are in force in the Federal courts and available to Federal suitors by virtue of the conformity requirements of R. S. § 914.¹⁷ There is a provision of the revised statutes declaring property taken under the revenue laws irrepleviable.¹⁸

Author's section.

If a State has abolished replevin the remedy is no longer available in the Federal court there sitting.¹⁹ The statutory action of claim and delivery is in many States a substitute for replevin and available in the Federal court.²⁰ State decisions construing the State replevin laws will be followed;¹ and the State law as to the obligation upon a replevin bond;² and the effect of the giving of bond.³ But in replevin proceedings brought by the United States the provision of the State law regarding a replevin bond is not applicable to compel the United States to furnish such a bond.⁴ Where property is in the custody of the law by virtue of levy thereon by the marshal under valid writ, a replevin in another court, is not a proper mode of relief.⁵

§ 909. Ejectment and statutory substitutes therefor.

The State laws and practice providing legal as distinguished from equitable^[b] remedies for the possession of, or to try title to real property, are in force in the Federal courts and available to Federal suitors by virtue of the conformity requirements of R. S. § 914,⁷ and by virtue also of R. S. § 721,⁸ making State laws the rules of decision in Federal courts.^[a]

Author's section.

¹⁷Ante, § 900.

¹⁸Post, § 1386.

¹⁹Baltimore & O. R. R. v. Hamilton, 16 Fed. 181. See on appeal Ex parte Baltimore, etc. R. R. 108 U. S. 566, 27 L. ed. 812, 2 Sup. Ct. Rep. 876.

²⁰Vance v. W. A. Vandercock Co. 170 U. S. 473, 42 L. ed. 1113, 18 Sup. Ct. Rep. 645.

¹Wood v. Weimar, 104 U. S. 791, 26 L. ed. 781; Schulenberg v. Harri-man, 21 Wall. 64, 22 L. ed. 551.

²Douglass v. Douglass, 21 Wall. 104, 22 L. ed. 479.

³Cornett v. Williams, 20 Wall. 245, 22 L. ed. 257.

⁴United States v. Bryant, 111 U. S. 499, 28 L. ed. 496, 4 Sup. Ct. Rep. 601.

⁵Lammon v. Fensier, 111 U. S. 19, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; Gumbel v. Pitkin, 124 U. S. 145, 31 L. ed. 374, 8 Sup. Ct. Rep. 379. See ante, § 17.

⁷Ante, § 900.

⁸Ante, § 12.

[a] Remedies by ejectment, writ of right, trespass to try title and unlawful detainer.

The Federal courts have frequently adopted and enforced ejectment as a remedy for recovery of possession of real property following the State rules as to pleading and proof thereon.¹⁰ So a local remedy by petitory action is available in the Federal court.¹¹ Writ of right was at one time a common remedy and has been entertained by the Federal courts.¹² Trespass to try title is the common remedy in some jurisdictions and is enforced by the Federal courts there sitting.¹³ The same is true of the action of forcible entry and unlawful detainer.¹⁴ In all these actions the Federal courts under R. S. § 914 properly follow the forms and modes of proceeding prescribed by the State laws. Under R. S. § 721 and under controlling principles of law the substantive law administered by the Federal courts in such cases are also in the main derived from the law of the State where the property is situated.¹⁵

[b] Restriction as to equitable remedies, titles, or defenses—quieting title.

The preservation of the distinction between law and equity in the Federal courts sometimes prevents a strict conformity between the Federal and State practice in the matter of suits for the recovery of lands. Thus the Federal courts will not follow State courts in permitting ejectment or similar remedy at law to be maintained upon an equitable title; nor in permitting equitable defenses.¹⁶ The modern statutory action to quiet title has been the source of perplexity in Federal practice. It is settled that it is equitable in character and therefore not governed by the conformity requirements of R. S. § 914.¹⁷

§ 910. Right of trial by jury guaranteed.

In suits at common law,^[c] where the value in controversy shall exceed twenty dollars, the right of trial by jury^[b] shall be preserved.^[a]

Part of 7th Amendment, U. S. Constitution

¹⁰See *McArthur v. Porter*, 6 Pet. 211, 8 L. ed. 371, following the State practice at a time when the fictions were preserved; *Barrows v. Kindred*, 4 Wall. 402, 18 L. ed. 383, following the Illinois practice in which all fictions abolished. *Metzgar v. McCoy*, 105 Fed. 676; *King v. Davis*, 137 Fed. 198.

¹¹*Gilmer v. Poindexter*, 10 How. 267, 13 L. ed. 411; *United States v. King*, 3 How. 787, 11 L. ed. 824.

¹²*Green v. Liler*, 8 Cranch, 249, 3 L. ed. 545; *Homer v. Brown*, 16 How. 364, 14 L. ed. 970; *Green v. Watkins*, 7 Wheat. 29, 5 L. ed. 388; *Inglis v. Sailors* S. H. 3 Pet. 133, 7 L. ed. 617.

¹³*Brownsville v. Cavazos*, 100 U. S. 145, 25 L. ed. 574; *Cox v. Hart*, 145 U. S. 389, 36 L. ed. 741, 12 Sup. Ct. Rep. 962; *Cooke v. Avery*, 147 U. S. 393, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Grayson v. Breckenridge*, 108 Fed. 583, 47 C. C. A. 504; *Cochran v. Schreiber*, 107 Fed. 371, 46 C. C. A. 349.

¹⁴See *Lehmen v. Dickson*, 148 U. S. 76, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *Maloney v. Adsit*, 175 U. S. 289, 44 L. ed. 163, 20 Sup. Ct. Rep. 115; *Ellis v. Fitzpatrick*, 118 Fed. 430, 55 C. C. A. 260.

¹⁵Ante, §§ 10-12.

¹⁶Ante, § 800 [a] [b].

¹⁷Ante, § 800.

[a] In general.

The remainder of the Seventh Amendment was proposed Sept. 25, 1789, and ratified Dec. 15, 1791. The portion of the amendment which is omitted above, declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."² The amendment merely guarantees and does not create the right of jury trial.³ It is settled that this guaranty of trial by jury refers to Federal and not State courts and is a limitation upon the powers of the Federal government.⁴ It applies in the District of Columbia⁵ and to the organized territories which have been brought under the Constitution;⁶ to their legislative and judicial officers⁷ as also to a Territorial governor;⁸ and to tribunals established under a provisional government in territory covered by the Constitution,⁹ but not to consular courts.¹⁰ One effect of this guaranty is to prevent a blending of equitable and legal matters in such a way as to deny the right of trial by jury.¹¹ It abolishes wager of law if in fact that ever had any existence.¹² It does not prevent waiver of jury in common law causes and Congress has expressly provided for trial in cases of waiver.¹³ So, it does not prevent Congress conferring an absolute right to jury trial in other than common-law causes. Bankruptcy proceedings are equitable in character, yet Congress has given an absolute right to jury trial in certain bankruptcy proceedings.¹⁴ But it does prevent parties from resorting to equity where by Federal equity standards there is adequate remedy at law.¹⁵ In equity a jury may be called in¹⁶ but its verdict is merely advisory.¹⁷

²See post, § 2081.

³McBride v. Stradley, 103 Ind. 465; Seeley v. Bridgeport, 53 Conn. 1.

⁴Livingston v. Moore, 7 Pet. 469, 8 L. ed. 751; Edwards v. Elliott, 21 Wall. 557, 22 L. ed. 487; Walker v. Sauvinet, 92 U. S. 92, 23 L. ed. 678; Pearson v. Yewdall, 95 U. S. 296, 24 L. ed. 436; Baylis v. Travelers' Ins. Co. 113 U. S. 321, 28 L. ed. 989, 5 Sup. Ct. Rep. 494; Eilenbecker v. Plymouth Co. 134 U. S. 35, 33 L. ed. 801, 10 Sup. Ct. Rep. 424.

⁵Capital T. Co. v. Hof, 174 U. S. 5, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

⁶Callan v. Wilson, 127 U. S. 550, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; Walker v. New Mexico R. R. 165 U. S. 595, 41 L. ed. 837, 17 Sup. Ct. Rep. 421; Thompson v. Utah, 170 U. S. 349, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. See Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

⁷Webster v. Reid, 11 How. 437, 13 L. ed. 761; Whallon v. Bancroft, 4 Minn. 109.

⁸Claim of Reside, 9 Op. At. Gen. 200.

⁹Scott v. Billgerry, 40 Miss. 119.

¹⁰In re Ross, 140 U. S. 464, 35 L. ed. 581, 11 Sup. Ct. Rep. 897.

¹¹Scott v. Neely, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; Lilienthat v. McCormick, 117 Fed. 89, 54 C. C. A. 475.

¹²Childress v. Emory, 8 Wheat. 642, 5 L. ed. 705.

¹³Parsons v. Armour, 3 Pet. 425, 7 L. ed. 724. See post, § 914.

¹⁴See Elliott v. Toepfmer, 187 U. S. 331, 332, 47 L. ed. 202, 23 Sup. Ct. Rep. 133.

¹⁵Scott v. Neely, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; United States v. White, 9 Sawy. 125, 17 Fed. 561; Coles v. Northrup, 66 Fed. 831, 14 C. C. A. 138; In re Foley, 76 Fed. 390; United States v. Debs, 64 Fed. 724; Grand R. R. v. Sparrow, 36 Fed. 210, 1 L.R.A. 480; Ross, etc. Co. v. Southern, etc. Co. 72 Fed. 957.

¹⁶Fitton v. Phoenix Ins. Co. 23 Blatchf. 110, 23 Fed. 3.

¹⁷Idaho, etc. Co. v. Bradbury, 132 U. S. 515, 33 L. ed. 437, 10 Sup. Ct. Rep. 177; Perego v. Dodge, 163 U.

[b] What constitutes trial by jury.

Trial by jury within the meaning of this amendment means the common law jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them upon the law and advise them upon the facts.²⁰ A territorial law permitting a verdict by nine jurors or any less than the twelve is invalid.¹ But a Territory may require the jury to submit answers to special interrogatories as well as its general verdict and permit the court to choose between them.²

[c] To what cases applicable.

The guaranty of jury trial does not apply where less than twenty dollars is in controversy.⁵ It does not apply to equity cases;⁶ nor to suits in admiralty.⁷ Bankruptcy proceedings are equitable in character although the statute gives a right of jury trial in certain cases.⁸ Suits against a receiver though of a common-law character are nevertheless in a court of equity where no right to a jury exists.⁹ It has been said that the phrase "in suits at common law" embraces all suits not of equity or admiralty jurisdiction.¹⁰ But the amendment does not apply to suits against the United States in the circuit court or Court of Claims;¹¹ or to recover duties paid¹²; nor to special statutory proceedings and inquiries thereunder, such as an examination of a claim for services under the fugitive slave law,¹³ or proceedings for abatement of an unlawful inclosure of public

S. 160, 41 L. ed. 114, 16 Sup. Ct. Rep. 971.

²⁰Capitol T. Co. v. Hof, 174 U. S. 13-16, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Maxwell v. Dow, 176 U. S. 586, 44 L. ed. 599, 20 Sup. Ct. Rep. 448, 494; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

¹American P. Co. v. Fisher, 166 U. S. 467, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 S. 708, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; Kleinschmidt v. Dunphy, 1 Mont. 118. See Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

²Walker v. New Mexico, etc. R. R. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421.

⁵Whallon v. Bancroft, 4 Minn. 109.

⁶Shields v. Thomas, 18 How. 253, 15 L. ed. 368; Barton v. Barbour, 104 U. S. 133, 26 L. ed. 673; Woodworth v. Rogers, 3 Wood. & M. 135, Fed. Cas. No. 18,018; Ely v. M. & B. Mfg. Co. 4 Fish. Pat. 64, Fed. Cas. No. 4,431; Buford v. Holley, 28 Fed. 680; Scott v. Billgerry, 40 Miss. 119; Motte v. Bennett, 2 Fish. Pat. 642.

Fed. Cas. No. 9,884. Bankruptcy proceedings are equitable in character: Elliott v. Toeppner, 187 U. S. 331, 47 L. ed. 202, 23 Sup. Ct. Rep. 133.

⁷Waring v. Clarke, 5 How. 441, 12 L. ed. 226; The Huntress, 2 Ware (Dav. 82) 89, Fed. Cas. No. 6,914; Bains v. The James and Catherine, Bald. 544, Fed. Cas. No. 756; United States v. La Vengeance, 3 Dall. 297, 1 L. ed. 610.

⁸Elliott v. Toeppner, 187 U. S. 331, 47 L. ed. 202, 23 Sup. Ct. Rep. 133; In re Rude, 101 Fed. 805; In re Christensen, 101 Fed. 243. See post, § 2200 et seq.

⁹Kennedy v. Indianapolis C. R. R. 2 Flip. 704, 3 Fed. 97.

¹⁰Parsons v. Bedford, 3 Pet. 447, 7 L. ed. 732.

¹¹McElrath v. United States, 102 U. S. 440, 26 L. ed. 189; Torrey v. United States, 42 Fed. 207.

¹²Auffmordt v. Heddin, 137 U. S. 310, 34 L. ed. 674, 11 Sup. Ct. Rep. 103.

¹³Miller v. McQuerry, 5 McLean, 469, Fed. Cas. No. 9,583; In re Martin, 2 Paine, 348, Fed. Cas. No. 9,154.

lands;¹⁴ nor an assessment of damages on condemned property,¹⁵ nor to determine claims against a town,¹⁶ nor to determine titles.¹⁷ It does not prevent the directing of a verdict,¹⁸ nor the granting of a non-suit;¹⁹ nor prevent entry of judgment by default.²⁰ It does not prevent the court from requiring remittitur of part of verdict as a condition of denying a new trial;² or an affidavit of defense as a condition of a right to proceed to trial.³ In statutory proceedings summary in character and akin to equity suits the guaranty of jury trial has no application.⁴ There is no right by jury trial in contempt proceedings.⁵ It does apply, however, to informations in rem for forfeitures upon land,⁶ and forbids trial by referees without the consent of the parties.⁷

§ 911. Issues of fact in district court triable by jury.

The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury.

Part of R. S. § 566, U. S. Comp. Stat. 1901, p. 461.

This provision was originally part of the judiciary act of 1789.¹⁰ The remainder of the section relates to trial of issues of fact in admiralty.¹¹ The bankruptcy act gives an absolute right to jury trial upon certain is-

¹⁴Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595. U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458.

¹⁵United States v. Jones, 109 U. S. 519, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; Bauman v. Ross, 167 U. S. 593, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; United States v. Engerman, 46 Fed. 176; Bonaparte v. Camden, etc. R. R. Baldw. 205, Fed. Cas. No. 1,617. But see Bank of Hamilton v. Dudley, 2 Pet. 525, 7 L. ed. 496. ¹⁶Fidelity & D. Co. v. United States, 187 U. S. 315, 47 L. ed. 194, 23 Sup. Ct. Rep. 120.

¹⁷Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595. ¹⁸In re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; King v. Ohio, etc. R. R. 7 Biss. 529, Fed. Cas. No. 7,800.

¹⁹Armstrongs Foundry, 6 Wall. 766, 18 L. ed. 882; United States v. One Hundred and Thirty Barrels, 1 Bond, 587, Fed. Cas. No. 15,938; United States v. Distillery, 6 Biss. 483, Fed. Cas. No. 14,966; United States v. Fourteen Packages of Pins, Gilp. 235, Fed. Cas. No. 15,151. But not forfeiture within admiralty jurisdiction: Clark v. United States, 2 Wash. C. C. 519, Fed. Cas. No. 2,837.

²⁰Guthrie Nat. Bank v. Guthrie, 173 U. S. 537, 43 L. ed. 796, 19 Sup. Ct. Rep. 513. ⁷United States v. Rathbone, 2 Paine, 578, Fed. Cas. No. 16,121.

¹Barker v. Jackson, 1 Paine, 559, Fed. Cas. No. 989. ¹⁰Act September 24, 1789, c. 20, § 9, 1 Stat. 76; act February 26, 1845, c. 20, 5 Stat. 726.

²Treat Mfg. Co. v. Standard, S. Co. 157 U. S. 675, 39 L. ed. 853, 15 Sup. Ct. Rep. 718. ¹¹Post, § 1283.

³Coughran v. Bigelow, 164 U. S. 308, 41 L. ed. 442, 17 Sup. Ct. Rep. 117.

⁴Hircart v. Ballou, 9 Pet. 167, 9 L. ed. 85; Miller v. United States, 11 Wall. 268, 20 L. ed. 135; United States v. Distillery, 6 Biss. 483, Fed. Cas. No. 14,966. ²Arkansas Val. Co. v. Mann, 130

²Arkansas Val. Co. v. Mann, 130

sues, although bankruptcy proceedings are really equitable in character.¹² Even if this provision gives a right to jury trial in other than the "suits at common law" contemplated by the Seventh Amendment,¹³ that would be no ground for questioning its validity, since the amendment merely prevents restriction and not extension of the right of jury trial. This section for instance, requires jury trial of issues of fact in condemnation proceedings instituted by the government in the district court¹⁴ although the Seventh Amendment does not so require.¹⁵ This provision for jury trial in the district court may, however, be waived by the parties¹⁶ although there is no express statute as to waiver of jury in that court.¹⁷ In the event of waiver, however, questions both of law and fact raised at the trial are not reviewable on appeal;¹⁸ but only the sufficiency of the declaration.¹⁹

§ 912. Issues of fact in circuit court triable by jury.

The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy,³ and by the next section.⁴

R. S. § 648, U. S. Comp. Stat. 1901, p. 525.

This provision was originally part of the judiciary act of 1789⁵ which became law one day previous to the submission of the Seventh Amendment⁶ for ratification by the States, and is of weight as a contemporaneous construction of that amendment.⁷ The general scope of the guaranty of trial by jury has already been considered.⁸ It is not an infringement of the provisions of this section or of the Seventh Amendment, for the court to direct a verdict where the evidence with all inferences in its favor would be insufficient to support a contrary verdict;⁹ nor to grant a nonsuit where plaintiff fails to make out a case that would support a verdict in his

¹²*Elliott v. Toepfner*, 187 U. S. Rep. 91; *Merrill v. Floyd*, 50 Fed. 331, 332, 47 L. ed. 202, 23 Sup. Ct. 850, 2 C. C. A. 58.
¹³Rep. 133. See post § 2288.

¹⁴Ante, § 910.

¹⁵*Chapell v. United States*, 160 U. S. 513, 514, 40 L. ed. 514, 515, 16 Sup. Ct. Rep. 397. See *United States v. Engerman*, 46 Fed. 176.

¹⁶*Bauman v. Ross*, 167 U. S. 593, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

¹⁷*Rogers v. United States*, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; *Hendersons Dist. Spirits*, 14 Wall. 44, 53, 20 L. ed. 819.

¹⁸See post, § 914, which provides only for waiver in the circuit court.

¹⁹*Rogers v. United States*, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct.

¹*Rush v. Newman*, 58 Fed. 160, 7 C. C. A. 136.

³See post, § 2285 et passim.

⁴Post, § 913.

⁵Act September 24, 1789, c. 20, § 12, 1 Stat. 79. See act March 3, 1865, c. 86, § 4, 13 Stat. 501.

⁶See ante, § 910.

⁷*Capital T. Co. v. Hof*, 174 U. S. 9, 10, 43 L. ed. 876, 19 Sup. Ct. Rep. 580.

⁸Ante, § 910 [a] [c].

⁹*Baylis v. Travellers Ins. Co.* 113 U. S. 320, 28 L. ed. 989, 5 Sup. Ct. Rep. 494; *Ferguson v. Arthur*, 117 U. S. 490, 29 L. ed. 982, 6 Sup. Ct. Rep. 865.

favor.¹⁰ Where material facts are admitted by the pleadings there is no issue of fact requiring the intervention of a jury.¹¹ There is no right to a jury where the issue is one of law and not of fact.¹² It is error for the court to try issues of fact without a jury or waiver thereof;¹³ and in the absence of counsel.¹⁴ It is error for the court to try some issues of fact itself and submit the others to a jury.¹⁵ An act of 1875 provides for trial by jury in certain cases in admiralty and equity.¹⁶

§ 913. Certain issues of fact in Supreme Court triable by jury.

The trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury.

R. S. § 689, U. S. Comp. Stat. 1901, p. 565.

This provision was originally part of the judiciary act of 1789.¹⁹ The scope of the Supreme Court's original jurisdiction is elsewhere considered.²⁰ Cases involving actions at law therein against citizens have been infrequent,¹ and none seem to have proceeded to a trial of issue of fact.

§ 914. Waiver of jury in circuit court.

Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury,^[a] whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury.^[b] The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.^{[c]-[d]}

R. S. § 649, U. S. Comp. Stat. 1901, p. § 525.

[a] History and scope in general.

This provision was originally enacted in 1865.⁵ The propriety of giving instructions where jury is waived is elsewhere discussed.⁶ The mode and scope of review in cases at law tried without a jury are provided by R. S. § 700.⁷ An act of 1875 provides for jury trials under certain circumstances

¹⁰Central T. Co. v. Pullmans P. C. Co. 139 U. S. 24, 35 L. ed. 61, 11 Sup. Ct. Rep. 478; Coughran v. Bigelow, 164 U. S. 308, 41 L. ed. 442, 17 Sup. Ct. Rep. 117.

¹¹Marion Co. v. Coler, 75 Fed. 352. 21 C. C. A. 392. So on plea of guilty: West v. Gammon, 98 Fed. 426, 39 C. C. A. 271.

¹²Interstate C. Com. v. Brinson, 154 U. S. 488, 38 L. ed. 1047, 14 Sup. Ct. Rep. 1125.

¹³Kearney v. Case, 12 Wall. 285, 20 L. ed. 395.

¹⁴Morgan v. Gay, 19 Wall. 83, 22 L. ed. 100.

¹⁵Hodges v. Easton, 106 U. S. 412, 27 L. ed. 169, 1 Sup. Ct. Rep. 307.

¹⁶Post, § 1283.

¹⁹Act September 24, 1789, c. 20, § 13, 1 Stat. 80.

²⁰Ante, § 35.

¹See Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. Ante, § 2.

⁵Act March 3, 1865, c. 86, § 4, 13 Stat. 501.

⁶See post, § 920. [b].

⁷Post, § 2082.

in equity and admiralty⁸ cases. That act did not in its third section, repeal this provision of the Revised Statutes.⁹ This section applies only to the circuit court.¹⁰ But parties may waive a jury in the district court though no statute so provides.¹¹ So they may validly waive a jury in the circuit court in other than the prescribed statutory mode.¹² But in such a case they lose all right to have the proceedings at the trial reviewed on appeal.¹³ Jury may be impliedly waived.¹⁴ One who is present by counsel and goes to trial without objection or exception voluntarily waives a jury trial.¹⁵ Intent to waive may be presumed from the conduct of the parties.¹⁶ But while the parties may waive a jury, the court has no power to deprive them of the right.¹⁷

[b] Necessity for filing written stipulation of waiver.

To secure a right of review on appeal, where jury has been waived there must be "a reasonably strict conformity" to the requirements of this section.¹ Oral waiver in open court is insufficient.² An oral agreement for a reference is insufficient.³ The waiver must be unconditional.⁴ The record must affirmatively show waiver in the statutory mode.⁶ But it need not contain a copy of the stipulation as the fact may be shown by the

⁸Post, §§ 1067, 1283.

⁹Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603. The third section of the act of 1875 was repealed in 1891. See U. S. Comp. Stat. 1901, p. 526.

¹⁰Howard v. Crompton, 14 Blatchf. 333, Fed. Cas. No. 6,758. See Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91.

¹¹Henderson Distilled Spirits, 14 Wall. 53, 20 L. ed. 815; Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91.

¹²Guild v. Frontin, 18 How. 135, 15 L. ed. 290; Kelsey v. Forsyth, 21 How. 85, 16 L. ed. 32; Campbell v. Bayreau, 21 How. 223, 226, 16 L. ed. 96.

¹³Campbell v. Bayreau, 21 How. 223, 16 L. ed. 96; Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; Rush v. Newman, 58 Fed. 160, 7 C. C. A. 136; Lyons v. Lyons Nat. Bank, 8 Fed. 371; Branch v. Texas, etc. Co. 53 Fed. 849, 4 C. C. A. 52; Cudahy P. Co. v. Sioux Nat. Bank, 69 Fed. 782, 16 C. C. A. 409; Duncan v. Atchison, etc. Ry. 72 Fed. 808, 19 C. C. A. 202.

¹⁴Moncure v. Zunts, 11 Wall. 416, 20 L. ed. 181; Richmond v. Smith, 15 Wall. 429, 21 L. ed. 200.

¹⁵Kearney v. Case, 12 Wall. 275, 20 L. ed. 395; Baylis v. Travelers Ins. Co. 113 U. S. 316, 28 L. ed. 989, 5

Sup. Ct. Rep. 474; Morgan v. Gay, 19 Wall. 81, 22 L. ed. 100.

¹⁶Bank of Columbia v. O'Kely, 4 Wheat. 243, 4 L. ed. 559.

¹⁷Hodges v. Easton, 106 U. S. 411, 27 L. ed. 169, 1 Sup. Ct. Rep. 307.

¹Flanders v. Tweed, 9 Wall. 431, 19 L. ed. 680.

²Kearney v. Case, 12 Wall. 282, 20 L. ed. 397; Gilman v. Illinois, etc. Co. 91 U. S. 614, 23 L. ed. 405; Madison Co. v. Warren, 106 U. S. 622, 27 L. ed. 311, 2 Sup. Ct. Rep. 86; Bond v. Dustin, 112 U. S. 607, 28 L. ed. 836, 5 Sup. Ct. Rep. 296; Roberts v. Benjamin, 124 U. S. 64, 31 L. ed. 334, 8 Sup. Ct. Rep. 393; Dundee Co. v. Hughes, 124 U. S. 157, 31 L. ed. 357, 8 Sup. Ct. Rep. 377; Andes v. Slauson, 130 U. S. 438, 32 L. ed. 991, 9 Sup. Ct. Rep. 573; Spalding v. Manasse, 131 U. S. 65, 33 L. ed. 86, 9 Sup. Ct. Rep. 649; Duncan v. Atchison, etc. R. R. 72 Fed. 810, 19 C. C. A. 202.

³Rush v. Newman, 58 Fed. 160, 7 C. C. A. 136; Dietz v. Lymer, 63 Fed. 758, 11 C. C. A. 410; Cudahy P. Co. v. Sioux Nat. Bank, 69 Fed. 784, 16 C. C. A. 409.

⁴Merrill v. Floyd, 53 Fed. 172, 3 C. C. A. 494.

⁶Madison Co. v. Warren, 106 U. S. 622, 27 L. ed. 220, 2 Sup. Ct. Rep. 86; Hodges v. Easton, 106 U. S. 412,

findings, or by bill of exceptions, or by a recital in the judgment.⁷ A finding or recital that "by stipulation of parties hereto duly entered" a jury was waived, is insufficient to show that it was written and filed with the clerk.⁸ The same is true of findings or recitals that "both parties in open court having waived a jury and agreed to trial before the court;" and recital "the jury being waived;" or "the parties having stipulated to submit the case for trial by the court without the intervention of a jury."⁹ But a stipulation submitting agreed facts for decision thereon by the court is a sufficient compliance to secure the right of review.¹⁰ An agreement in writing filed with the clerk and signed by counsel that the cause may be tried by the court without a jury, is sufficient.¹¹ Withdrawal of a juror and written consent to a reference are the equivalents of an express waiver of jury trial.¹² A stipulation, written and filed, that the cause be tried by the court is equivalent to waiver.¹³

[c] General and special findings.

The court's findings, whether general or special has the same effect as the verdict of a jury.¹⁷ It is essential that there be some findings to support the judgment.¹⁸ It is as proper for the court to announce its findings and have them entered, in open court, as to write and file them.¹⁹ A general finding may be as general as the verdict of a jury.²⁰ If the court finds specially it should find the ultimate facts. A statement in the court's opinion is not equivalent to a special finding.² If there is no finding other

27 L. ed. 171, 1 Sup. Ct. Rep. 307; *Ham v. Edgell*, 106 Fed. 820, 45 C. C. A. 661; *Rush v. Newman*, 58 Fed. 158, 7 C. C. A. 136; *Abraham v. Levy*, 72 Fed. 124, 18 C. C. A. 469; *Branch v. Texas Lumber Mfg. Co.* 53 Fed. 849, 4 C. C. A. 52.

⁷*Kearney v. Case*, 12 Wall. 283, 284, 20 L. ed. 397; *Dickinson v. Planters' Bank*, 16 Wall. 257, 21 L. ed. 280; *Bond v. Dustin*, 112 U. S. 607, 28 L. ed. 836, 5 Sup. Ct. Rep. 296.

⁸*Cudahy P. Co. v. Sioux Nat. Bank*, 69 Fed. 782, 16 C. C. A. 409.

⁹See *Rush v. Newman*, 58 Fed. 158, 7 C. C. A. 136; *Bond v. Dustin*, 112 U. S. 608, 5 Sup. Ct. Rep. 296, 28 L. ed. 835; *Merrill v. Floyd*, 50 Fed. 849, 2 C. C. A. 58; *United States v. Carr*, 61 Fed. 802, 10 C. C. A. 80.

¹⁰*Wayne Co. Supervisors v. Kennicott*, 103 U. S. 554, 26 L. ed. 487.

¹¹*Citizens Bank v. Farwell*, 56 Fed. 571, 6 C. C. A. 24.

¹²*Boogher v. New York, L. I. Co.* 103 U. S. 90, 26 L. ed. 312.

¹³*Bamberger v. Terry*, 103 U. S. 40, 26 L. ed. 317.

¹⁷*Miller v. Life Ins. Co.* 12 Wall.

295, 20 L. ed. 398; *Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *Richmond v. Smith*, 15 Wall. 437, 21 L. ed. 200; *United States v. Dawson*, 101 U. S. 569, 25 L. ed. 791. So if special they are equivalent to special verdict: *Grayson v. Lynch*, 163 U. S. 476, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064.

¹⁸*Insurance Assoc. v. Boon*, 95 U. S. 117, 24 L. ed. 395.

¹⁹*Aetna L. Ins. Co. v. Board Co.* 79 Fed. 575, 25 C. C. A. 94.

²⁰*Aetna L. I. Co. v. Board Co.* 79 Fed. 575, 25 C. C. A. 94; *Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *Mining Co. v. Taylor*, 100 U. S. 37, 25 L. ed. 541; *Miller v. Life Ins. Co.* 12 Wall. 301, 20 L. ed. 398; *American Nat. Bank v. Watkins*, 119 Fed. 545, 56 C. C. A. 111; *Key West v. Baer*, 66 Fed. 440, 13 C. C. A. 572; *Aetna L. Ins. Co. v. Board Co.* Com'rs. 79 Fed. 575, 25 C. C. A. 94.

²*Hinckley v. Arkansas City* 69 Fed. 768, 16 C. C. A. 395; *Lehnen v. Dickson*, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481.

than the court's opinion it is equivalent to a general finding.³ The court's special findings must be sufficient in themselves;⁴ and should be separately stated.⁵ Reference to another case for findings is insufficient.⁶ A finding that there was no such cotenancy between parties in a mine, as entitled plaintiff to an accounting, is the assertion of a mere legal inference and not a finding of fact.⁷ If the meaning of a term of art is a material fact it should be included in special findings.⁸ A decision, mingling fact, discussion of law and evidence is not to be regarded as special findings.⁹ There is no error in failing to find an evidential fact¹⁰ or facts merely incidental to those found.¹¹ If the court finds only evidentiary and not ultimate facts, this is error and judgment should be reversed.¹² An agreed statement of evidentiary facts will not supply the place of a finding of ultimate facts by the court.¹⁴ If one finding is in effect a legal conclusion it will not control prior specific findings from which an opposite conclusion properly follows.¹⁵ It rests in the discretion of the court to make its findings either general or special.¹⁸ They cannot be both.¹⁹ If it only makes a general finding the sufficiency of the facts to support it cannot be reviewed.²⁰ Nor can a party raise that question by a request that the court find a fact a given way, and except to the refusal to do so;¹ though a motion for nonsuit or to direct a verdict is available to this end, where the evidence is not conflicting. Ordinarily therefore, the court should make special findings, on request.² For if there are special findings, their legal

³British Q. M. Co. v. Baker M. Co. 139 U. S. 222, 35 L. ed. 147, 11 Sup. Ct. Rep. 523; Con. Coal Co. v. Polar W. Co. 106 Fed. 798, 45 C. C. A. 638.

⁴Miller v. Life Ins. Co. 12 Wall. 301, 20 L. ed. 398; Corliss v. Pulaski Co. 116 Fed. 289, 53 C. C. A. 567.

⁵Miller v. Life Ins. Co. 12 Wall. 301, 20 L. ed. 398.

⁶Olcott v. Ennis C. Co. 114 Fed. 907, 52 C. C. A. 527.

⁷Kahn v. Smelting Co. 102 U. S. 647, 26 L. ed. 266. See United States v. Kelly, 89 Fed. 946, 32 C. C. A. 441. However findings sometimes necessarily embody a legal inference: Insurance Co. v. Intern. T. Co. 71 Fed. 88, 17 C. C. A. 616.

⁸The John H. Pearson, 121 U. S. 473, 30 L. ed. 979, 7 Sup. Ct. Rep. 1008.

⁹Minchen v. Hart, 72 Fed. 294, 18 C. C. A. 570.

¹⁰Kelsey v. Crowther, 162 U. S. 408, 40 L. ed. 1017, 16 Sup. Ct. Rep. 808.

¹¹Hathaway v. First Nat. Bank of 134 U. S. 499, 33 L. ed. 1004, 10 Sup. Ct. Rep. 608.

¹²Powers v. United States, 119 Fed. 562, 56 C. C. A. 128.

¹⁴Packer v. Whittier, 91 Fed. 511, 33 C. C. A. 658; Burnham v. North C. & St. Ry. 78 Fed. 101, 23 C. C. 677.

¹⁵United States v. Harris, 77 Fed. 821, 23 C. C. A. 483.

¹⁸Insurance Co. v. Folsom, 18 Wall. 249, 21 L. ed. 833; Dirst v. Norris, 14 Wall. 490, 20 L. ed. 723; Marye v. Strouse, 5 Fed. 497; Aetna L. Ins. Co. v. Board of Comrs. 79 Fed. 575, 25 C. C. A. 94; State Nat. Bank v. Smith, 94 Fed. 608, 36 C. C. A. 412; Searcy Co. v. Thompson, 66 Fed. 92, 13 C. C. A. 349; Key West v. Baer, 66 Fed. 440, 13 C. C. A. 572.

¹⁹British O. M. Co. v. Baker, etc. Co. 139 U. S. 222, 35 L. ed. 147, 11 Sup. Ct. Rep. 523; Wright v. Bragg, 96 Fed. 729, 37 C. C. A. 574; Austin v. Hamilton Co. 76 Fed. 208, 22 C. C. A. 128; Marye v. Strouse, 5 Fed. 494.

²⁰See post, § 2082.

¹Searcy Co. v. Thompson, 66 Fed. 92, 13 C. C. A. 349. See Lang v. Baxter, 69 Fed. 905.

²Searcy Co. v. Thompson, 66 Fed. 96, 13 C. C. A. 349.

sufficiency to support the judgment may be inquired into.³ But the question whether the evidence supports the findings cannot be raised in either case, whether of general or of special findings.⁴ The making of findings in a case where the jury is waived is governed by the above provision and R. S. § 700,⁵ and the court cannot be required to rule on specific propositions of law presented by the parties, according to state practice.⁶

[d] — addition, amendment and correction.

Prior to writ of error and while a case remains under the control of the trial court, it may add a material finding which has been omitted, though after judgment and motion for new trial,⁹ and even at an ensuing term.¹⁰ An inadvertent entry of erroneous findings may also be set aside and the error corrected.¹¹ The rule has also been applied to findings of the court of claims.¹² But substitution of special for general findings has been refused after lapse of a term.¹³ So, additional findings have been refused;¹⁴ and this is proper where the additional finding would be of facts merely incidental to those found,¹⁵ or where another finding really covers the ground.¹⁶

§ 915. Reference of questions of fact.

There can be no doubt of the power of the Federal courts at law to refer to an auditor or referee the ascertainment of questions of fact, with the consent of the parties. But State laws permitting or authorizing a reference cannot be followed where the effect would be to deny to a party against his wishes the right of jury trial in common-law cases guaranteed by the seventh amendment.¹⁸

Author's section.

The power to refer with consent of parties is well settled,¹⁹ and an incident to all judicial administration.²⁰ The state practice as to form and

³See post, § 2082.

⁴R. S. § 1011. See post, § 2083.

⁵Jones v. United States, 135 Fed. 518, 68 C. C. A. 68.

⁶Streeter v. Sanitary District, 133 Fed. 124, 66 C. C. A. 190.

⁹North v. Peters, 138 U. S. 282, 283, 34 L. ed. 936, 11 Sup. Ct. Rep. 346.

¹⁰Insurance Co. v. Boon, 95 U. S. 124, 24 L. ed. 395. See also McGavock v. Woodlief, 20 How. 225, 15 L. ed. 884.

¹¹Syracuse Twp. v. Rollins, 104 Fed. 962, 44 C. C. A. 277.

¹²United States v. St. Louis, etc. Co. 184 U. S. 247, 46 L. ed. 520, 22 Sup. Ct. Rep. 350.

¹³Marye v. Strouse, 5 Fed. 494.

¹⁴Lang v. Baxter, 69 Fed. 905.

¹⁵Hathaway v. Cambridge Nat. Bank, 134 U. S. 499, 33 L. ed. 1004, 16 Sup. Ct. Rep. 608.

¹⁶See Fox v. Harstick, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457.

¹⁸Ante, § 910.

¹⁹See Alexander Canal Co. v. Swann, 5 How. 89, 12 L. ed. 63; Y. & C. R. R. v. Myers, 18 How. 246, 15 L. ed. 380; Heckers v. Fowler, 2 Wall. 127, 17 L. ed. 759; Thornton v. Carson, 7 Cranch, 596, 3 L. ed. 451; Shipman v. Stratsville C. M. Co. 158 U. S. 361, 39 L. ed. 1016, 15 Sup. Ct. Rep. 886; Denny v. Brown, 2 Betts, C. C. 51, Fed. Cas. No. 3,805.

²⁰Newcomb v. Wood, 97 U. S. 583, 24 L. ed. 1085.

mode of reference has been followed where a reference was agreed to.² But in the absence of waiver of jury an action on a book account cannot be referred to an auditor conformally to State practice, because the Federal law makes issues of fact triable by jury.³ And in general State practice as to reference can never be followed in the Federal courts when infringing the guaranty of jury trial,⁴ though the parties may validly waive the guaranty.⁵ But the ordering of a preliminary investigation of complicated accounts is no infringement of the guaranty, where the issues are finally submitted to a jury.⁶ The facts found by the referee when approved by the court, are conclusive, just as is the verdict of a jury.⁷ Errors in the admission or exclusion of evidence or in refusal to find facts or in the correctness of the facts found, are not reviewable; but only the question whether the facts found sustain the judgment.⁸

§ 916. Impaneling of jury.

There are Federal statutory provisions respecting the impaneling of juries, and the competency of jurors, considered elsewhere.¹¹

Author's section.

§ 917. Mode of proof in common-law actions.

The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.

R. S. § 861, U. S. Comp. Stat. 1901, p. 661.

This provision was originally part of the judiciary act of 1789.¹⁴ Open

²Parker v. Ogdensburgh, etc. R. R. No. 4,235, an early case (1822) going further than that.

79 Fed. 817, 25 C. C. A. 205; Fourth Nat. Bank v. Neyhardt, 13 Blatchf.

393, Fed. Cas. No. 4,991; Robinson v. Mutual Ben., etc. Co. 16 Blatchf.

194, Fed. Cas. No. 11,961. But under

early conformity acts State practice

was declared not applicable: Denny

v. Brown, 2 Betts C. C. 51, Fed. Cas.

No. 3,805. Contra see Eaken v.

United States, 1 U. S. L. J. 545,

Fed. Cas. No. 4,235.

³Sulzer v. Watson, 39 Fed. 414.

⁴Howe M. Co. v. Edwards, 15

Blatchf. 402, Fed. Cas. No. 6,784;

United States v. Rathbone, 2 Paine,

578, Fed. Cas. No. 16,121; Denny v.

Brown, 2 Betts C. C. 51, Fed. Cas.

No. 3,805.

⁵United States v. Rathbone, 2

Paine, 578, Fed. Cas. No. 16,121.

⁶Fenno v. Primrose, 119 Fed. 803,

56 C. C. A. 313. See Eaken v. United

States, 1 U. S. L. J. 545, Fed. Cas.

⁷Heckers v. Fowler, 2 Wall. 131, 17

L. ed. 759; Roberts v. Benjamin, 124

U. S. 71, 31 L. ed. 334, 8 Sup. Ct.

Rep. 393.

⁸Shipman v. Straitsville, C. M. Co.

158 U. S. 361, 39 L. ed. 1016, 15 Sup.

Ct. Rep. 886; Roberts v. Benjamin,

124 U. S. 64, 31 L. ed. 334, 8 Sup.

Ct. 393; Boogher v. New York L. I.

Co. 103 U. S. 90, 26 L. ed. 310; Bond

v. Dustin, 112 U. S. 604, 28 L. ed.

835, 5 Sup. Ct. Rep. 296; Paine v.

Central & F. Co. 118 U. S. 152, 30 L.

ed. 193, 6 Sup. Ct. Rep. 1019; Andes

v. Slauson, 130 U. S. 435, 32 L. ed.

989, 9 Sup. Ct. Rep. 573.

¹¹Post, §§ 1701, et seq.

¹⁴Act September 24, 1789, c. 20, 1

Stat. 88. See also Act Feb. 20, 1812,

c. 25, 2 Stat. 682; act January 24,

1827, c. 4, 4 Stat. 197, 199.

court means in the presence of the court and jury at the trial.¹⁵ The exception of other modes of proof refers to the various provisions of Federal law respecting the taking of depositions, letters rogatory, the admissibility of transcripts, copies of official records, etc.¹⁶ This section makes it improper for the Federal courts to follow State laws respecting the occasions when a deposition may be taken in advance of trial¹⁷ or State laws giving a right to examine a party to the cause in advance of trial.¹⁸ In these matters Federal practice is controlled by the Federal statutes,¹⁹ though the mere mode of taking a deposition may now conform to the mode prevailing in the State practice.²⁰ The section also renders inapplicable to Federal practice, a State law making admissible a deposition taken in a prior discontinued case;² or the State practice of attaching to the petition interrogatories to be answered by the defendant.³ It is held in the sixth circuit that this section does not forbid the Federal court to follow State law permitting evidence given in a former trial to be introduced where witness is out of the State.⁴ But the rule in the eighth circuit is probably to the contrary.⁵ A State law requiring a plaintiff in suit for personal injuries to submit to physical examination before trial, is not in conflict with this provision and is in force in the Federal courts by virtue of R. S. § 721,⁶ making State laws the rule of decision,⁷ though not permissible in Federal courts in the absence of such a State law.⁸

§ 918. Direction of verdict and demurrer to evidence.

In addition to motion for nonsuit, motion to direct a verdict^{[a]-[b]} and demurrer to evidence^[c] have been used in Federal practice as a means of testing the legal effect and sufficiency of evidence. Demurrer to evidence has been largely superseded in modern practice by the motion to direct a verdict.

Author's section.

¹⁵Beardsley v. Littell, 14 Blatchf. 102, Fed. Cas. No. 1,185.

¹⁶See post, § 1761, et seq.

¹⁷McLennan v. Kansas, etc. R. R. 22 Fed. 198.

¹⁸Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Easton v. Hodges, 7 Biss. 324, Fed. Cas. No. 4,258; Colgate v. Comp. Franc, 23 Blatchf. 86, 23 Fed. 82. In Pennsylvania however, following State practice and court rule, depositions for use on hearing of rule to show cause may be taken, see Importers, etc. Bank v. Lyons, 134 Fed. 510.

¹⁹McLennan v. Kansas, etc. R. R. 22 Fed. 198.

²⁰See post, § 1776. National C. Fed. Proc.—55.

R. v. Leland, 94 Fed. 502, 37 C. C. A. 372. This was formerly not true: Randall v. Venable, 17 Fed. 162.

²Seeley v. Kansas C. S. Co. 71 Fed. 554.

³Pierce v. Union P. Co. 47 Fed. 709; contra Bryant v. Leland, 6 Fed. 125.

⁴Toledo T. Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28.

⁵Salt Lake City v. Smith, 104 Fed. 469, 43 C. C. A. 637.

⁶Ante, § 12.

⁷Camden, etc. R. R. v. Stetson, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617.

⁸Union Pac. R. R. v. Botsford, 141 U. S. 250, 35 L. ed. 735, 11 Sup. Ct. Rep. 1000.

[a] Direction of verdict.

The point that evidence only justifies one verdict may be raised by demurrer to evidence, by motion to exclude it from the jury and by motion to give peremptory instruction;¹² also by motion for nonsuit.¹³ The right to ask a peremptory instruction or for direction of a verdict, or for an instruction that plaintiff's evidence is insufficient to warrant a verdict in his favor, was recognized in the Federal courts at a time when the right of involuntary non-suit was denied,¹⁴ and is well settled.¹⁵ The practice is so well established in the Federal courts that it is doubtful whether the absence of the remedy in the State courts would be deemed good ground under the conformity law, for denying its existence in the Federal court there sitting.¹⁶ Before the court can instruct the jury that one party is entitled to recover, it should be satisfied that there is nothing in the evidence or any fact which the jury could lawfully infer therefrom, from which the jury could reach a contrary conclusion.¹⁷ The evidence with all inferences therefrom must be susceptible of but one conclusion,¹⁸ and if it is the court may direct verdict accordingly.²⁰ If there is any evidence from which a jury may conclude to the contrary verdict should not be directed.² If there is no conflict in the evidence it is proper for the court to instruct as to its legal effect.³ If there is conflicting evidence and opposite verdicts might lawfully be reached thereunder it is improper to direct verdict, and the jury must determine its weight.⁴ It is often said that verdict should be directed if a contrary verdict would be set aside on motion

¹²Louisville, etc. R. R. v. Woodson, 134 U. S. 621, 33 L. ed. 1032, 10 Sup. Ct. Rep. 628.

¹³Ante, § 916 [c].

¹⁴See *Mercantile Ins. Co. v. Folom*, 18 Wall. 251, 252, 21 L. ed. 833.

¹⁵*Bank of United States v. Carneal*, 2 Pet. 551, 17 L. ed. 513; *Schuchardt v. Allen*, 1 Wall. 370, 371, 17 L. ed. 642; *Macon Co. v. Shores*, 97 U. S. 278, 24 L. ed. 889; *Arthur v. Cumming*, 91 U. S. 365, 23 L. ed. 438; *Meguire v. Corwine*, 101 U. S. 111, 25 L. ed. 899; *Bib v. Allen*, 149 U. S. 493, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; *Marande v. Texas, etc. Ry.* 184 U. S. 192, 46 L. ed. 487, 22 Sup. Ct. Rep. 340.

¹⁶See *Sloss Iron Co. v. South C., etc. R. R.* 85 Fed. 138, 29 C. C. A. 50, holding the Federal practice upon nonsuit and direction of verdict uniform regardless of State laws.

¹⁷*Ewing v. Burnet*, 11 Pet. 50, 9 L. ed. 624.

¹⁸*Meguire v. Corwine*, 101 U. S. 111, 25 L. ed. 899; *Griggs v. Houston*, 104 U. S. 554, 26 L. ed. 840; *Bibb v. Allen*, 149 U. S. 493, 37 L. ed. 819,

13 Sup. Ct. Rep. 950; *Texas, etc. Ry. v. Cox*, 145 U. S. 606, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Lincoln v. Power*, 151 U. S. 439, 38 L. ed. 224, 14 Sup. Ct. Rep. 387; *Woodward v. Chicago, etc. Ry.* 145 Fed. 577 (C. C. A.)
²⁰*Arthur v. Cumming*, 91 U. S. 365, 23 L. ed. 438; *Louisville, etc. R. R. v. Woodson*, 134 U. S. 621, 33 L. ed. 1032, 10 Sup. Ct. Rep. 628; *Bunt v. Sierra, etc. Min. Co.* 138 U. S. 485, 34 L. ed. 1031, 11 Sup. Ct. Rep. 464; *Parks v. Ross*, 11 How. 373, 13 L. ed. 730.

²*Richardson v. Boston*, 19 How. 268, 269, 15 L. ed. 639; *Bank of Washington, v. Triplett*, 1 Pet. 31, 7 L. ed. 37; *Humiston v. Wood*, 124 U. S. 20, 31 L. ed. 354, 8 Sup. Ct. Rep. 347; *Hadden v. Iselin*, 142 U. S. 679, 35 L. ed. 1155, 12 Sup. Ct. Rep. 330.

³*Bevans v. United States*, 13 Wall. 63, 20 L. ed. 531.

⁴*Weightman v. Washington*, 1 Black, 49, 17 L. ed. 52; *Manchester v. Erickson*, 105 U. S. 349, 26 L. ed. 1099; *Pennsylvania R. R. v. Green*, 140 U. S. 51, 35 L. ed. 339, 11 Sup.

for new trial;⁵ even though there would have been a scintilla of evidence to support such contrary verdict.⁶ It is not a deprivation of the constitutional right to jury trial.⁷ The direction of a verdict is also proper where the opening statement of counsel by admission shows facts which would legally preclude his recovery.⁸ Where each party requests a peremptory instruction it is equivalent to a request that the court try the facts.¹⁰ Where the court has offered to submit the only question in the case which should properly have gone to the jury, and plaintiff insisted on a general submission, it has been held proper for the court to direct a verdict against plaintiff.¹¹ If plaintiff's evidence is legally insufficient to support a verdict in his favor the court may instruct for defendant.¹² So if it is legally sufficient and defendant offers no evidence, the court may instruct for plaintiff.¹³ Refusal to direct a verdict is ground for exception,¹⁴ and is assignable error¹⁵ and improper direction of verdict or refusal thereof is reversible error.¹⁶

[b] Waiver of error in granting or refusing motion.

Where the party moving for a direction of verdict introduces evidence

- Ct. Rep. 650; *White v. Van Horn*, 159 U. S. 12, 40 L. ed. 55, 15 Sup. Ct. Rep. 1027; *Bamberger v. Schoolfield*, 160 U. S. 157, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; *United States v. Tiltonson*, 12 Wheat. 183, 6 L. ed. 594.
- ⁵*Herbert v. Butler*, 97 U. S. 320, 24 L. ed. 958; *Randall v. Baltimore*, etc. R. R. 109 U. S. 482, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Arthur v. Jacoby*, 103 U. S. 678, 26 L. ed. 454; *Phoenix, etc. Ins. Co. v. Doster*, 106 U. S. 32, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Haines v. McLaughlin*, 135 U. S. 598, 34 L. ed. 290, 10 Sup. Ct. Rep. 876; *Delaware, etc. R. R. v. Converse*, 139 U. S. 472, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Treat Mfg. Co. v. Standard S. Co.* 157 U. S. 675, 39 L. ed. 853, 15 Sup. Ct. Rep. 718; *Patton v. Texas*, etc. Ry. 179 U. S. 659, 660, 45 L. ed. 363, 21 Sup. Ct. Rep. 275.
- ⁶*Hinchman v. Lincoln*, 124 U. S. 49, 31 L. ed. 337, 8 Sup. Ct. Rep. 369; *Berbecker v. Robertson*, 152 U. S. 377, 38 L. ed. 484, 14 Sup. Ct. Rep. 590.
- ⁷*Treat Mfg. Co. v. Standard S. Co.* 157 U. S. 675, 39 L. ed. 853, 15 Sup. Ct. Rep. 718.
- ⁸*Liverpool, etc. Co. v. Com'rs of Emig.* 113 U. S. 37, 28 L. ed. 899, 5 Sup. Ct. Rep. 352; *Butler v. National Home*, 144 U. S. 72, 36 L. ed. 346, 12 Sup. Ct. Rep. 581; *Oscanyan v. Arms Co.* 103 U. S. 263, 26 L. ed. 539.
- ¹⁰*Beutell v. Magone*, 157 U. S. 157, 39 L. ed. 654, 15 Sup. Ct. Rep. 566.
- ¹¹*Toplitz v. Hedden*, 146 U. S. 257, 258, 36 L. ed. 961, 13 Sup. Ct. Rep. 70.
- ¹²*Schuchardt v. Allen*, 1 Wall. 370, 371, 17 L. ed. 642; *Stewart v. Lansing*, 104 U. S. 512, 26 L. ed. 866; *Pleasants v. Fant*, 22 Wall. 122, 22 L. ed. 780; *Roundtree v. Smith*, 108 U. S. 277, 27 L. ed. 722, 2 Sup. Ct. Rep. 630; *Merchants Bank v. State Bank*, 10 Wall. 637, 19 L. ed. 1008; *Baylis v. Travelers Ins. Co.* 113 U. S. 320, 28 L. ed. 989, 5 Sup. Ct. Rep. 494.
- ¹³*Hendrick v. Lindsay*, 93 U. S. 147, 23 L. ed. 855.
- ¹⁴*Insurance Co. v. Folsom*, 18 Wall. 250, 251, 21 L. ed. 827.
- ¹⁵*Hickman v. Jones*, 9 Wall. 201, 19 L. ed. 515.
- ¹⁶*Russell v. Post*, 138 U. S. 426, 34 L. ed. 1009, 11 Sup. Ct. Rep. 353; *Torrent Co. v. Rodgers*, 112 U. S. 669, 28 L. ed. 842, 5 Sup. Ct. Rep. 501; *United States v. Chidester*, 140 U. S. 49, 35 L. ed. 339, 11 Sup. Ct. Rep. 650.

after the denial of his motion, this is a waiver of the error if any.¹ The party should renew his motion at the close of the testimony.²

[c] Demurrer to evidence.

Demurrer to evidence is a proceeding by which the court in which an action is pending is called upon to decide what the law is upon the facts shown in the evidence.⁴ It is a cumbrous proceeding requiring an elaborate admission of the facts upon the record,⁵ and a joining in demurrer,⁶ besides being discretionary with the court.⁷ As long ago as 1813 it was spoken of as rare,⁸ and in modern practice the motion to direct a verdict has taken its place.⁹ While it is available in Federal practice in those States where permitted by the local law,¹⁰ it may be questioned whether its use would now be sanctioned in the absence of such local practice.

§ 919. Continuance, dismissal and nonsuit.

The granting of continuances in common-law causes is part of the State practice to which the Federal courts should conform "as near as may be" under R. S. § 914.¹³ The only general Federal provision on the subject, to which the requirement of conformity is necessarily subordinate, is one granting continuance after death of a party.^[a]¹⁴ The conformity requirement also applies to the matter of dismissal or nonsuit, subject, however, to a special Federal provision respecting dismissal of a Federal case "at any time" for want of jurisdiction^{[b]-[e]}¹⁵

Author's section.

[a] Continuances.

Since the conformity provided by R. S. § 914 is only "as near as may be,"¹⁷ and not required when calculated to impair or impede the administration of justice,¹⁸ the cases show no great attention to the provisions of

¹Grand Trunk Ry. v. Cumming, 106 U. S. 701, 22 L. ed. 266, 1 Sup. Ct. Rep. 493; Hansen v. Boyd, 161 U. S. 403, 40 L. ed. 746, 16 Sup. Ct. Rep. 571; Robertson v. Perkins, 129 U. S. 236, 32 L. ed. 686, 9 Sup. Ct. Rep. 279; Wilson v. Haley L. S. Co. 153 U. S. 43, 38 L. ed. 627, 14 Sup. Ct. Rep. 768.

²Union Pac. Ry. v. Callaghan, 161 U. S. 95, 40 L. ed. 628, 16 Sup. Ct. Rep. 493.

⁴Van Stone v. Stillwell, etc. Mfg. Co. 142 U. S. 134, 35 L. ed. 961, 12 Sup. Ct. Rep. 181.

⁵Fowle v. Alexandria, 11 Wheat. 320, 6 L. ed. 484.

⁶Columbia Ins. Co. v. Catlett, 12 Wheat. 389, 6 L. ed. 664.

⁷Young v. Black, 7 Cranch, 568, 3 L. ed. 440.

⁸Young v. Black, 7 Cranch, 568, 3 L. ed. 440. See a modern instance, Van Stone v. Stillwell, 142 U. S. 134, 35 L. ed. 961, 12 Sup. Ct. Rep. 181.

⁹Supra, note [a].

¹⁰Central Trust Co. v. Pullman Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

¹³Ante, § 900.

¹⁴Ante, § 817.

¹⁵Ante, § 818.

¹⁷Ante, § 900 [d].

¹⁸Indianapolis, etc. R. R. v. Horst, 93 U. S. 291, 23 L. ed. 898.

the State laws in the granting or refusal of continuances.¹⁹ Moreover the matter of continuances is largely discretionary²⁰ and not assignable error² unless upon the showing of abuse of discretion.³ Loss of record of a former suit on which defendant relies;⁴ and death of senior counsel in an important case⁵ have been held good grounds for continuance.

[b] Voluntary dismissal and discontinuance, or nonsuit.

The State law governs as to the right of voluntary dismissal or discontinuance without prejudice, in the Federal courts, and as to the time when such dismissal may be taken.⁸ The question whether such voluntary dismissal or nonsuit, was a bar to further proceedings is governed by the State law.⁹

[c] Involuntary nonsuit or dismissal.

Early cases took the view that the Federal courts were without power to award nonsuit against the objection of plaintiff.¹² This was upon the theory that the party could not thus be deprived of his right to a jury trial.¹³ But the contrary is now settled, and if the State law permits nonsuit where the facts with all inferences, would not sustain a verdict for plaintiff, the Federal court may do likewise.¹⁴ The similar remedies of motion to direct a verdict and of demurrer to evidence, are also available

¹⁹See Texas, etc. R. R. v. Nelson, 50 Fed. 814, 1 C. C. A. 688, refusing continuance though a case was within the provisions of the State law.

²⁰Hunter v. Fairfax, 3 Dall. 305, 1 L. ed. 613; Barrow v. Hill, 13 How. 56, 14 L. ed. 48; Dexter v. Kel- las, 113 Fed. 48.

²Woods v. Young, 4 Cranch, 238, 2 L. ed. 607; Sims v. Hundley, 6 How. 6, 12 L. ed. 319; United States v. Rio Grande Dam Co. 184 U. S. 422, 46 L. ed. 621, 22 Sup. Ct. Rep. 428; Missouri, etc. Ry. v. Elliott, 102 Fed. 96, 42 C. C. A. 188.

³Goldsby v. United States, 160 U. S. 72, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; Hardy v. United States, 186 U. S. 224, 46 L. ed. 1138, 22 Sup. Ct. Rep. 889; Isaacs v. United States, 159 U. S. 489, 40 L. ed. 229, 16 Sup. Ct. Rep. 51; Fidelity, etc. Co. v. Bucki Co. 189 U. S. 135, 47 L. ed. 745, 23 Sup. Ct. Rep. 582; Lyman v. Warner, 113 Fed. 87, 51 C. C. A. 73.

⁴Crim v. Handley, 94 U. S. 660, 24 L. ed. 216.

⁵Hunter v. Fairfax, 3 Dall. 305, 1 L. ed. 613; Rhode Island v. Massachusetts, 11 Pet. 228, 9 L. ed. 697.

⁸Gassman v. Jarvis, 94 Fed. 603.

See Wolcott v. Studebaker, 34 Fed. 13; Nussbaum v. Northern I. Co. 40 Fed. 337. As to nol. pros. against one of several defendants see: Barton v. Petit, 7 Cranch, 202, 3 L. ed. 313; United States v. Leffler, 11 Pet. 98, 9 L. ed. 642; Amis v. Smith, 16 Pet. 311, 10 L. ed. 973; United States v. Linn, 1 How. 107, 11 L. ed. 64.

⁹United States v. Parker, 120 U. S. 95, 30 L. ed. 604, 5 Sup. Ct. Rep. 454. In general it is not a bar. See Amis v. Smith, 16 Pet. 310, 10 L. ed. 973; Minor v. Mechanics Bank, 1 Pet. 74, 7 L. ed. 47; Haldeman v. United States, 91 U. S. 586, 23 L. ed. 433; United States v. Parker, 120 U. S. 95, 30 L. ed. 607, 7 Sup. Ct. Rep. 454.

¹²Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 226; De Wolf v. Raband, 1 Pet. 476, 7 L. ed. 227; Crane v. Morris, 6 Pet. 609, 8 L. ed. 514; Silsby v. Foote, 14 How. 222, 14 L. ed. 394; Castle v. Bullard, 23 How. 183, 16 L. ed. 424; Schuchardt v. Allens, 1 Wall. 369, 17 L. ed. 642; Ins. Co. v. Folsom, 18 Wall. 250, 21 L. ed. 827.

¹³Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 226.

¹⁴Central T. Co. v. Pullmans P. C. Co. 139 U. S. 39, 40, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Meehan v. Val-

in the Federal courts.¹⁵ The right of plaintiff to take a voluntary nonsuit has always been conceded.¹⁶ The procedure on motion for nonsuit or dismissal is usually prescribed by rule of court in the different circuits and districts.

§ 920. Instructions and verdict.

The Federal courts are not bound by State laws respecting the mode of giving instructions, but follow their own practice in that respect;^{[a]-[b]} nor do they hold themselves to any strict conformity in the matter of verdicts.^[c] The matter of amendment of verdicts is governed by the Federal statute as to amendments.²⁰

Author's section.

[a] Instructions.

As already stated the conformity requirements of R. S. § 914 are not applied to the personal conduct and administration of the judge; and hence not to the mode of giving instructions.³ State laws requiring instructions to be in writing,⁴ and to be taken to the jury room,⁵ and forbidding comment by the judge upon the facts,⁶ are not binding in the Federal courts. Where instructions are excepted to as a whole, the exceptions will not be sustained if a portion of the instructions are correct.⁷

[b] Instructions where jury waived.

In some cases where jury was waived, the practice of requesting the court to give instructions to itself and of excepting to instructions given or refused, has been followed.⁸ But the preponderance of authority is against

entire, 145 U. S. 618, 36 L. ed. 839, 12 Sup. Ct. Rep. 973; *Coughran v. Bigelow*, 164 U. S. 308, 41 L. ed. 446, 17 Sup. Ct. Rep. 119; *Peoples' Bank v. Aetna Ins. Co.* 74 Fed. 511, 512, 20 C. C. A. 630; *Sloss Iron Co. v. South, etc. R. R.* 85 Fed. 133, 29 C. C. A. 50.

¹⁵See ante, § 917.

¹⁶*Chicago, etc. R. R. v. Metalstaff*, 101 Fed. 769, 41 C. C. A. 669.

²⁰Ante, § 817.

³Ante, § 900 [e]; *Liverpool, etc. Co. v. Fredeman*, 133 Fed. 716, 66 C. C. A. 543.

⁴*Lincoln v. Power*, 151 U. S. 442, 38 L. ed. 227, 14 Sup. Ct. Rep. 387.

⁵*Nudd v. Burrows*, 91 U. S. 441, 23 L. ed. 290; *Western U. T. Co. v. Burgess*, 108 Fed. 32, 47 C. C. A. 168; *Mexican C. Ry. v. Glover*, 107 Fed. 357, 46 C. C. A. 334.

⁶*Vicksburg, etc. R. R. v. Putnam*, 118 U. S. 553, 30 L. ed. 258, 7 Sup.

Ct. Rep. 1; *St. Louis, etc. R. R. v. Vickers*, 122 U. S. 363, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1216; *Lincoln v. Power*, 151 U. S. 442, 38 L. ed. 227, 14 Sup. Ct. Rep. 387; *Hankin v. Squires*, 5 Biss. 186, Fed. Cas. No. 6,025; *Hathaway v. East Tennessee R. R.* 29 Fed. 489; *Somers v. Carbon H. Co.* 91 Fed. 337; *United States v. Train*, 12 Fed. 853.

⁷*Lindblom v. Fallett*, 145 Fed. 805, (C. C. A.).

⁸See *Norris v. Jackson*, 9 Wall. 128, 19 L. ed. 608; *Insurance Co. v. Sea*, 21 Wall. 160, 22 L. ed. 512; *Nat. Bank v. First Nat. Bank*, 61 Fed. 810, 10 C. C. A. 87; *Mercantile Co. v. Wood*, 60 Fed. 348, 8 C. C. A. 658; *Humphreys v. Third Nat. Bank*, 75 Fed. 852, 21 C. C. A. 538; *St. Louis v. Western Union Tel. Co.* 148 U. S. 96, 37 L. ed. 382, 13 Sup. Ct. Rep. 485.

such practice;⁹ and a State law requiring the judge to charge himself is not binding.¹⁰

[c] Verdicts.

A State law requiring the jury under certain circumstances to make a special verdict or special findings is not binding in the Federal court.¹² But as respects the form and effect of verdicts¹³ and the sufficiency of one good count to sustain a verdict,¹⁴ the Federal courts will in general¹⁵ be bound by the State practice. So a State statute as to remittitur of part of verdict has been followed.¹⁶

§ 921. Judgment and costs.

There are specific Federal statutory provisions respecting the indexing of judgments, their lien and interest thereon.²⁰ State provisions respecting the signing and entry of judgments and their form will generally be followed by virtue of the requirement of conformity to State practice in R. S. § 914;^[a]¹ and State proceedings for the vacating of a judgment rendered are also available and justify the granting of similar relief in the Federal courts.^[b] The matter of costs is governed almost exclusively by Federal statutes.^[c]

Author's section.

⁹See *Insurance Co. v. Folsom*, 18 Wall. 253, 21 L. ed. 834; *Cooper v. Omohundro*, 19 Wall. 68, 69, 22 L. ed. 48; *St. Louis v. Western Union Tel. Co.* 166 U. S. 390, 391, 41 L. ed. 1044, 17 Sup. Ct. Rep. 608; *Stanley v. Supervisors*, 121 U. S. 547, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Runkle v. Burnham*, 153 U. S. 224, 225, 38 L. ed. 698, 14 Sup. Ct. Rep. 837; *Jennisons v. Leonard*, 21 Wall. 302, 22 L. ed. 539; *Dickinson v. Planter's Bank*, 16 Wall. 250, 21 L. ed. 278; *Consolidated Coal Co. v. Polar W. Co.* 106 Fed. 799, 45 C. C. A. 638; *United States v. Indian G. Dist.* 85 Fed. 930, 29 C. C. A. 578; *Searcy Co. v. Thompson*, 66 Fed. 92, 13 C. C. A. 349; *Distilling Co. v. Gottschalk*, 66 Fed. 609, 610, 13 C. C. 618; *Key West v. Baer*, 66 Fed. 443, 444, 13 C. C. A. 572.

¹⁰*United States v. Indian G. Dist.* 85 Fed. 930, 29 C. C. A. 578.

¹²*Indianapolis, etc. Ry. v. Horst*, 93 U. S. 300, 23 L. ed. 901; *United States Mut. Asso. v. Barry*, 131 U. S. 119, 33 L. ed. 66, 9 Sup. Ct. Rep. 755; *McElwee v. Metropolitan L. Co.*

69 Fed. 302, 16 C. C. A. 232; *Dwyer v. St. Louis, etc. R. R.* 52 Fed. 87; *Times P. Co. v. Carlisle*, 94 Fed. 771, 36 C. C. A. 475.

¹³*Glenn v. Sumner*, 132 U. S. 156, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; *Fitzpatrick v. Flanagan*, 106 U. S. 660, 27 L. ed. 215, 1 Sup. Ct. Rep. 369; *Mexican N. R. R. v. Slater*, 115 Fed. 593, 53 C. C. A. 239.

¹⁴*Bond v. Dustin*, 112 U. S. 608, 609, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; *Santa Anna v. Frank*, 113 U. S. 340, 28 L. ed. 979, 5 Sup. Ct. Rep. 537; *Hopkins v. Orr*, 124 U. S. 514, 31 L. ed. 525, 8 Sup. Ct. Rep. 591.

¹⁵See *Abbott v. Curtis*, 25 Fed. 402, refusing to be bound as to form of verdict in suit involving counter-claims. Under early conformity laws the State practice respecting form of verdicts was not controlling: *Long v. Palmer*, 16 Pet. 70, 10 L. ed. 888; *Parks v. Turner*, 12 How. 43, 44, 13 L. ed. 883.

¹⁶*Alabama, etc. Co. v. Nichols*, 109 U. S. 234, 27 L. ed. 915, 3 Sup. Ct. Rep. 120.

²⁰Post, §§ 1860-1864, 1859.

¹Ante, § 900.

[a] Judgments.

The Louisiana rule that an unsigned judgment is not final and cannot be enforced applies to Federal judgments in that State.³ So the Arkansas rule permitting judgment *ex contractu* against one of several defendants has been declared the rule of practice in the Federal courts there sitting.⁴ Where the question whether judgment is a bar involves a matter of the effect of pleadings or some matter of practice such as the dismissal of a cause, the State law will be followed.⁵ The State practice respecting the entry and recording of judgments has been followed where requiring entry of judgments by the clerk in a record book,⁶ as to entry of judgment without formal application to the court;^{6½} and where permitting only judgment for costs on dismissal of a *replevin* suit.⁷

[b] Vacating and setting aside.

Most of the States provide summary proceedings for the vacating or setting aside of judgments when there has been a want of proper service of process or other similar defect. So far as these laws apply to common-law causes⁹ and to such a proceeding taken at the term when judgment was entered or the cause pending, they are followed by the Federal courts.¹⁰ But a different question is presented where an application to vacate or set aside a judgment at law, is made after the term,—in reliance upon a State statute so providing. It is a general rule of the Federal courts that the trial court loses all control over a judgment at the end of a term;¹¹ and the Supreme Court has declared that this is a jurisdictional defect of power in the Federal courts which cannot be supplied by the operation of the conformity clause adopting State practice for common law causes.¹² Hence State laws cannot justify the Federal courts at law in vacating a judgment after the term, for errors in the computations of a referee;¹³ or errors of law upon which the judgment was based.¹⁴ Nor can they justify the Federal courts in permitting

³*Yznaga del Valle v. Harrison*, 93 U. S. 233, 23 L. ed. 892.

⁴*Sawin v. Kenny*, 93 U. S. 290, 23 L. ed. 926.

⁵See *Witters v. Sowles*, 34 Fed. 119, *United States v. Parker*, 120 U. S. 96, 30 L. ed. 605, 7 Sup. Ct. Rep. 454.

⁶*Morrison v. Bernards, Twp.* 35 Fed. 400.

^{6½}*Fourth National Bank v. Neyhardt*, 13 Blatchf. 393, Fed. Cas. No. 4,991.

⁷*Lapp v. Ritter*, 88 Fed. 108.

⁹See as to opening default judgments: *Detmold v. Gate V. C. Co.* 3 W. N. C. 567, Fed. Cas. No. 3,830; *Brown v. Philadelphia, etc. R. R.* 9 Fed. 183; *Republican Ins. Co. v. Williams*, 3 Biss. 370, Fed. Cas. No. 11,707.

¹⁰The State practice has no opera-

tion in Federal equity cases: *Austin v. Riley*, 55 Fed. 835.

¹¹*Bronson v. Schulten*, 104 U. S. 417, 26 L. ed. 797. So new trial may not be applied for at an ensuing term. See post, § 923 [e]. See also *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; *McMicken v. Perin*, 18 How. 507, 511, 15 L. ed. 506; *United States v. Wallace*, 46 Fed. 570; *Campbell v. James*, 31 Fed. 526; *Morgans, etc. S. S. Co. v. Texas, etc. Ry.* 32 Fed. 530; *King v. Davis*, 137 Fed. 227.

¹²*Bronson v. Schulten*, 104 U. S. 417, 26 L. ed. 797.

¹³*Bronson v. Schulten*, 104 U. S. 417, 26 L. ed. 707.

¹⁴*Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1014, 6 Sup. Ct. Rep. 901; *Klever v. Seawall*, 65 Fed. 378, 12 C. C. A. 653.

material amendments after the term.¹⁵ It would seem that State laws as to the vacating a default after the term, would be equally inapplicable; but a recent case in the circuit court of appeals refused equitable relief against a default judgment upon the very ground that a State statute permitting application for new trial after the term was available and afforded an adequate remedy at law.¹⁶

The cases seem to concede that Federal courts of law have power over a judgment at a subsequent term, in the limited class of cases where writ of error coram nobis was available at common law to correct certain errors of fact, e. g. that one of the parties to the judgment had died before it was rendered, or was an infant unrepresented by guardian, or was feme covert; or error in the process through the fault of the clerk.¹⁷ The question of the availability of State remedies for vacating a judgment at law after the term—must not be confused with the question of the power of Federal courts of equity over their decrees at a subsequent term;¹⁸ nor yet with the question of the right to apply to a Federal court of equity for relief against a Federal or State judgment at law.¹⁹

[c] Costs.

Early statutes left the costs to be regulated by State laws.² But R. S. §§ 823 and 983³ are general Federal statutes upon the subject which must be followed to the exclusion of the State practice.⁴ There is now a Federal law respecting costs in suits in forma pauperis.⁵ Certainly the conformity requirements of R. S. § 914 were not intended as a consent to the imposition of costs against the government.⁶ However, the State law as to costs in special statutory proceedings has been followed.⁷ So a State law requiring security for costs from a nonresident plaintiff, has been enforced.⁸

§ 922. The taking of objections and exceptions.

The State practice respecting appeal and the preservation and

¹⁵Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1014, 6 Sup. Ct. Rep. 901; Hickman v. Fort Scott, 141 U. S. 415, 12 Sup. Ct. Rep. 9, 35 L. ed. 776.

¹⁶Travelers Pro. Asso. v. Gilbert, 111 Fed. 276, 49 C. C. A. 309, 55 L.R.A. 538.

¹⁷See Bronson v. Schulten, 104 U. S. 417, 26 L. ed. 797; Phillip v. Negley, 117 U. S. 665, 29 L. ed. 1015, 6 Sup. Ct. Rep. 901; Hickman v. Fort Scott, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9, and cases cited. United States v. Wallace, 46 Fed. 570.

¹⁸See post, §§ 1094, 1099.

¹⁹See ante, § 19.

²Ethridge v. Jackson, 2 Sawy. 598, Fed. Cas. No. 4,541; Hathaway v.

Roach, 2 Woodb. & M. 63, Fed. Cas. No. 6,213.

³Ante, § 705, post § 1839.

⁴United States v. Treadwell, 15 Fed. 532; O'Neil v. Kansas City, 31 Fed. 664; Chadbourne v. German-A. Ins. Co. 31 Fed. 625; Richter v. Magone, 47 Fed. 192.

⁵See post, § 1823. As to effect of State laws previous thereto see: Bradford v. Bradford, 2 Flipp, 280, Fed. Cas. No. 1,766; Heckman v. Mackey, 32 Fed. 574.

⁶Carlisle v. Cooper, 64 Fed. 475, 12 C. C. A. 235.

⁷Huntress v. Epson, 15 Fed. 732; Morrison v. Bernards Tp. 35 Fed. 400; New H. L. Co. v. Tilton, 29 Fed. 764.

⁸Henning v. Western U. T. Co. 40 Fed. 658.

reservation in the trial court of the right of review is not adopted for the Federal courts by the conformity requirements of R. S. § 914.¹² The parties must make their objections and take their exceptions according to rules of Federal practice, which are uniform throughout the United States. The objections and exceptions must be timely^[a] and they must be specific.^{[b]-[c]} The form and contents of the bill of exceptions are elsewhere considered.¹³

Author's section.

[a] Necessity of timely objections and exceptions.

In the matter of objections to evidence, the general rule is that a party should object to the question, and that he will not be permitted to take chances of a favorable answer and if unfavorable then move to strike it out.¹⁴ Objections to the sufficiency of copies of documents annexed to depositions should be raised by motion to suppress them before trial.¹⁵ If no objection is taken to evidence when offered objection afterwards made will not be entertained.¹⁶ And if evidence is admitted upon promise of showing its relevancy, an objection must be renewed after the party offering it has failed therein.¹⁷ As respects objections to other rulings the rule is strict that they must be taken during the trial and before verdict or they will not be considered on appeal.¹⁸ An objection first taken in the bill of exceptions is futile.¹⁹ Objections to the giving or refusal of instructions must be taken before the jury retires.²⁰ It is too late to object after the jury retires,¹ or the day after verdict,² or on motion for new

¹²Ante, § 900[d].

¹³Post, § 1932.

¹⁴Benson v. United States, 146 U. S. 332, 333, 36 L. ed. 994, 13 Sup. Ct. Rep. 60; Farmers & T. Bank v. Greene, 74 Fed. 439, 20 C. C. A. 500; see Kelsey v. Hobby, 16 Pet. 277, 10 L. ed. 961. However, motion to exclude or strike out is sometimes sufficient: Lucas v. United States, 163 U. S. 617, 41 L. ed. 282, 16 Sup. Ct. Rep. 1168.

¹⁵Insurance Co. of North America v. Guardioli, 129 U. S. 643, 32 L. ed. 802, 9 Sup. Ct. Rep. 425.

¹⁶Patrick v. Graham, 132 U. S. 627, 33 L. ed. 460, 10 Sup. Ct. Rep. 194; San Pedro Co. v. United States, 146 U. S. 136, 36 L. ed. 911, 13 Sup. Ct. Rep. 94.

¹⁷Central R. R. v. Soper, 59 Fed. 879, 8 C. C. A. 341.

¹⁸Railway Co. v. Heck, 102 U. S.

120, 26 L. ed. 58; Thiede v. Utah, 159 U. S. 511, 40 L. ed. 238, 16 Sup. Ct. Rep. 62; Tnismen v. F. R. Patch Co. 101 Fed. 373, 41 C. C. A. 388.

¹⁹St. Louis Ry. v. Spencer, 71 Fed. 93, 18 C. C. A. 114; United States v. Carey, 110 U. S. 51, 28 L. ed. 67, 3 Sup. Ct. Rep. 424.

²⁰Improvement Co. v. Munson, 14 Wall. 449, 20 L. ed. 872; United States v. Breitling, 20 How. 254, 15 L. ed. 902; Hickory v. United States, 151 U. S. 316, 38 L. ed. 177, 14 Sup. Ct. Rep. 334; Com. Trav. Assn. v. Fulton, 79 Fed. 423, 24 C. C. A. 654; Sternenberg v. Mailhos, 99 Fed. 46, 39 C. C. A. 408.

¹Park v. Bushnell, 60 Fed. 585, 9 C. C. A. 138; Bracken v. Union Pac. R. R. 56 Fed. 450, 5 C. C. A. 548.

²Phelps v. Mayer, 15 How. 160, 14 L. ed. 643.

trial.³ The absence of counsel is no excuse.⁴ No rule of practice of a lower court can validate exceptions after close of trial.⁵

The record on appeal must affirmatively show that objection was timely,⁶ but where a bill of exceptions recites that it was signed during the term and purports to state what happened at the trial, it will be assumed that exception was taken at the trial, unless the contrary is disclosed by the language.⁷

[b] Necessity of specific objections to evidence.

Objections to evidence must be specific, not merely vague and general.¹⁰ The precise point on which a ruling is asked should be apparent therefrom;¹¹ and the party should specify the precise part of the evidence objected to, since if the objection covers any admissible evidence it is properly overruled.¹² An objection that evidence is incompetent irrelevant and immaterial is too general if in any possible circumstances it could be considered relevant material or competent.¹³ So an objection has been deemed bad that evidence is "immaterial and improper."¹⁴ Objection to the admission in evidence of a copy of a letter not specifying the grounds therefor, is unavailing.¹⁵ The specified objection is a waiver of all others.¹⁶ On appeal the party is confined to the objection taken.¹⁷ If he has taken no exception there is no question for review.¹⁸ An objection is of no avail unless it is followed by an exception to the ruling thereon.²⁰

³Lewis v. United States, 146 U. S. 379, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136.

⁴Stewart v. Wyoming, etc. Co. 128 U. S. 390, 32 L. ed. 442, 9 Sup. Ct. Rep. 101; but see Merchants' Ex. Bank v. McGraw, 76 Fed. 936, 22 C. C. A. 622.

⁵Johnson v. Garber, 73 Fed. 523, 19 C. C. A. 556; and see Price v. Pankhurst, 53 Fed. 313, 3 C. C. A. 551.

⁶United States v. Carey, 110 U. S. 51, 28 L. ed. 67, 3 Sup. Ct. Rep. 424; Yates v. United States, 90 Fed. 62, 32 C. C. A. 507; Stone v. United States, 64 Fed. 677, 12 C. C. A. 451; Hutchins v. King, 1 Wall. 60, 17 L. ed. 544.

⁷New Orleans, etc. R. R. v. Jopes, 142 U. S. 22, 23, 35 L. ed. 922, 12 Sup. Ct. Rep. 109; see French v. Edwards, 13 Wall. 516, 20 L. ed. 705.

¹⁰Camden v. Doremus, 3 How. 530. 11 L. ed. 705; Stebbins v. Duncan, 108 U. S. 46, 27 L. ed. 641, 2 Sup. Ct. Rep. 313.

¹¹Sparf v. United States, 156 U. S. 57, 39 L. ed. 343, 15 Sup. Ct. Rep. 273.

¹²Moore v. Bank of Metropolis, 13 Pet. 310, 10 L. ed. 172; United States v. McMasters, 4 Wall. 682, 18 L. ed. 311.

¹³Sparf v. United States, 156 U. S. 57, 39 L. ed. 343, 15 Sup. Ct. Rep. 273; Ogden City v. Weaver, 108 Fed. 565, 47 C. C. A. 485.

¹⁴Mine & S. Co. v. Parke Co. 107 Fed. 884, 47 C. C. A. 34. But compare Wood v. Weimar, 104 U. S. 795, 26 L. ed. 782.

¹⁵Toplitz v. Hedden, 146 U. S. 255, 36 L. ed. 961, 13 Sup. Ct. Rep. 70.

¹⁶Hinde v. Longworth, 11 Wheat. 199, 6 L. ed. 454; Evanston v. Gunn, 99 U. S. 665, 25 L. ed. 306; Belk v. Meagher, 104 U. S. 289, 26 L. ed. 735.

¹⁷Burton v. Driggs, 20 Wall. 133, 22 L. ed. 299.

¹⁸Stoddard v. Chambers, 2 How. 315, 316, 11 L. ed. 269; Schuchardt v. Allens, 1 Wall. 367, 17 L. ed. 642.

²⁰Newport N. Co. v. Pace, 158 U. S. 37, 39 L. ed. 887, 15 Sup. Ct. Rep. 743; United States v. Breitling, 20 How. 254, 15 L. ed. 902.

[c] Necessity for specific objection to instructions given or refused.

Rules of the Supreme Court and of the circuit courts of appeals provide that "the party excepting shall be required to state distinctly the several matters of law" in a court's charge to which he excepts; and direct the lower court to insert in the bill of exceptions "those matters of law and those only."² The lower courts have no power to waive or modify these requirements.³ The rule is that a general exception to a charge is unavailing⁴ if any portion of the charge is correct.⁵ The whole must be substantially wrong before a general exception will avail for any purpose.⁶ If some instructions are unobjectionable, the others must be pointed out specifically.⁷ An exception to all and to each part "of a charge is too general;"⁸ so also is objection to the "theory announced throughout the instruction;"⁹ or any objection that the court did not give eighteen special charges in the specific language requested;¹⁰ or an objection that the court erred in charging of its own motion in lieu of giving the instructions prayed;¹¹ or an objection to such portions of the charge as vary from certain requests made.¹² The part excepted to must be distinctly pointed out.¹³ If the part of a charge in which occurs the erroneous proposition of law stands by itself, unembarrassed by an admixture of fact or the blending of other points of law an exception can be taken thereto by quoting it.¹⁴ But in other cases this is not strictly sufficient because, by the rules above quoted, the exception must go to the alleged false statement of law, and not the charge. Hence it is then necessary to specify the alleged false proposition of law and refer also to the part of the charge containing it.¹⁵ The proper form of objection has been suggested to be

²See post, § 1933.

³Price v. Pankhurst, 53 Fed. 313, 3 C. C. A. 551; and see Johnston v. Garber, 73 Fed. 523, 19 C. C. A. 556.

⁴Beckwith v. Bean, 98 U. S. 284, 25 L. ed. 131; Railroad Co. v. Varnell, 98 U. S. 479, 25 L. ed. 233; Mobile Co. v. Jurey, 111 U. S. 596, 28 L. ed. 532, 4 Sup. Ct. Rep. 566; Jones v. East Tenn. R. R. 157 U. S. 682, 39 L. ed. 858, 15 Sup. Ct. Rep. 719; Baggs v. Martin, 108 Fed. 33, 47 C. C. A. 175.

⁵Johnston v. Jones, 1 Black, 220, 17 L. ed. 119; Rogers v. Marshal, 1 Wall. 654, 17 L. ed. 717; Beaver v. Taylor, 93 U. S. 54, 23 L. ed. 798; Cooper v. Schlesinger, 111 U. S. 151, 152, 28 L. ed. 382, 4 Sup. Ct. Rep. 360; Union Pac. Ry. Co. v. Callaghan, 161 U. S. 95, 40 L. ed. 630, 16 Sup. Ct. Rep. 493; Cass Co. v. Gibson, 107 Fed. 366, 46 C. C. A. 341.

⁶Anthony v. Louisville R. R. 132 U. S. 173, 33 L. ed. 301, 302, 10 Sup. Ct. Rep. 53.

⁷Baltimore, etc. R. R. v. Mackey,

157 U. S. 86, 39 L. ed. 624, 15 Sup. Ct. Rep. 491.

⁸Block v. Darling, 140 U. S. 238, 35 L. ed. 476, 11 Sup. Ct. Rep. 832; Masonic Assn. v. Lyman, 60 Fed. 498, 23 L.R.A. 517, 9 C. C. A. 104; Price v. Parkhurst, 53 Fed. 312, 3 C. C. A. 551; Western, etc. Co. v. Polk, 104 Fed. 650, 44 C. C. A. 104.

⁹Bogk v. Gassert, 149 U. S. 26, 37 L. ed. 631, 13 Sup. Ct. Rep. 738.

¹⁰Chateaugay Ore. Co. v. Blake, 144 U. S. 488, 36 L. ed. 510, 12 Sup. Ct. Rep. 731.

¹¹Lucas v. Brooks, 18 Wall. 456, 21 L. ed. 779.

¹²Beaver v. Taylor, 93 U. S. 55, 23 L. ed. 797.

¹³Railroad Co. v. Varnell, 98 U. S. 485, 25 L. ed. 233.

¹⁴Felton v. Newport, 92 Fed. 474, 34 C. C. A. 470; Columbus Co. v. Crane Co. 98 Fed. 951, 40 C. C. A. 35.

¹⁵Columbus Co. v. Crane Co. 101 Fed. 56, 41 C. C. A. 189; Stewart v. Morris, 96 Fed. 703, 37 C. C. A. 562.

that "the plaintiff [or defendant] except to the ruling that [stating a single proposition or matter of law] as shown by the following portion of the charge [setting it out]."¹⁶ The form of bill of exceptions is considered elsewhere.¹⁷

§ 923. Power to grant new trial in jury cases.

All of the said courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

R. S. § 726, U. S. Comp. Stat. 1901, p. 584.

[a] History and scope of the section.

The foregoing provision was originally § 17 of the judiciary act of 1789.¹ It is to be read in connection, and is contemporaneous² with that part of the seventh amendment declaring that "no fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law."³ The authority to grant new trials on established common-law grounds, conferred by R. S. § 726, was undoubtedly intended to confer a right to re-examine "according to the rules of the common law" within the seventh amendment. This adherence to common-law rules, however refers to essentials and not to subordinate matters of procedure. Thus, application for new trial is now permissible after entry of judgment, although at common law it was required to be before judgment.⁴ It is furthermore well settled that a State statute giving an absolute right of new trial in ejectment cases should be followed by the Federal courts as a rule of property, although in other respects the Federal courts are not required to conform to the State practice, forms and modes of proceeding on motions for new trial.⁵ There is no law or rule preventing the granting of a second new trial after a second trial;⁶ though it has been doubted whether a rehearing may properly be granted of an order granting or refusing a new trial.⁷ The rules guiding the court on motion for new trials are substantially different from the rules governing review on appeal. Thus new trial will be refused if on the whole, substantial justice has been done, notwithstanding mistakes at the trial; while on error, with bill of exceptions, the instructions of the court must stand or fall upon their own intrinsic soundness in law.⁸ So an error of law unexcepted to can be made the ground of motion for new trial though it would not be reviewable on error;⁹ and failure to give an instruction

¹⁶Columbus Co. v. Crane Co. 101 Fed. 56, 41 C. C. A. 189.

¹⁷Post, § 1932.

¹Act Sept. 24, 1789, c. 20, 1 Stat. 83.

²See ante, § 912, note.

³See post, § 2081.

⁴Arnold v. Jones, Bee, 104, Fed. Cas. No. 559; compare § 924.

⁵See ante, § 900[d].

⁶Parker v. Lewis, Hempst. 72, Fed. Cas. No. 10,741a.

⁷Laird v. De Soto, 23 Fed. 780.

⁸McLanahan v. Universal Ins. Co. 1 Pet. 183, 7 L. ed. 105; Rowe v. Matthews, 18 Fed. 133.

⁹Railway Co. v. Heck, 102 U. S. 120, 26 L. ed. 58; United States v. Seufert, 78 Fed. 520; Post v. Wise, 101 Fed. 205.

although not asked may be ground of new trial where the omission resulted in a clear failure of justice.¹⁰

[b] Reasons for new trial—in general.

This conduct of the jury is a proper ground of new trial.¹⁴ So misconduct of counsel or of a party calculated to influence the jury improperly is ground for the motion.¹⁵ Error of law occurring at the trial is also ground,¹⁶ provided it materially affected the result.¹⁷ Federal courts have also granted new trial where the illness or incapacity of the judge resulted in a failure to have a bill of exceptions settled, and the opposite party would not agree to the supplying of the omission.¹⁸ Newly discovered evidence is ground for new trial¹⁹ and sometimes surprise.²⁰

[c] — excessive damages.

The award of excessive damages in a verdict is good ground for granting of a new trial.³ In fact that is the proper remedy;⁴ there is no right to allege error therein without application having first been made.⁵ An excessive verdict in a case where there is an exact measure of damages should be sought on the ground of insufficiency of evidence rather than upon this ground. This ground is properly available where there is no definite measure of damages. The damages must be "palpably excessive;"⁶ such as to satisfy the court that the verdict was "perverse, or the result of gross error, or that the jury have acted under the influence of undue motion or misconception;"⁷ or "so excessive or outrageous. . . . as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices or their perverse disregard of

¹⁰Calbreath v. Gracy, 1 Wash. C. C. 219, Fed. Cas. No. 2,296.

¹⁴United States v. Reid, 12 How. 366, 13 L. ed. 1023; Mattox v. United States, 146 U. S. 150, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; United States v. Five Cases, etc. 2 N. Y. Leg. Obs. 84, Fed. Cas. No. 15,110.

¹⁵Baggs v. Martin, 108 Fed. 33, 47 C. C. A. 175; Preston v. Mutual L. I. Co. 71 Fed. 467.

¹⁶Thompson v. Bowie, 4 Wall. 472, 18 L. ed. 423; Rochell v. Phillips, Hempst. 22, Fed. Cas. No. 11,974a.

¹⁷Lucas v. Brooks, 18 Wall. 454, 21 L. ed. 779; Rowe v. Mathews, 18 Fed. 133.

¹⁸See Hume v. Bowie, 148 U. S. 253, 37 L. ed. 438, 13 Sup. Ct. Rep. 582, where there was a rule of court to that effect; Manning v. German Ins. Co. 107 Fed. 54, 46 C. C. A. 144.

¹⁹See Board of Comrs. v. Keene Bank, 108 Fed. 516, 47 C. C. A. 464; Ex parte Fuller, 182 U. S. 562, 45 L. ed. 1230, 21 Sup. Ct. Rep. 871.

²⁰Atchison, etc. R. R. v. Howard, 49 Fed. 207, 1 C. C. A. 229.

³Chesapeake, etc. Co. v. Knapp, 9 Pet. 570, 9 L. ed. 222; Arkansas C. Co. v. Mann, 130 U. S. 75, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; Baltimore, etc. R. R. v. Fifth B. C. 137 U. S. 576, 34 L. ed. 784, 11 Sup. Ct. Rep. 185; Lincoln v. Power 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387.

⁴Chesapeake, etc. Co. v. Knapp, 9 Pet. 570, 9 L. ed. 222; Arkansas C. Co. v. Mann, 130 U. S. 75, 32 L. ed. 854, 9 Sup. Ct. Rep. 458.

⁵Lincoln v. Power, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387; Wabash Ry. v. McDaniels, 107 U. S. 456, 27 L. ed. 607, 2 Sup. Ct. Rep. 932.

⁶White v. Arleth, 1 Bond, 319, Fed. Cas. No. 17,536.

⁷Wightman v. Providence, 1 Cliff. 524, Fed. Cas. No. 17,630.

justice to mislead them.”⁸ If a verdict is so excessive as to show passion and prejudice the granting of a new trial rather than remission of excess is the remedy.⁹ But in ordinary cases of excessive verdict the court will make a remission of the excess a condition of the denial of a new trial;¹⁰ and a consent to such remission binds the prevailing party.¹¹

[d] — insufficiency of evidence or verdict against weight of evidence.

If the evidence is insufficient to support a verdict, the court should award a new trial;¹² and if a jury's verdict is against the weight of evidence, motion for new trial is the proper remedy.¹⁴ But the evidence must be clearly insufficient,¹⁵ so that the court can see there has been some mistake, or some improper motive, or bias, or feeling.¹⁶ It is not enough that the courts would have found otherwise,¹⁷ or that there was a strong preponderance of evidence to the contrary,¹⁸ although some cases show perhaps a stronger tendency to the entertaining of such a motion than the foregoing would imply.¹⁹

[e] Procedure.

In the absence of statute there is no power in a court to entertain a motion for new trial made at a term subsequent to the rendition and entry² of judgment,³ though it may then award a new trial previously applied for. The court may by standing rule limit the time within a term when the application may be made,⁴ and rules of court prescribing the time and mode of applying, must be observed.⁵ R. S. § 987 provides for a stay of execution for forty-two days after judgment to enable a party to

⁸Whipple v. Cumberland, 2 Story, 661, Fed. Cas. No. 17,516; see also Malloy v. Bennett, 15 Fed. 376; Marriott v. Fearing, 11 Fed. 846; Swann v. Bowie, 2 Cranch C. C. 221, Fed. Cas. No. 13,672; Lancaster v. Providence Co. 26 Fed. 233.

⁹Arkansas C. Co. v. Mann, 130 U. S. 75, 32 L. ed. 854, 9 Sup. Ct. Rep. 458.

¹⁰Northern Pac. R. R. v. Herbert, 116 U. S. 646, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; Kennon v. Gilmer, 131 U. S. 29, 33 L. ed. 110, 9 Sup. Ct. Rep. 696; Hansen v. Boyd, 161 U. S. 411, 40 L. ed. 746, 16 Sup. Ct. Rep. 571.

¹¹Lewis v. Wilson, 151 U. S. 555, 28 L. ed. 267, 14 Sup. Ct. Rep. 419.

¹²Pleasants v. Fant, 22 Wall. 122, 22 L. ed. 780; Metropolitan R. R. v. Moore, 121 U. S. 569, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334.

¹⁴Hedden v. Iselin, 142 U. S. 680, 35 L. ed. 1155, 12 Sup. Ct. Rep. 330.

¹⁵Waters v. Mutual Ins. Co. 7 Rep. 456, Fed. Cas. No. 17,267.

¹⁶Nuskegon Bank v. N. W. Ins.

Co. 19 Fed. 405; Davey v. Aetna Ins. Co. 20 Fed. 494; Davis v. Memphis, 22 Fed. 887.

¹⁷Alsop v. Com. Ins. Co. 1 Sumn, 451, Fed. Cas. No. 262; per Story, J.

¹⁸Wilkinson v. Greely, 1 Curt. 439, Fed. Cas. No. 17,672; per Curtis, J.

¹⁹See Mt. Adams Ry. v. Lowery, 74 Fed. 470, 20 C. C. A. 596; Felton v. Spiro, 78 Fed. 582, 583, 24 C. C. A. 321; Ulman v. Clark, 100 Fed. 183.

²As to entry see Emma S. M. Co. v. Park, 14 Blatchf. 411, Fed. Cas. No. 4,467.

³Coughlan v. District of Col. 106 U. S. 7, 27 L. ed. 74, 1 Sup. Ct. Rep. 37; Brooks v. Burlington & S. W. R. R. 102 U. S. 107, 26 L. ed. 91; Belknap v. United States, 150 U. S. 590 37 L. ed. 1192, 14 Sup. Ct. Rep. 183; Manning v. German Ins. Co. 107 Fed. 52, 46 C. C. A. 144.

⁴Henning v. Western U. T. Co. 41 Fed. 865; Post v. Wise, 101 Fed. 205.

⁵Henning v. Western U. T. Co. 41 Fed. 865.

file petition for a new trial,⁶ but it would seem that where the forty-two days would extend beyond the close of the term, application for the stay should be made during the term. Bill of exceptions is not necessary on motion for new trial as the recollection of the judge can be appealed to;⁸ but a bill of exceptions may be used,⁹ though there is authority for the holding that after the obtaining of a bill of exceptions motion for new trial will not be entertained.¹⁰

[f] Review of order denying new trial.

An order granting a new trial is not a final judgment.¹² It is the uniform rule in Federal practice that the granting or denying of a new trial is discretionary with the court and not assignable as error.¹³ The rule is uniformly applied in all cases where the right to grant new trial exists and the court exercises the discretion conferred, whether the ground of the motion be excessive damages,¹⁴ insufficiency of the evidence,¹⁵ errors in law,¹⁶ surprise,¹⁷ newly discovered evidence,¹⁸ or misconduct of counsel.¹⁹ But if the court order new trial without power to do so,²⁰ or refuse to entertain the motion in the belief that it has no power,¹ or refuses to consider affidavits properly before it on the motion,² or refuse it when a State law which is a rule of decision for Federal courts gives it as matter of right,³ this is an error which may be reviewed.

§ 924. Stay of execution on new trial—new trial where jury waived.

When a circuit court enters judgment in a civil action, either

⁶Post, § 924.

⁸Chandler v. Thompson, 30 Fed. 38; Hynes v. Chicago Ry. 23 Fed. 18.

⁹Brewster v. Gelston, 1 Paine, 426, Fed. Cas. No. 1,853.

¹⁰Bell v. Cunningham, 1 Sumn. 89, Fed. Cas. No. 1,246.

¹²See ante, § 77.

¹³Barr v. Gratz, 4 Wheat. 216, 4 L. ed. 554; Brown v. Clark, 4 How. 15, 11 L. ed. 855; Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085; Holder v. United States, 150 U. S. 91, 37 L. ed. 1010, 14 Sup. Ct. Rep. 10; Addington v. United States, 165 U. S. 185, 41 L. ed. 679, 17 Sup. Ct. Rep. 288; Louisville R. R. v. White, 100 Fed. 242, 40 C. C. A. 352.

¹⁴Railroad Co. v. Fraloff, 100 U. S. 31, 25 L. ed. 535; Ash v. Prunier, 105 Fed. 723, 44 C. C. A. 675; New York R. R. v. Anderson, 50 Fed. 462, 1 C. C. A. 529; Morning Journal v. Rutherford, 51 Fed. 513, 2 C. C. A. 354, 16 L.R.A. 803.

¹⁵Moore v. United States, 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep.

26; Marine Ins. Co. v. Young, 5 Cranch, 187, 3 L. ed. 74; Neidlinger v. Yoost, 99 Fed. 240, 39 C. C. A. 494; Lincoln v. Sun Vaper Co. 59 Fed. 761, 9 C. C. A. 253.

¹⁶Fishburn v. Chicago Ry. 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8.

¹⁷Atchison, etc. R. R. v. Howard, 49 Fed. 207, 1 C. C. A. 229.

¹⁸Board of Comrs. v. Keene Bank, 108 Fed. 516, 47 C. C. A. 464.

¹⁹Baggs v. Martin, 108 Fed. 33, 47 C. C. A. 175; see Chandler v. Thompson, 30 Fed. 45.

²⁰Manning v. German Ins. Co. 107 Fed. 54, 46 C. C. A. 144; Phillips v. Negley, 117 U. S. 671, 29 L. ed. 1015, 6 Sup. Ct. Rep. 901.

¹Felton v. Spiro, 78 Fed. 576, 24 C. C. A. 321.

²Mattox v. United States, 146 U. S. 147, 36 L. ed. 919, 13 Sup. Ct. Rep. 50.

³Shreve v. Cheeseman, 69 Fed. 787, 16 C. C. A. 413.

upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time^[b] to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void.

R. S. § 987, U. S. Comp. Stat. 1901, p. 708.

[a] History and scope of section.

The general provision as to stay of execution is given elsewhere.⁵ This provision is based upon § 18 of the judiciary act of 1789,⁶ and an amendatory act of 1865.⁷ While R. S. § 726⁸ only authorizes application for new trial in jury cases, this section impliedly sanctions the power of the court to grant new trial in cases where jury is waived and the case is tried by the court with findings. It does not authorize stay to permit of application for new trial where the issues were referred to a referee and judgment was entered upon his report.⁹ But prior to entry of judgment on such a reference, motion to set aside his report and grant a new trial has been entertained pursuant to State practice and a rule of the Federal court.¹⁰

[b] Time for making application for new trial.

It has been held that this section does not prescribe the time for applying for new trial, but merely the time and mode whereby such application may constitute a stay.¹¹ But as a trial court loses power to entertain an application for new trial at the end of the term when judgment was entered,¹² the proceeding constituting the application for new trial must be instituted at that term and perhaps a rule may require it to be within a given time during that term.¹³

⁵Post, § 1866.

⁶Act Sept. 24, 1789, c. 20, 1 Stat. 83.

⁷Act March 3, 1865, c. 86, § 4, 13 Stat. 501.

⁸Ante, § 923.

⁹Neafie v. Cheesborough, 14 Blatchf. 313, Fed. Cas. No. 10,064; and see Fourth Nat. Bank v. Neyhardt, 13 Blatchf. 393, Fed. Cas. No. 4,991.

Fed. Proc.—56.

¹⁰Robinson v. Mutual Ben. Ins. Co. 16 Blatchf. 194, Fed. Cas. No. 11,961.

¹¹Felton v. Spiro, 78 Fed. 531, 24 C. C. A. 321; see Rutherford v. Penn M. L. I. Co. 1 Fed. 456, 1 McCrary, 120; Emma, etc. Min. Co. v. Park, 14 Blatchf. 411, Fed. Cas. No. 4,467.

¹²Ante, § 923[e].

¹³Ante, § 923[e].

[c] Effect of stay and grant of new trial.

The stay of execution allowed by this section to permit application for new trial, and the seasonable filing of such application suspend the operation of the judgment and destroy its finality for purposes of writ of error. Hence the time for suing out a writ of error does not begin to run while the application is pending;¹⁸ and if writ of error is taken it should probably be dismissed,¹⁹ would certainly be dismissed if the new trial is granted.²⁰ An order granting a new trial vacates the judgment.¹

§ 925. Remedies on Federal judgments by executions etc. furnished by state laws.

The party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor,^{[e]-[f]} as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules^[g] of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise.^{[a]-[d]}

R. S. § 916, U. S. Comp. Stat. 1901, p. 684.

[a] Statutes affecting execution elsewhere stated.

There are several provisions respecting Federal execution which are not stated in this chapter because not exclusively applicable to execution in common-law causes. These provisions permit execution to run in other districts,⁴ provide for stay of execution in general,⁵ and in suits against revenue officers,⁶ relate to the right of imprisonment for debt,⁷ and provide the mode of selling real and personal property under Federal judgment or decree.⁸ Elsewhere will also be found provisions respecting the lien of

¹⁸Cambuston v. United States, 95 U. S. 285, 24 L. ed. 448; Northern P. R. R. v. Holmes, 155 U. S. 138, 39 L. ed. 100, 15 Sup. Ct. Rep. 28 Kingman v. Western Co. 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786; Rutherford Co. v. Penn Ins. Co. 1 Fed. 456, 1 McCrary, 120; Louisville T. Co. v. Stockton, 72 Fed. 1, 18 C. C. A. 408; Merchants' Co. v. Buckner, 98 Fed. 225, 39 C. C. A. 19; Brown v. Evans, 18 Fed. 56, 8 Sawy. 502.

¹⁹Voorhees v. Noye Mfg. Co. 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295.

²⁰United States v. Ayres, 9 Wall. 610, 19 L. ed. 627; United States v. Crusell, 12 Wall. 176, 20 L. ed. 385; United States v. Young, 94 U. S. 259, 24 L. ed. 153.

¹Maning v. German Ins. Co. 107 Fed. 54, 46 C. C. A. 144.

⁴Post, § 1865.

⁵Ante, § 924; post, §§ 1866, 1867.

⁶Post, § 1868.

⁷Post, §§ 1558-1560.

⁸Post, §§ 1869-1872.

Federal judgment;⁹ respecting the form of Federal writs¹⁰ and their issuance in general.¹¹

[b] History of section.

The early process acts contained no specific provisions conferring on Federal courts power to enforce the State remedies on execution, but merely a general section requiring conformity of practice, which applied to executions as well as other proceedings.¹⁴ The law of 1872, which first enacted the present general conformity provision, contained also the foregoing specific section respecting remedies by way of execution. It permits the Federal courts to adhere to the remedies formerly available on execution, rather than adopt changes in the State law, whereas the general practice is required to conform "as near as may be" to existing State practice.¹⁵

[c] Scope and validity of section in general.

The power of Congress to legislate with respect to the form and effect of executions upon Federal judgments was settled by an early case.¹⁶ Congress has seen fit to mold the Federal practice in this respect to that of the several States, and the Federal courts will generally follow State decisions construing State execution laws in force in the Federal courts.¹⁷ The section grants similar remedies only in common-law causes.¹⁹ It does not apply to equity decrees,²⁰ or admiralty,¹ or judgments in criminal cases.² But a forfeiture proceeding under the revenue laws is within the provision, although of purely statutory origin.³

[d] Is R. S. § 914 at all applicable to executions?

There is ground for argument that R. S. § 914 requiring conformity to State practice forms and modes of proceeding, is not necessarily rendered entirely inapplicable to executions, by R. S. § 916, adopting existing State remedies by way of execution, etc.⁶ The language of R. S. § 914 is broad enough to cover the entire conduct of a cause in the trial court, including the proceedings to enforce the judgment rendered.⁷ Such was the construc-

⁹Post, §§ 1861-1864.

¹⁰Ante, § 836.

¹¹Ante, § 841.

¹⁴Wayman v. Southard, 10 Wheat, 1, 6 L. ed. 253; Bank of U. S. v. Halstead, 10 Wheat. 51, 6 L. ed. 265; see history of conformity enactments; ante, § 900[a].

¹⁵Ante, § 900 [a].

¹⁶Bank of U. S. v. Halstead, 10 Wheat, 53, 6 L. ed. 264. See ante, § 799.

¹⁷United States v. Morrison, 4 Pet. 137, 7 L. ed. 804; Sowles v. Witters, 46 Fed. 497; Ex parte Boyd, 105 U. S. 652, 26 L. ed. 1200.

¹⁹Hudson v. Wood, 119 Fed. 764.

²⁰Steam S. C. Co. v. Jones, 13 Fed.

567, 21 Blatchf. 138; Steam S. C. Co. v. Sears, 9 Fed. 8, 20 Blatchf. 23.

¹The Blanche Page, 16 Blatchf. 1, Fed. Cas. No. 1,524.

²Clark v. Allen, 114 Fed. 374.

³In re Quantity of Tobacco, 10 Ben. 447, Fed. Cas. No. 11,499; see as to similar claim in R. S. § 914, ante §, 900[c].

⁶It has been said that R. S. § 914 does not extend to proceedings to enforce a judgment: United States v. Train, 12 Fed. 853; see also Lamaster v. Keeler, 123 U. S. 376, 31 L. ed. 242, 8 Sup. Ct. Rep. 197.

⁷Lamaster v. Keeler, 123 U. S. 389, 31 L. ed. 242, 8 Sup. Ct. Rep. 197.

tion given the earlier conformity law.⁸ Undoubtedly R. S. § 916 renders it inapplicable to the substance of the remedy for the enforcement of judgments;⁹ yet it would seem that there may be subordinate details of practice and procedure and statutory provisions existing for the benefit of the execution debtor to which it would apply. It is to be remembered that there are so many specific Federal provisions respecting executions¹⁰ that there is but little room left for the operation of the general conformity law even if it be applicable.

[e] State remedies in aid of judgment adopted by this section.

Under the early process act it was held that the conformity provision included the proceedings upon, as well as the nature and form of the execution; and hence that an imprisoned Federal debtor might have the benefit of a State insolvency proceeding enabling him to obtain release from jail.¹¹ Under the present law it is settled that the State remedy by proceeding supplementary to execution for examination of the debtor, is available in aid of a Federal judgment.¹² A State law authorizing *fi. fa.* against a city is a remedy permitted to the Federal courts under this clause.¹³ *Mandamus* in aid of a Federal judgment is undoubtedly available in the Federal court under this section, where authorized by State law. However, it is also available in Federal courts in the absence of State law, under R. S. § 911, authorizing the issue of *scire facis* and other writs, agreeable to law,¹⁴ where there is no other adequate remedy.¹⁵ If the State law gives a statutory remedy that is available and should first be tried.¹⁶ A State law providing a mode for suspending the lien of a judgment upon realty pending appeal therefrom has been held applicable to Federal practice.¹⁷

But it is only remedies to reach the property and not remedies to reach the person, that are provided for by this section.³ It has been held that a State statute giving the State a right to levy on realty and denying the remedy to others, was not available under this section to permit such levy in favor of the United States as a judgment creditor, in view of other Federal provisions evincing a contrary intent.⁴

[f] State exemption laws.

The State homestead and exemption laws are in force in the Federal

⁸Wayman v. Southard, 10 Wheat.

1, 6 L. ed. 253.

⁹Lancaster v. Keeler, 123 U. S. 389, 31 L. ed. 242, 8 Sup. Ct. Rep. 197.

¹⁰See post, §§ 1865, et seq.

¹¹Beers v. Haughton, 9 Pet. 355, 9 L. ed. 155.

¹²Ex parte Boyd, 105 U. S. 647, 26 L. ed. 1200; see Byrd v. Badger, McAll. 443, Fed. Cas. No. 2,266.

¹³Canal, etc. Street R. R. v. Hart, 114 U. S. 661, 29 L. ed. 226, 5 Sup. Ct. Rep. 1127.

¹⁴Ante, § 841.

¹⁵Riggs v. Johnson Co. 6 Wall. 166, 18 L. ed. 768; United States v. Keokuk, 6 Wall. 518, 18 L. ed. 918.

¹⁶Moran v. Elizabeth, 9 Fed. 72; see President v. Mayor, etc. 40 Fed. 799.

¹⁷United States v. Sturgis, 14 Fed. 810.

³Friedly v. Giddings, 119 Fed. 438.

⁴Clark v. Allen, 117 Fed. 699.

courts by virtue of this provision,⁶ and it was the intent of Congress to apply such exemption laws even against the United States as judgment creditors.⁷ Congress might, however, validly enact exemption laws of its own.⁸

[g] **Adoption of changes in State law by rule of court.**

State execution laws passed subsequent to the enactment of the above provision are not in force in the Federal courts unless adopted therein;¹¹ and the same rule was rigidly applied under the earlier conformity laws.¹² An invalid State law cannot be adopted,¹³ or if adopted, at least has, no force.¹⁴ Under the earlier process acts the court refused to presume the adoption of a rule of court respecting the State practice.¹⁵ But the tendency to a stricter conformity in all matters of practice has been so much greater since the act of 1872 that the presumption on appeal might now be that existing State laws of execution rather than those of 1872 or 1873 have been adopted by some rule.¹⁶ It was laid down in an early case that the court has no power by rule to modify or alter a State execution law and adopt it as altered.¹⁷ There must therefore be exact conformity, either to the State remedies by execution, etc., existing in 1872, or to some more modern substitute.

⁶Fink v. O'Neil, 106 U. S. 279, 27 L. ed. 196, 1 Sup. Ct. Rep. 325.

⁷Fink v. O'Neil, 106 U. S. 272, 27 L. ed. 196, 1 Sup. Ct. Rep. 325; see Naumburg v. Hyatt, 24 Fed. 905; Webb v. Hayner, 49 Fed. 605.

⁸See ante, § 799.

¹¹Lamaster v. Keeler, 123 U. S. 391, 31 L. ed. 238, 8 Sup. Ct. Rep. 197.

¹²Boyle v. Zacharie, 6 Pet. 658, 8 L. ed. 532; McCracken v. Hayward, 2 How. 615, 616, 11 L. ed. 397.

¹³McCracken v. Hayward, 2 How. 615, 616, 11 L. ed. 397.

¹⁴Bronson v. Kenzie, 1 How. 311, 11 L. ed. 143.

¹⁵Boyle v. Zacharie, 6 Pet. 648, 8 L. ed. 532.

¹⁶See Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658. This has been said as to amendatory State attachment laws: See ante, § 905[f]. But compare Lamaster v. Keeler, 123 U. S. 391, 31 L. ed. 238, 8 Sup. Ct. Rep. 197.

¹⁷McCracken v. Hayward, 2 How. 608, 11 L. ed. 397.

CHAPTER 25.

PROCEDURE IN EQUITY CAUSES IN GENERAL.—BILLS IN EQUITY.

- § 935. The test of Federal equity jurisdiction.
- § 936. Forms and modes of proceeding in equity.
- § 937. Where no positive rule applies, practice of English high court of chancery to be consulted.
- § 938. Affirmation equivalent to oath required by equity rules.
- § 939. Power of judge at chambers, during term or vacation, as to orders etc.
- § 940. Notice of motions, rules and orders by entry in order book, service on solicitor or party.
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- § 944. Bills in Equity.—The introductory part.
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- § 953. Necessary allegations of stockholder's bill.
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- § 956. Amendment of bill before plea, demurrer or answer.
- § 957. Amendment after plea demurrer or answer and after replication.
- § 958. Amendment after answer—special replication not permissible.
- § 959. Permission to amend lost if not availed of by the next rule day.
- § 960. Bills of revivor and proceedings thereon.
- § 961. Supplemental bills and proceedings thereon.
- § 962. Bills of supplement and revivor need not repeat allegations of original.
- § 963. Cross bills for discovery and for relief.
- § 964. Creditors bill against national bank stockholders.
- § 965. Limit to taxable costs on bills in equity.

§ 935. The test of Federal equity jurisdiction.

Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.^{[a]-[g]}

R. S. § 723, U. S. Comp. Stat. 1901, p. 583.

[a] Meaning and construction of section in general.

This provision was originally part of the judiciary act of 1789¹ and has been continuously in force ever since. The seventh amendment guarantees a right of jury trial in common-law causes,² and various enactments of Congress, passed prior to its adoption, equally require the trial of issues of fact by a jury in common-law causes³ unless waived.⁴ That amendment and those provisions of Congress which antedated it,⁵ together with the foregoing prohibition against a resort to equity which also antedated the amendment, constitute the foundation upon which rests the distinction between law and equity so consistently maintained by Congress in its subsequent legislation, and by the Federal courts in the uniform current of their divisions.⁶ It would be too much to say, however, that the amendment of itself forbids a formal obliteration of the distinction between law and equity as found in the procedure of many States, so long as the substance of the right of jury trial was preserved for cases in fact of a common-law character. But Congress has not seen fit so to legislate.

[b] The section merely declaratory but obligatory.

The above provision is in fact merely declaratory of a principle which was accepted long prior to its enactment.⁹ But its embodiment in a positive statute, mandatory and prohibitive in form,¹⁰ effectively prevents a frittering away of the constitutional right by judicial enlargements of the equity jurisdiction. It positively preserves the right of jury trial by compelling resort to the common-law side of the court in all cases where adequate remedy can be had at law.¹¹ If such remedy exists, a defendant cannot be compelled to go into equity where the right to a jury does not exist.¹² The section is obligatory. ¹³ It was intended to emphasize the rule which it

¹Act Sept. 24, 1789, c. 20, § 16, 1 Stat. 82. 155 U. S. 323, 39 L. ed. 172, 15 Sup. Ct. Rep. 129.

²Ante, § 910.

³Ante, §§ 911-913.

⁴Ante, § 914.

⁵The judiciary act with these various provisions was passed Sept. 24, 1789. The seventh amendment was submitted for ratification Sept. 25, 1789.

⁶See Ante, § 800.

⁹Boyce v. Grundy, 3 Pet. 215, 7 L. ed. 655; Root v. Railroad, 105 U. S. 206, 26 L. ed. 975; Scott v. Neely, 140 U. S. 110, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; Wehrman v. Conklin.

¹⁰Wehrman v. Conklin, 155 U. S. 323, 39 L. ed. 167, 15 Sup. Ct. Rep. 129.

¹¹Smith v. American Nat. Bank, 89 Fed. 832, 32 C. C. A. 368.

¹²Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Insurance Co. v. Bailey, 13 Wall. 621, 20 L. ed. 501; Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70; Fussell v. Gregg, 113 U. S. 550, 28 L. ed. 993, 5 Sup. Ct. Rep. 631.

¹³Wehrman v. Conklin, 155 U. S. 323, 39 L. ed. 167, 15 Sup. Ct. Rep. 129.

asserts and impress it upon the attention of the Federal courts.¹⁴ It prevents any enlargement of the jurisdiction of courts of equity which would give them cognizance of purely legal causes of action in which the right to a jury constitutionally exists. Hence the rule that a State statute which gives a right to go into equity cannot be applied in the Federal courts if by their standard and adequate remedy at law exists¹⁵

[c] — and not restrictive — concurrent jurisdiction.

But it seems equally plain that it was not intended to restrict the equity jurisdiction to narrower limits than were recognized at the time the law was enacted.¹ If it was merely declaratory, designed to perpetuate existing boundaries between law and equity, then clearly it did not extend the absolute right of jury trial to cases in which it did not then exist. It was not intended to prohibit the exercise by equity courts of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction had been previously upheld.² It does not exclude the Federal courts of equity from any part of the field of equitable remedies.³ If a case belongs to a class in which equity has long exercised a well defined concurrent jurisdiction, the existence of a legal remedy will not oust that jurisdiction;⁴ nor will the creation of an adequate legal remedy by State laws, although their practical effect may be to render the equity remedy obsolete.⁵ The concurrent equity jurisdiction generally rests upon the inadequacy of legal remedy,⁶ so that the exercise of this concurrent jurisdiction by Federal equity courts is not a violation of R. S. § 723, either in letter or spirit. Some cases have gone the extent of declaring that the test respecting adequate legal remedy may be ignored in cases of concurrent jurisdiction;⁷ but it seems the better rule to regard it as controlling in all cases.⁸

¹⁴New York G. Co. v. Memphis, Fed. Cas. No. 5,535; Smythe v. Henry, etc. Co. 107 U. S. 215, 27 L. ed. 484, 488, 2 Sup. Ct. Rep. 279; White v. Boyce, 21 Fed. 228.

¹⁵Whitehead v. Shattuck, 138 U. S. 150, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; Whitehead v. Entwistle, 27 Fed. 778; Smythe v. Henry, 41 Fed. 715; Gordan v. Jackson, 72 Fed. 89.

¹Wehrman v. Conklin, 155 U. S. 323, 39 L. ed. 172, 15 Sup. Ct. Rep. 129; Harrison v. Rowan, 4 Wash. 202, Fed. Cas. No. 6,143; Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174.

²Pratt v. Northam, 5 Mason, 95, Fed. Cas. No. 11,376, per Story, J.; Wehrman v. Conklin, 155 U. S. 323, 39 L. ed. 172, 15 Sup. Ct. Rep. 129.

³Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2,133; Dow v. Berry, 18 Fed. 125.

⁴Goodenow v. Milliken, 1 Hask. 348,

Fed. Cas. No. 5,535; Smythe v. Henry, 41 Fed. 715.

⁵See Pittsburgh, etc. R. R. v. Keokuk Co. 68 Fed. 22, 15 C. C. A. 184; Grand Rapids, etc. R. R. v. Sparrow, 36 Fed. 211, 1 L.R.A. 480; Gordon v. Hobart, 2 Sumn. 401, Fed. Cas. No. 5,609; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 407; Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416; Frazer v. Colorado D. & S. Co. 5 Fed. 164; Pokegama Co. v. Klamath Co. 96 Fed. 55, 56.

⁶Pomeroy Eq. Jur. § 173; Boyce v. Grundy, 3 Pet. 215, 7 L. ed. 655; Harrison v. Rowan, 4 Wash. 202, Fed. Cas. No. 6,143; Spring v. Dom. S. M. Co. 13 Fed. 449.

⁷See Cox v. Wall, 99 Fed. 549; Smythe v. Henry, 41 Fed. 715.

⁸Gindrat v. Dane, 4 Cliff. 260, Fed. Cas. No. 5,455.

[d] Dismissal sua sponte because legal remedy adequate — waiver.

Objection that there is adequate remedy at law is jurisdictional and requires dismissal of a bill even though the parties fail to raise the question.¹² It is the court's duty to notice the objection sua sponte.¹³ If the case proceeds to final determination in the trial court without objection raised or noticed, the appellate court will entertain the objection if then raised where the case is plainly not of equity cognizance;¹⁴ but if the general subject matter belong to that class over which equity has jurisdiction, the court in its discretion may decline to do so.¹⁵ It is apparent therefore that right to raise the objection may be lost, and hence that it may be waived by failure to object in due time.¹⁶ So where the bill clearly shows that it is competent for the court to grant relief the objection that there is an adequate remedy at law must be taken by plea demurrer or answer at the earliest opportunity, and if not so taken will be considered waived.¹⁷

[e] Plain, adequate and complete legal remedy.

There must not only be a remedy at law, but it must also be plain and adequate and as practical and efficient to the ends of justice as the remedy in equity.¹ If it be doubtful,² or less efficient and prompt,³ or less complete and adequate⁴ equity will not decline cognizance of the suit. In-

¹²Graves v. Boston M. Ins. Co. 2 Cranch, 419, 2 L. ed. 324; Hepburn v. Dunlop 1 Wheat, 197, 4 L. ed. 65; Carpenter v. Provident Ins. Co. 4 How. 224, 11 L. ed. 931; Buzard v. Houston, 119 U. S. 351, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; Arkansas Bldg. Assn. v. Madden, 175 U. S. 273, 44 L. ed. 159, 20 Sup. Ct. Rep. 119.

¹³Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43; Hipp v. Babin, 19 How. 278, 15 L. ed. 633; Lewis v. Cocks, 23 Wall. 470, 471, 23 L. ed. 70; Sullivan v. Portland, etc. R. R. 94 U. S. 806, 24 L. ed. 324; White v. Boyce, 21 Fed. 232; Kane v. Luckman, 131 Fed. 621.

¹⁴Thompson v. Central O. R. R. 6 Wall. 134, 137, 18 L. ed. 765, 767; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 89, 12 Sup. Ct. Rep. 340; Parkersburg v. Brown, 106 U. S. 500, 27 L. ed. 238, 1 Sup. Ct. Rep. 442.

¹⁵Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594; Brown v. Lake Co. 134 U. S. 535, 536, 33 L. ed. 1024, 1025, 10 Sup. Ct. Rep. 604; Allen v. Pullman's P. C. Co. 139 U. S. 658, 662, 35 L. ed. 305, 11 Sup. Ct. Rep. 682; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 89,

12 Sup. Ct. Rep. 340; Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Lone J. M. Co. v. Megginson, 82 Fed. 89, 27 C. C. A. 63.

¹⁶Cecil Nat. Bank v. Thurber, 59 Fed. 913, 8 C. C. A. 365; see also Waite v. O'Neil, 72 Fed. 348; Levi v. Evans, 57 Fed. 677, 6 C. C. A. 500; Book v. Justice M. Co. 58 Fed. 827; Knight v. Fisher, 58 Fed. 991.

¹⁷Southern Pac. R. Co. v. United States, 133 Fed. 651, 66 C. C. A. 581.

¹Boyce v. Grundy, 3 Pet. 215, 7 L. ed. 655; Lewis v. Cocks, 23 Wall. 470, 23 L. ed. 70; Watson v. Sutherland, 5 Wall. 78, 18 L. ed. 580; Allen v. Hanks, 136 U. S. 311, 34 L. ed. 414, 10 Sup. Ct. Rep. 961; Walla Walla v. Walla Walla Water Co. 172 U. S. 12, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; McMullen L. Co. v. Strother, 136 Fed. 305, 69 C. C. A. 433.

²Davis v. Wakelee, 156 U. S. 688, 39 L. ed. 578, 15 Sup. Ct. Rep. 555; Wiemer v. Louisville W. Co. 130 Fed. 246.

³Rich v. Braxton, 158 U. S. 406, 39 L. ed. 1022, 15 Sup. Ct. Rep. 1006; Mutual L. Ins. Co. v. Blair, 130 Fed. 971.

⁴Wylie v. Cox, 15 How. 420, 14 L. ed. 753; Whitehead v. Shattuck,

adequacy of legal remedy refers to the character of the remedy itself as adopted to the end in view and not to its practical effect.⁵ It is not rendered inadequate in contemplation of law, by the fact that it fails to produce the money.⁶ The want of adequate legal remedy must affirmatively appear. Certain general principles have been derived in the practical application of this rule. Actions merely to obtain a decree for the payment of money,⁷ and actions simply for the recovery and possession of specific real or personal property⁸ must be maintained in Federal courts upon the law side, even though there be allegations of fraud, concealment and the like.⁹ Ejectment is an adequate remedy for recovering possession of real property and claimant having a legal title cannot go into equity.¹⁰ A recent case holds that the fact that State courts can vacate judgments in ejectment at law does not mean that Federal courts can, and intimates that resort to equity is necessary.¹¹

[f] Adequacy of remedy "at law" is tested by common law.

The adequacy of remedy "at law" which will forbid resort to equity in the Federal courts under this section has reference to the common law as it existed at the time of the judiciary act,¹⁵ unless subsequently changed by act of Congress.¹⁶ Any other rule would have made the equity jurisdiction one thing in one State and something else in another, depending upon the local legislation.¹⁷

138 U. S. 151, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Spokane M. Co. v. Post*, 50 Fed. 431; *Smith v. American Nat. Bank*, 89 Fed. 840, 32 C. C. A. 368.

⁵*Thompson v. Allen Co.* 115 U. S. 554, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *Burdon, etc. Co. v. Leverich*, 37 Fed. 68; *Safe D. Co. v. Anniston*, 96 Fed. 663.

⁶*Thompson v. Allen Co.* 115 U. S. 554, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *O'Brien v. Wheelock*, 78 Fed. 679; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Southern Pac. Co. v. Goodrich*, 57 Fed. 882.

⁷*Parkersburg v. Brown*, 106 U. S. 500, 27 L. ed. 244, 1 Sup. Ct. Rep. 442; *Ambler v. Choteau*, 107 U. S. 586, 27 L. ed. 322, 323, 1 Sup. Ct. Rep. 556; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Buzard v. Houston*, 119 U. S. 352, 30 L. ed. 454, 7 Sup. Ct. Rep. 249; *Whitehead v. Shattuck*, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Mills v. Knapp*, 39 Fed. 592; *Frey v. Wiltoughby*, 63 Fed. 865, 11 C. C. A. 463.

⁸*Whitehead v. Shattuck*, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712.

⁹See *Ambler v. Choteau*, 107 U. S. 590, 27 L. ed. 322, 1 Sup. Ct. Rep. 556.

¹⁰See *Galt v. Galloway*, 4 Pet. 339, 7 L. ed. 876; *Lewis v. Cocks*, 23 Wall. 469, 23 L. ed. 70; *Ellis v. Davis*, 109 U. S. 503, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; *Killian v. Ebbinghaus*, 110 U. S. 573, 28 L. ed. 246, 4 Sup. Ct. Rep. 232; *Arrowsmith v. Gleason*, 129 U. S. 97, 32 L. ed. 630, 9 Sup. Ct. Rep. 237.

¹¹*King v. Davis*, 137 Fed. 198.

¹⁵*McConihay v. Wright*, 121 U. S. 201, 30 L. ed. 932, 7 Sup. Ct. Rep. 940; *Cropper v. Coburn*, 2 Curt. 465, Fed. Cas. No. 3,416.

¹⁶*Grand R. Co. v. Sparrow*, 36 Fed. 211, 1 L.R.A. 480; *Pokegama, etc. Co. v. Klamath Co.* 96 Fed. 55, 56; *Peck v. Ayers*, 116 Fed. 275, 53 C. C. A. 551.

¹⁷*Missouri K. & T. R. R. v. Elliott*, 56 Fed. 773.

[g] — hence Federal equity jurisdiction is uniform, not subject to enlargement or restriction by State or English practice.

Several important consequences follow from this principle that adequacy of remedy at law is tested by the common law. Since that test or standard of measurement is the same in all States, it follows that Federal equity jurisdiction is everywhere uniform, regardless of State legislation.¹ It also follows that the equity jurisdiction is of the same scope as that exercised by English courts of chancery at the time of the judiciary act,² and is unaffected by later changes in the English practice.³ It further follows that the creation of new legal remedies by State laws, though available in the Federal courts at law by virtue of the conformity laws,⁴ and though in fact adequate, will not oust the jurisdiction of Federal courts on their equity side to administer the older equitable remedy.⁵ The Federal suitor may thus sometimes have the option of a remedy at law taken from the State courts, and a remedy in equity no longer there available. In an early chapter of this work the principle that the States are without power to regulate the procedure or jurisdiction of Federal courts, was discussed and its bearing upon the equity jurisdiction was shown.⁶ The doctrine that the Federal courts will administer an enlargement of equitable rights created by State legislation is not really an exception to the rule that the States may not enlarge the equity jurisdiction of Federal courts.⁷ Since the enactment of R. S. §§ 869 and 724 allowing either party to call the other as a witness at law and requiring the production of books and papers, the question arises as to whether a pure bill of discovery will lie. In the face of the above-mentioned enactments such a bill has to a great extent become obsolete,⁸ and it is held that it cannot be maintained where the claim is legal and such bill is the only ground of equitable relief.⁹ But a recent case has held it maintainable notwithstanding State and Federal statutes rendering it unnecessary.¹⁰

§ 936. Forms and modes of proceeding in equity.

The forms of mesne process and the forms and modes of pro-

¹See ante, § 5; see also *Gordon v. Hobart*, 2 Sumn. 401, Fed. Cas. No. 5,609, and *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, per Story, J.; *Robinson v. Campbell*, 3 Wheat. 222, 4 L. ed. 375.

²See ante, § 5[]

³*Baker v. Biddle*, Bladw. 394, Fed. Cas. No. 764.

⁴See ante, §§ 900, 905, 925.

⁵*Kimball v. Mobile*, 3 Woods, 555, Fed. Cas. No. 7,774; *Pokegama*, etc. Co. v. *Klamath*, etc. Co. 96 Fed. 55, 56; *Grand R. Co. v. Sparrow*, 36 Fed. 211; *Pittsburgh*, etc. R. R. v. *Keokuk*, 63 Fed. 22, 15 C. C. A. 184; *Gordon v. Hobart*, 2 Sumn. 401, Fed. Cas. No. 5,609; *Dodge v. Woolsey*, 18

How, 331, 15 L. ed. 407; *Cropper v. Coburn*, 2 Curt. 465, Fed. Cas. No. 3,416; *Frazer v. Colorado Co.* 5 Fed. 164, 2 McCrary, 11.

⁶Ante, § [5].

⁷See ante, § 5[], § 10[aa], § 800.

⁸See *Safford v. Ensign*, etc. Co. 120 Fed. 480, 56 C. C. A. 630; *Field v. Hastings*, 65 Fed. 279; *Brown v. McDonald*, 130 Fed. 965, and cases cited.

⁹*United States v. Bitter*, etc. Co. 133 Fed. 274, 66 C. C. A. 652; *Brown v. McDonald*, 130 Fed. 964; *London*, etc. Co. v. *Doyle*, 130 Fed. 719.

¹⁰*McMullen L. Co. v. Strother*, 136 Fed. 301, 69 C. C. A. 433; see also post, § 950, note.

ceeding in suits of equity . . . jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity . . . except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time to any circuit or district court, not inconsistent with the laws of the United States.

R. S. § 913, U. S. Comp. Stat. 1901, p. 683.

This provision was originally enacted in 1789.¹⁵ It also specifies similarly as to admiralty practice.¹⁶ This section is to be read in connection with R. S. § 917,¹⁷ which gives the Supreme Court very broad powers to regulate Federal equity procedure, and R. S. § 918,¹⁸ which gives the circuit and district courts power to regulate their practice by rules. This section is therefore residuary in character and only applicable in the absence of specific statute or rule of the Supreme Court or of the trial court.¹⁹ The equity practice is so comprehensively covered by rules of court that it is seldom controlling. The rules of the high court of chancery in England are recognized as "the common law of chancery" and an authoritative exposition of the "principles, rules and usages which belong to courts of equity" within this section.¹ The Supreme Court has expressly declared in the 90th equity rule that in other matters than those covered by the Federal equity rules, the practice shall be according to that of the high court of chancery in England;² and itself follows that practice with necessary modifications in the exercise of its original equity jurisdiction.³

§ 937. Where no positive rule applies, practice of English high court of chancery to be consulted.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England,^[b] so far as the same may reasonably be applied con-

¹⁵Act Sept. 29, 1789, c. 21, § 2, 1 Stat. 43; see act May 8, 1792, c. 36, § 2, 1 Stat. 276; act May 19, 1828, c. 68, § 1, 4 Stat. 278; act Aug. 1, 1842, c. 109, 5 Stat. 499.

¹⁶See post, § 1195.

¹⁷Ante, § 802.

¹⁸Ante, § 805.

¹⁹See Story v. Livingston, 13 Pet. 359, 10 L. ed. 200.

¹Vattier v. Hinde, 7 Pet. 274, 8 L. ed. 684; Boyle v. Zacharie, 6 Pet. 648, 3 L. ed. 532; Bein v. Heath, 12 How. 178, 13 L. ed. 944; Pennsylvania v.

Wheeling, etc. Co. 13 How. 563, 14 L. ed. 268; Richmond v. Atwood, 52 Fed. 25, 2 C. C. A. 596, 17 L.R.A. 615; Taylor v. Clark, 89 Fed. 7; Davidson v. Calkins, 92 Fed. 233; Alger v. Anderson, 92 Fed. 696; Shuford v. Cain, 1 Abb. 305, Fed. Cas. No. 12,823; United States v. Parrott, 1 McAll. 287, 289, Fed. Cas. No. 15,998; Breeden v. Lee, 2 Hughes, 488, Fed. Cas. No. 1,828; Ball v. Tompkins, 41 Fed. 489.

²See post, § 937.

³See ante, § 35.

sistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.^{7a}

99th equity rule, adopted March 1842, 16 Pet. lxi.

[a] In general.

The earlier equity rules of 1822 provided that "in all cases where the rules prescribed by this court, or by the circuit court, do not apply; the practice of the circuit courts shall be regulated by the practice of the high court of chancery in England."⁷ The above rule therefore changes the earlier provision by adopting the rules as of a certain date and by making the English practice a guide rather than controlling authority. In the exercise of that discretion the circuit court has refused to hold that a husband must join in a wife's suit for infringement.⁸ This rule neither enlarges nor diminishes the jurisdiction, but simply regulates the practice.⁹ It is the English chancery practice and not the practice of the courts of exchequer,¹⁰ nor of the individual States¹¹ that is the guide.

[b] English practice of 1842 adopted—authoritative evidence thereof.

As this rule was promulgated in March, 1842, it is the English chancery practice as it then existed that was adopted for the circuit court.¹² Authoritative exposition of the English practice of that date is to be found in the first edition of Daniel's Chancery Practice and the second edition of Smith's Practice, both published in 1836, as supplemented and modified by the general orders in chancery, made by Lords Cottenham and Langdale in August, 1841. Many of these general orders are in fact closely copied in the equity rules. The value of the second edition of Daniel (1846) as evidence of the English practice which the Federal courts must look to is impaired by the fact that it reflects the extensive changes introduced into English practice by the English orders of May, 8, 1845, and the third and later editions by the still more radical changes introduced by the general orders of April, 1850.¹⁴

⁷Rule 32, see 7 Wheat. 7, 5 L. ed. R. Co. 2 Cliff. 351, Fed. Cas. No. 377; see also Boyle v. Zacharie, 6 Pet. 5,583; Griswold v. Bragg, 48 Fed. 648, 8 L. ed. 532; Livingston v. Story, 520; Evory v. Candee, 17 Blatchf. 200, 13 Pet. 368, 10 L. ed. 205; Gaines v. Fed. Cas. No. 4,583.

Relf, 15 Pet. 16, 10 L. ed. 642. ¹⁴See note by Bradley, J., to Thompson v. Wooster, 114 U. S. 112, 29 L. ed. 107, 5 Sup. Ct. Rep. 788;

⁸Lorillard v. Standard O. Co. 2 Fed. 902, 18 Blatchf. 199.

⁹Lewis v. Shainwald, 48 Fed. 492. Romaine v. Union Ins. Co. 28 Fed. 632, per Hammond, J.; Partee v. Thomas, 27 Fed. 430; Richmond v. Atwood, 52 Fed. 25, 2 C. C. A. 596;

¹⁰Smith v. Burnham, 2 Sumn. 612, Fed. Cas. No. 13,018.

¹¹Goodyear v. Prov. R. Co. 2 Cliff. 351, Fed. Cas. No. 5,583; United States v. Parrott, 1 McAll. 447, Fed. Cas. No. 15,999; Martindale v. Waas, 11 Fed. 551, 3 McCrary, 637.

¹²Badger v. Badger, 1 Cliff. 237, Fed. Cas. No. 717; Goodyear v. Prov. Whitman, 96 Fed. 875.

§ 938. Affirmation equivalent to oath required by equity rules.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

91st equity rule.

R. S. § 1,¹⁸ also provides that "a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form," and the Federal Constitution provides for "oath or affirmation" in several sections.¹⁹ The earlier cases required a very clear showing of conscientious scruples against an oath.²⁰

§ 939. Power of judge at chambers, during term or vacation, as to orders etc.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule days at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

3d equity rule.

A justice of the Supreme Court and a district judge are sometimes given the powers and may perform the duties of the circuit judge.¹ This rule does not apply so as to require formal notice of application for interlocutory order or of motion made during term and in the presence of opposing counsel.² By an act passed August 23rd, 1842,³ a few months after the adoption of this rule it was provided that the circuit court as a court of equity should always be open for the making and directing of rules, orders, etc., and the judge was empowered to make, direct, and award, process, commissions, orders, rules, etc.⁴ That provision is still in force as R. S. § 638 and the foregoing rule is therefore merely auxiliary to it.

¹⁸U. S. Comp. Stat. 1901, p. 3.

1 Cranch C. C. 157, Fed. Cas. No.

¹⁹See Cons. art. I., § 3, art. II., §

8,824.

1; art. VI.; amend. art. IV.

¹Ante, §§ 100-104.

²⁰See King v. Fearson, 3 Cranch

C. C. 435, Fed. Cas. No. 7,790; Bank

of Col. v. Wright, 3 Cranch C. C. 216,

Fed. Cas. No. 883; McIntire's Cases,

²McLean v. Lafayette Bank, 3 McLean, 503, Fed. Cas. No. 8,887.

³C. 188, § 5, 5 Stat. 517.

⁴See ante, § 365.

§ 940. Notice of motions, rules and orders by entry in order book, service on solicitor or party.

All motions, rules, orders and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required.

Part of 4th equity rule.

The remainder of the rule provides for abridging the length of notice in certain cases.⁷ It is believed that the noticing of such rules, motions and orders as must be procured from the court or judge, merely by entry in the order book has practically become obsolete; and that it is now customary to require service of notice upon the solicitor of the opposite party.⁸ The order book is a relic of the time when judges and lawyers rode upon circuit and it was necessary to provide by rule that the clerk's office should be open and the clerk in attendance on the first Monday of every month.⁹ Objection for failure to make entry upon the order book is sometimes taken, however, for purposes of delay.¹⁰

§ 941. When court may abridge time for notice of orders, rules, etc.

Where the solicitors for all the parties in a suit reside in or near the town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

Part of 4th equity rule.

The remainder of the rule prescribes the mode of giving notice.¹²

⁷Post, § 941.

⁸See *Bennett v. Hoefner*, 17 Blatchf. 341, Fed. Cas. No. 1,320; see *Electrolibration Co. v. Jackson*, 52 Fed. 774, where order book had had

no entry for seven years, and rule day was not observed.

⁹Equity rule 2; see ante, § 604.

¹⁰*Newby v. Oregon C. Ry.* 1 Sawy. 63, Fed. Cas. No. 10,145.

¹²Ante, § 940.

§ 942. What motions and applications deemed grantable of course by clerk.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

5th equity rule.

The concluding sentence of the above rule conforms to a decision of the Supreme Court previously made.¹⁶ Reading this rule in connection with rule 6 it is apparent that a distinction is to be drawn between motions and orders which require allowance by the judge on special notice to the adverse party, and those grantable of course under this rule.¹⁷

§ 943. Procedure on motions and orders sought during term and not grantable of course.

All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused in his discretion.

6th equity rule.

This rule differs from rule 51⁹ in that it concerns motions and orders not grantable of course; and from rule 32⁰ in that it governs the procedure as to motions and orders sought during the term and not the power of the judge in vacation.

§ 944. Bills in equity—the introductory part.

Every bill,^[a] in the introductory part thereof, shall contain the

¹⁶See *Poultney v. Lafayette*, 12 Pet. 472, 9 L. ed. 1162.

¹⁹Ante, § 942.

²⁰Ante, § 939.

¹⁷*United States v. Parrott*, 1 McAll. 447, Fed. Cas. No. 15,999.

names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," etc.^[b]

20th equity rule.

[a] Bills and informations in general.

The authorities upon equity pleading lay down the rule that the original pleading of a complainant in equity is a bill, in the form of a petition, in all cases where complainant is a private party; but in cases of suit instituted on behalf of the government, or of those who partake of its prerogative (e. g. idiots and lunatics) or whose rights are under its protection (e. g. public charities) the matter of complaint should be offered to the court by way of information by the Attorney General or solicitor or other government officer; and that such a pleading is called an information. Where the government proceeds upon the relation of some person (termed the relator) who has a personal interest in the matter in dispute, these authorities further declare that the pleading is properly termed an information and bill.³

But Federal practice presents but few instances of the use of information⁴ in suit by the government. It is the established custom for the officers of the government to proceed by ordinary bill in equity in the name of the United States,⁵ and Congress has in several particular instances directed the filing of a "bill in equity" on behalf of the government,⁶ or the institution of proceedings in equity "by way of petition."⁷ It is settled also that while the Attorney General has power and is in duty bound to institute proper suits for the government, such suits should be in the name of the United States⁸ The absence of any provision respecting informations in the equity rules further suggests the inapplicability of the ancient learning upon this subject, in Federal practice.

³Story Eq. Pleading, § 7, 8; Mitf. Eq. Pl. 22, 23, 99, 100; Cooper Eq. Pl. 1. American B. T. Co. 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; for injunction: United States v. Debs, 63 Fed. 436.

⁴Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 987; Atty. Gen. v. Rumford C. Works, 32 Fed. 608.

⁶See United States v. Union P. R. R. 98 U. S. 569, 25 L. ed. 143.

⁵E. g. suits to cancel land patents: United States v. Hughes, 11 How. 552, 13 L. ed. 809; United States v. Stone, 2 Wall. 525, 17 L. ed. 765; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; to cancel patents for inventions: United States v.

⁷See United States v. Freight Assn. 166 U. S. 291, 41 L. ed. 1011, 17 Sup. Ct. Rep. 540.

⁸See Attorney General v. Rumford C. Works, 32 Fed. 608; United States v. San Jacinto T. Co. 125 U. S. 285, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

[b] The form of the introductory part.

A bill addressed to the "circuit court," etc., "in chancery sitting" has been held sufficient.¹¹ The introductory part of the bill must give with certainty the names of all the parties.¹² No party can be made defendant to a bill save by name.¹³ A bill "against H. H. Day, Thomas J. Andrews, W. H. Clark and one hundred and fifty other persons of whose name complainant is ignorant, and who are designated each by the name of John Doe, and whose true names, when discovered, complainant asks leave to insert," etc., has been held insufficient to support service upon or jurisdiction over such unnamed parties.¹⁴ Where the court's jurisdiction depends upon diverse citizenship, the allegations of the introductory part of the bill become of jurisdictional importance.¹⁵ It is the invariable rule of Federal pleading that jurisdiction must affirmatively appear.¹⁶ Under the later Federal statutes defining the jurisdiction of the circuit and district courts, the allegations as to residence often becomes jurisdictionally as important as the allegation of citizenship itself.¹⁷ But an allegation of residence without any averment of citizenship is insufficient to support jurisdiction.¹⁸ Where one of the parties is a corporation the bill should show under the laws of what State it is organized;¹⁹ and if a State contains more than one district an averment of the corporate "residence" becomes material.²⁰ If one party is an alien he should be designated as a "citizen and subject of a foreign State, to wit," etc.² Defects in the introductory part of the bill cannot be cured by reference to its caption.³

Where the jurisdiction of a bill is not rested upon diverse citizenship, failure to comply with the requirements of the above rule might be deemed mere matter of form and disregarded or formally amended, but if jurisdictional the omission is ground for demurrer;⁴ and since the act of 1875 may even be challenged at a later stage of the proceedings.⁵ A bill omitting proper averments of citizenship and residence in the introductory part thereof has been ordered dismissed with costs unless proper amendments

¹¹*Sterrick v. Pugsley*, 1 Flip. 350, Fed. Cas. No. 13,379.

¹²*Barth v. MaKeever*, 4 Biss. 206, Fed. Cas. No. 1,069.

¹³*Ex parte Richards*, 117 Fed. 658.

¹⁴*Kentucky S. M. Co. v. Day*, 2 Sawy. 468, Fed. Cas. No. 7,719.

¹⁵*See Wright v. Skinner*, 136 Fed. 694, holding allegation of citizenship necessary only when jurisdiction depends thereon.

¹⁶*Ante*, § 9.

¹⁷*Harvey v. Richmond, etc. Ry.* 64 Fed. 21; *see ante*, §§ 131, 402.

¹⁸*Wolfe v. Hartford L. I. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Cooper v. Newell*, 155 U. S. 533, 39 L. ed. 249, 15 Sup. Ct. Rep. 355; *See ante*, § 9[d].

¹⁹*Covington D. Co. v. Shepherd*, 20

How. 232, 233, 15 L. ed. 896; *St. Louis, etc. Ry. v. James*, 161 U. S. 562, 40 L. ed. 802, 16 Sup. Ct. Rep. 621. Its members are then conclusively presumed to be citizens of that State; *See ante*, § 2[t].

²⁰*See Harvey v. Richmond, etc. Ry.* 64 Fed. 21; *Galveston, etc. Ry. v. Gonzales*, 151 U. S. 504, 38 L. ed. 248, 14 Sup. Ct. Rep. 401.

²*Wilson v. City Bank*, 3 Sumn. 422, Fed. Cas. No. 17,797; *see Stuart v. Easton*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 268.

³*Jackson v. Ashton*, 8 Pet. 149, 8 L. ed. 898.

⁴*See Harvey v. Richmond, etc. Ry.* 64 Fed. 21.

⁵*Ante*, § 818.

were filed.⁶ Such omission is held to be corrected by motion and not by demurrer.⁷

§ 945. — narrative or stating part and prayer for relief.

The plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief.^[a] The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of ne exeat regno or any other special order pending the suit, is required, it shall also be specially asked for.^[b]

Concluding part of 21st equity rule. For first part see next section.

[a] The narrative or stating part of the bill.

Matter which was formerly the charging part of the bill may by this rule be embodied in the narrative part. The narrative or stating part is the real substance of the bill. It should contain a narrative of the facts and circumstances of plaintiff's case, the wrong or grievance complained of, and the names of the persons by whom done and against whom redress is sought.¹² These facts must be distinctly alleged so as to put them in issue,¹³ although it is not necessary to enter into minutia of evidence.¹⁴ The bill must contain sufficient matter to maintain the case of plaintiff.¹⁵ An allegation of an essential fact in a bill by way of recital, but in such form that the existence of the fact appears by necessary implication, is good as against a general demurrer.¹⁶ A bill for rescission must contain clear and positive allegations showing the equitable right of the complainants to the relief asked.¹⁷ A petition stating a decree entered in a former proceeding, either as matter of inducement or as the basis of plaintiff's action, need not set out the petition on which such decree was rendered.¹⁸ A bill in equity charging fraud should state the facts relied on with sufficient particularity to justify the conclusion and to apprise the defendant of what he must meet in the way of evidence, but this should be done without undue minuteness of detail.¹⁹ Strictness of pleading is not required of those who come in to assert their claims to property in a suit for the administration of a trust

⁶Carlsbad v. Tibbetts, 51 Fed. 855.

⁷Wright v. Skinner, 136 Fed. 694.

¹²Story Eq. Pl. § 27.

¹³Harding v. Handy, 11 Wheat.
119, 120, 6 L. ed. 429.

¹⁴Dunham v. Railway Co. 1 Bond,
492, Fed. Cas. No. 4,150.

¹⁵Harrison v. Nixon, 9 Pet. 483, 9
L. ed. 201.

¹⁶Investor Pub. Co. v. Dobinson, 72
Fed. 603.

¹⁷Post v. Beacon Vacuum Pump
Co. 84 Fed. 371.

¹⁸Davis v. Davis, 65 Fed. 380.

¹⁹Field v. Hastings & Bradley Co.
65 Fed. 279.

by foreclosure.²⁰ The court may, of its own motion, dismiss a bill which fails to make out a case for equitable relief.¹

[b] The prayer for relief.

The rule requires a prayer for general as well as for specific relief. Under the general prayer other relief than that specifically asked, may be granted if consistent with the case made out;⁵ but not relief inconsistent with that specifically asked;⁶ nor relief unwarranted by the showing.⁷ Damages have been allowed under the general prayer;⁸ and specific performance has been ordered.⁹ The general prayer will authorize the granting of relief though the party is not entitled to the specific relief asked.¹⁰ Relief may sometimes be asked in the alternative,¹¹ as that complainant recover the specific property or its value.¹² In a suit to settle bounds the court may order an old obliterated boundary to be remarked.¹³ A prayer for discovery may be ignored in the answer where the bill propounds no interrogatories and answer under oath is waived.¹⁴ It is only where an exeat is asked pending suit that this rule requires it to be specially prayed.¹⁵ Failure to pray relief in accordance with this rule would be ground of demurrer to a bill, but would not impair the collateral validity of a decree based thereon.¹⁶ The waiver of answer under oath, frequently made to avoid the evidentiary value of the answer under the 41st rule,¹⁷ is properly inserted in this part of the bill. Also any other waiver or tender or offer to do equity.

§ 946. — what formal parts of bill may be omitted.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of

²⁰Blake v. Pine Mt. Iron & C. Co. 43 U. S. 490, 76 Fed. 624.

¹Fourgeres v. Jones, 66 Fed. 316.

⁵Oteri v. Scalzo, 145 U. S. 589, 36 L. ed. 824, 12 Sup. Ct. Rep. 895; Hopkins v. Grimshaw, 165 U. S. 358, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; English v. Foxall, 2 Pet. 595, 7 L. ed. 531; Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398; Hobson v. McArthur, 16 Pet. 182, 10 L. ed. 930; Boon v. Chiles, 8 Pet. 536, 8 L. ed. 1034; Jones v. Van Doren, 130 U. S. 692, 32 L. ed. 1077, 9 Sup. Ct. Rep. 685; Tyler v. Savage, 143 U. S. 98, 36 L. ed. 82, 12 Sup. Ct. Rep. 340.

⁶Wilson v. Graham, 4 Wash. 53, Fed. Cas. No. 17,804; Curry v. Lloyd, 22 Fed. 258, 265.

⁷Kent v. Lake S. C. Co. 144 U. S. 92, 36 L. ed. 352, 12 Sup. Ct. Rep. 650.

⁸Penhollow v. Doane, 3 Dall. 86, 1 L. ed. 521.

⁹Taylor v. Merchants, etc. Co. 9 How. 406, 13 L. ed. 187.

¹⁰Moore v. Mitchell, 2 Woods, 483, Fed. Cas. No. 9,770; Watts v. Waddle, 6 Pet. 403, 8 L. ed. 437.

¹¹See Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Kilgour v. New Orleans G. L. Co. 2 Woods, 144, Fed. Cas. No. 7,764; Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Jones v. Electric Co. 144 Fed. 765, (C. C. A.)

¹²Hubbard v. Urton, 67 Fed. 419.

¹³Virginia v. Tennessee, 148 U. S. 528, 37 L. ed. 546, 13 Sup. Ct. Rep. 728.

¹⁴Excelsior W. P. Co. v. Seattle, 117 Fed. 140, 55 C. C. A. 156.

¹⁵Lewis v. Shainwold, 7 Sawy. 403, 48 Fed. 492.

¹⁶See United States v. Agler, 62 Fed. 824.

¹⁷See post, § 951.

the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor.

First part of 21st equity rule. For remainder of rule see preceding section.

[a] **Frame of equity bills.** •

Formerly equity bills consisted of nine parts, viz.: First, the address; second, the introduction; third, premises or stating part; fourth, the confederating part; fifth, the charging part; sixth, the jurisdiction clause; seventh, the interrogating part; eighth, prayer for relief, and ninth, prayer for process. The five principals of these were the statement, charges, interrogatories, prayer for relief, and prayer for process.¹ The above rule permits an omission of the confederacy clause, the charging part, and the jurisdiction clause. But the object sought previously by the charging part, viz., to enable plaintiff to meet some defense or excuse which he anticipates from defendant, may now be accomplished by stating and avoiding such counter averments in the narrative part of the bill.

§ 947. — **averment as to nonjoinder of parties out of jurisdiction.**

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

22d equity rule.

This rule is peculiar to Federal practice, where parties, otherwise necessary, may be dispensed with if their joinder would oust the jurisdiction of the court.⁵ Where such parties have not the requisite diverse citizenship they should not be joined and the bill should always show the reason for their nonjoinder. But where the trouble is merely that they are not within

¹See Story Eq. Pl. §§ 38, 46, notes; ⁵See ante, § 817.
Comstock v. Herron, 45 Fed. 660.

reach of process of the court⁶ it is not improper to join them as parties since it is possible they will voluntarily appear.⁷ In suits where service may be made beyond the State or by publication it is clearly proper to join all parties having the requisite diverse citizenship regardless of their residence.⁸ As respects the concluding portion of the above rule, authorizing prayer for process against a party if he come within the jurisdiction, it is to be remembered that the act of 1887 took away the privilege of suing a person in the district in which he may be found and permits suit only in the district of the residence of plaintiff or defendant.⁹

§ 948. — the prayer for process.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

23rd equity rule.

The omission from the prayer for subpoena of the names of some of the defendants named in the introductory part of the bill, is a violation of the above rule and is a fatal defect.¹² It would seem clear that absence of any prayer for process renders a bill demurrable;¹³ though it would not render void an injunction issued by the court upon such a bill.¹⁴ Objection for failure to name a defendant in the prayer for process is waived by appearance.¹⁵

§ 949. — the signature of counsel and its legal effect.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

24th equity rule.

⁶Ante, § 853.

⁷Ante, § 860.

⁸Ante, § 856.

⁹Shaw v. Quincy M. Co. 145 U. S. 444, 449, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; South Pac. Co. v. Denton. 146 U. S. 202, 36 L. ed. 944, 13 Sup. Ct. Rep. 44; see ante, § 402.

¹²Carlsbad v. Tibbetts, 51 Fed. 852;

Goebel v. American R. S. Co. 55 Fed. 827.

¹³United States v. Agler, 62 Fed. 824. But see Jennes v. Landes, 84 Fed. 74.

¹⁴United States v. Agler, 62 Fed. 824.

¹⁵Buerk v. Imhaeuser, 8 Fed. 457.

Signature on the back of a bill has been held sufficient. Signing as "solicitor" is probably sufficient and as proper as signing "of counsel."¹⁶ "Solicitor" is in fact the term customarily used to designate the attorney for a party in an equity proceeding, although in this country the English distinction between attorney, solicitor and barrister has lost its legal significance.¹⁷ The requirement for signature of counsel cannot be deemed obligatory where complainant sues in person, in view of R. S. § 747 permitting a party to conduct his own cause in any court of the United States.¹⁸ A bill defective in this particular is demurrable,¹⁹ and may be stricken from the file.²⁰ But the court should permit an amendment as of course.¹ If the omission is to be deemed merely formal, it can be waived under R. S. § 954 directing the court to ignore merely formal defects unless demurred to.² A bill ordered from the files for want of signature may be signed and on motion restored.³

§ 950. — interrogatories—form of statement.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "to the end thereof," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."^{[a]-[b]}

43rd equity rule, promulgated Mar. 1842.

[a] In general.

Where plaintiff merely annexed the interrogatories to the bill and failed to refer to them therein, this has been held an informality which may be

¹⁶Stinson v. Hildrup, 8 Bis. 376, v. Hildrup, 8 Biss, 376, Fed. Cas. No. 13,459. Fed. Cas. No. 13,459.

¹⁷Stinson v. Hildrup, 8 Biss. 376, ¹Dwight v. Humphrey, 3 McLean, 104, Fed. Cas. No. 4,216; Stinson v. Hildrup, 8 Biss. 376. Fed. Cas. No.

¹⁸See ante, § 493.

¹⁹Dwight v. Humphrey, 3 McLean, 13,459; see R. S. § 954, ante, § 813. 104, Fed. Cas. No. 4,216. ²See ante, § 813.

²⁰Roach v. Huling, 5 Cranch C. 3 Roach v. Hulings, 5 Cranch C. C. 637, Fed. Cas. No. 11,874; Stinson 637, Fed. Cas. No. 11,874.

waived when not prejudicial.⁷ If the defendant does not duly answer the interrogatories plaintiff's remedy is by exception to the answer.⁸ The court will then order due answer to be made and tax the costs against defendant.⁹

[b] Discovery.

While defendant is now required to answer a bill fully without interrogatories,¹⁰ though not if his answer contains a plea in bar or to the merits,¹¹ it is still advisable for complainant who seeks discovery to attach interrogatories to his bill.¹² The interrogatory or discovery part of a bill is now of less importance than it was prior to the act of 1864¹³ permitting parties to be examined as witnesses.¹⁴ It has been doubted whether a bill seeking only discovery and not relief, is now permissible.¹⁵ The answer to the question depends upon whether there is a plain speedy and adequate remedy at law as tested in the Federal courts.¹⁶ State laws giving relief at law previously available only in equity will not extinguish although they may render obsolete, the old equity remedy in the Federal court.¹⁷ But the act of Congress making parties competent witnesses, has probably made bills for discovery no longer maintainable.

§ 951. — interrogatories must be numbered.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form, or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

41st equity rule as originally promulgated March 1842.

The amendment of this rule adopted at the December term, 1861, is concerned with waiver of answer under oath,²⁰ and does not affect this portion of the rule.

⁷Federal M. Co. v. International L. ed. 1204; United States v. McLaughlin, 24 Fed. 823; Field v. Hastings, 65 Fed. 280; see post, § 996

⁸Post, § 1101.

⁹Langdon v. Goddard, 3 Story, 13, Fed. Cas. No. 8,061.

¹⁰Post, § 998.

¹¹Post, § 996.

¹²Parsons v. Cummings, 1 Woods, 461, Fed. Cas. No. 10,775.

¹³Post, § 1735.

¹⁴Ex parte Boyd, 105 U. S. 657, 26

L. ed. 1204; United States v. McLaughlin, 24 Fed. 823; Field v. Hastings, 65 Fed. 280; see post, § 996 [a].

¹⁵Ex parte Boyd, 105 U. S. 657, 26 L. ed. 1204; but see National, etc. Co. v. Interchangeable, etc. Co. 83 Fed. 26.

¹⁶See ante, § 935[c].

¹⁷Ante, § 935[c], [f].

²⁰See post, § 1000.

§ 952. — footnote respecting interrogatories deemed part of bill.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

42d equity rule, promulgated March, 1842.

§ 953. Necessary allegations of stockholder's bill.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action.

94th equity rule 104 U. S. ix.

[a] In general.

This rule was promulgated January 23rd, 1882. It was framed in the light of the opinion in *Hawes v. Oakland*,⁵ decided at the same term, and defining the facts which must appear to justify the maintenance of a shareholder's suit against a corporation. It applies only to suits instituted in the circuit court and not to causes removed from State courts;⁶ and to suits against the corporation and others, not merely against the corporation. Demand upon a resident managing agent and failure to make demand upon the directors because they were too far away, has been held an insufficient showing.⁷ A bill omitting any allegation of demand upon the corporate managers has been held jurisdictionally defective;⁸ and dismiss-

⁵*Hawes v. Oakland*, 104 U. S. 450, *Excelsior P. Co. v. Brown*, 74 Fed. 26 L. ed. 827; see *Corbus v. Alaska T. G. M. Co.* 187 U. S. 462, 47 L. ed. 259, 23 Sup. Ct. Rep. 160.

⁶*Leo v. Union P. Ry.* 17 Fed. 273; *Earle v. Seattle, etc. Ry.* 56 Fed. 909; *Evans v. Union P. Ry.* 58 Fed. 497; ⁷*Corbus v. Alaska T. G. M. Co.* 187 U. S. 463, 47 L. ed. 259, 23 Sup. Ct. Rep. 160. ⁸*Dickinson v. Cons. T. Co.* 114 Fed. 241.

able.⁹ An injunction sought will be refused where the bill lacks these averments.¹⁰ Plaintiff is required to show the efforts on his own part and not the efforts of others.¹¹ The requirement for a showing of the stockholders efforts to get redress, may sometimes be dispensed with where the facts set forth in the bill demonstrate that such efforts would have been futile.¹² The leading case itself recognizes that there are cases where demand cannot be made or where it would be unreasonable to require it.¹³ But there must be either allegations as to a demand or of facts which legally excuse it.¹⁴ The fact that five of the seven directors participating in a fraudulent transaction are still in office has been held no excuse.¹⁵ The allegation as to ownership of the stock is always essential.¹⁶ Technical compliance with this rule does not prevent an inquiry by the court into the bona fides of the efforts of complainant or the propriety of permitting him to sue.¹⁷

[b] Verification.

A stockholder's bill is the only one required to be verified by the equity rules. A bill for an injunction should however be verified if the party desires to read it in evidence at the hearing.¹

§ 954. Necessity for succinctness, and avoidance of impertinence and scandal.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, in haec verba, or any other impertinent matter,^[a] or any scandalous matter^[b] not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall

⁹Bimber v Calivada C. Co. 110 Fed. 59.

¹⁰Weidenfeld v. Allegheny, etc. R. R. 47 Fed. 14; Squair v. Lookout M. Co. 42 Fed. 730.

¹¹Dannmeyer v. Coleman, 11 Fed. 101, 8 Sawy. 51.

¹²Lafayette Co. v. Neely, 21 Fed. 738; Young v. Alhambra M. Co. 71 Fed. 810; Excelsior P. P. Co. v. Brown, 74 Fed. 321, 20 C. C. A. 428; De Neufville v. N. Y. etc. R. R. 81 Fed. 13, 26 C. C. A. 306; Weir v. Bay S. G. Co. 91 Fed. 940; Rogers v. Nashville, etc. Ry. 91 Fed. 305, 33 C. C. A. 517.

¹³Hawes v. Oakland, 104 U. S. 461, 26 L. ed. 827.

¹⁴Louisville, etc. R. R. v. Neal, 128 Ala. 156, 29 So. 867.

¹⁵Church v. Citizens St. Ry. 78 Fed. 526.

¹⁶Robinson v. West V. L. Co. 90 Fed. 772.

¹⁷Corbus v. Alaska T. G. M. Co. 187 U. S. 483, 47 L. ed. 259, 23 Sup. Ct. Rep. 160. See McHenry v. N. Y., etc. R. R. 22 Fed. 131.

¹See Woodworth v. Edwards, 3 Wood. & M. 120, Fed. Cas. No. 18,014; Hughes v. Northern P. R. R. 18 Fed. 108; Black v. H. G. Allen Co. 42 Fed. 622, 623, 9 L.R.A. 433.

otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

26th equity rule.

[a] Surplusage, irrelevant and impertinent matter.

Impertinence consists of any allegation that is irrelevant to the material issues made or tendered.⁴ Impertinences are matters not pertinent or relevant to the points properly before the court for decision;⁵ or such matters as are stated with needless prolixity.⁶ Matter which is entirely immaterial is impertinent, and should be expunged.⁷ Where exceptions are taken for impertinence, the pleading will be given a liberal construction.⁸ The rule that a bill in equity should contain a clear and explicit description sufficient to give the defendant notice of the subject matter of the complaint against him is not abrogated by the above rule.⁹ The circuit court has power to order the striking from its files of a rambling and verbose bill of excessive length, containing impertinent and scandalous matter, and to permit complainants to file within a stated time, as of the date of the original filing, a new bill not exceeding a prescribed length.¹⁰ The above rule does not abrogate or curtail the inherent power of the Federal courts in equity to strike out rambling or tautological pleadings, and purge their records of scandalous or impertinent matter, on their own motion, and in the absence of exceptions.¹¹ Mere argument in an answer as to the effect of facts already apparent in the bill is impertinent, and upon exception will be stricken out.¹²

[b] Scandalous matter.

Scandal in a pleading has been defined as any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners or anything unbecoming the dignity of the court to hear. Facts not material are impertinent and, if reproachful, are scandalous.¹⁶ Matter is not scandalous unless also impertinent, but the reverse is not true.¹⁷

§ 955. — timely exception to impertinence and scandal.

No order shall be made by any judge for referring any bill, answer

⁴Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14.

⁵Wood v. Mann, 1 Sum. 578, Fed. Cas. No. 17,952.

⁶Chapman v. School Dist. Deady, 108, Fed. Cas. No. 2,607.

⁷Langdon v. Goddard, 3 Story, 13, Fed. Cas. No. 8,061.

⁸Griswold v. Hill, 1 Paine, 390, Fed. Cas. No. 5,835.

⁹Electrolibration v. Jackson, 52 Fed. 773.

¹⁰Kelley v. Boettcher 29 C. C. A. 14, 85 Fed. 55.

¹¹Kelley v. Boettcher, 29 C. C. A. 14, 85 Fed. 55.

¹²Florida Mortg. & Inv. Co. v. Finlayson, 74 Fed. 671.

¹⁶Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14. See Green v. Elbert, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188.

¹⁷Toler v. East T. V. & G. Ry. 67 Fed. 175.

or pleading, or other matter or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

27th equity rule.

It is the proper practice to make separate exceptions covering each separate matter alleged to be impertinent or scandalous; as an exception taken is properly only considered and allowed or disallowed as a whole.¹ Demurrer is not the proper way of alleging impertinence.²

§ 956. Amendment of bill before plea, demurrer, or answer.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterward, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.^{[a]-[b]}

28th equity rule.

The Federal statute respecting amendment is applicable in equity as well as at law, and has already been considered.³ Different rules apply to

¹Chapman v. School Dist. Deady, 108, Fed. Cas. No. 2,607.

²Howe, etc. Co. v. Haugan, 140 Fed. 182.

³Ante, § 813 [j].

the amendment of different pleadings and according to the stage of the proceeding when amendment is sought. This rule deals merely with amendments of the bill prior to "any answer or plea or demurrer." It is to be observed that the rule contemplates the serving of a copy of the amendments only; except that where the amendments are numerous, it requires service of a copy of the whole bill as amended. So far as this rule differs from the principles laid down in an early *nisi prius* case respecting the proper method of amendment, it must be deemed to have superseded it.⁷ The natural tendency of careful practitioners would be to file an amended bill rather than amendments whenever doubtful whether the amendments would be deemed "numerous." If there has been plea, answer or demurrer by any of several defendants, it would seem that the right to amend would be governed by the next rule⁸ and not by this.⁹ The general rule is that nothing which has occurred subsequent to the filing of the bill can be added by amendment, but must be brought in by supplemental bill.¹⁰ A special appearance to object to the jurisdiction is not a plea, demurrer or answer; but in one case where there had been such special appearance plaintiff in amending proceeded upon petition and notice to the adverse party, in the mode prescribed by the next rule, although the court declared the case within this one.¹¹ The rule requires service of the amendments or of the amended bill upon the parties "affected thereby" but does not require a new subpoena; and no new subpoena is necessary unless against parties first added by the amendment.¹² While this rule expressly permits amendments "in any matter whatsoever" it would seem that the substitution of a different cause of action is not a proper amendment even at this preliminary stage of the proceedings. The courts have frequently declared such substitution improper after the defendant has pleaded;¹³ and the safer practice would be for complainant to begin all over again. Where amendment is attempted after defendant has taken a copy of the bill from the office, without paying costs or furnishing a copy as required, it is nugatory and plaintiff may withdraw it.¹⁴ The amendment need not be supported by affidavit.¹⁵

§ 957. Amendment after plea, demurrer, or answer and after replication.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice,

⁷Peirce v. West, 3 Wash. C. C. 354, Fed. Cas. No. 10,910.

⁸See post, § 957.

⁹See Peirce v. West, 3 Wash. C. C. 354, Fed. Cas. No. 10,910.

¹⁰See Hobson v. McArthur, 16 Pet. 194, 10 L. ed. 930; Jenkins v. International B. Co. 127 U. S. 489, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196; Mason v. Hartford, etc. R. R. 10 Fed. 334; Lyster v. Stickney, 4 McCrary, 109, 12 Fed. 609. See post, § 961.

¹¹Insurance Co. v. Svendsen, 74 Fed. 347.

¹²French v. Hay, 22 Wall. 238, 22 L. ed. 854; Longworth v. Taylor, 1 McLean, 514, Fed. Cas. No. 8,491.

¹³See post, § 957 [c].

¹⁴Sheffield F. Co. v. Witherow, 149 U. S. 576, 37 L. ed. 853, 13 Sup. Ct. Rep. 936.

¹⁵Chase E. C. Co. v. Columbia C. Co. 136 Fed. 699.

obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct.^[a] But after replication filed the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.^{[b]-[e]}

29th equity rule, adopted March, 1842.

[a] Ex parte order for amendment after plea, etc, but before replication.

This rule deals with amendment of a bill to which the defendant has pleaded, both before and after replication. Before replication leave to amend is obtainable *ex parte*, after replication it must be upon notice. It will be observed that this rule does not apply to the subject of amendment after a demurrer or plea is allowed, but only after it is filed.¹⁹ The 35th rule governs the matter of amendment after demurrer has been allowed.²⁰ As the court is empowered by order to allow an amendment without notice at this stage of the case, the opposing counsel cannot maintain a motion to set aside an order so made, or to strike the amended pleading from the files.¹ Defendant has no right by motion, to compel a complainant to amend with a view to disclosing an alleged defect in his case.²

[b] Amendment upon notice to adverse party, after replication and after hearing.

Where a matter might have been sooner introduced into the bill, courts have refused to permit amendment after replication even in small matters.⁵

An amended bill filed without leave, upon the day that original was discussed, will be disregarded by an appellate court.⁶ An amended bill filed after replication without leave may be stricken out;⁷ so also if the amended bill lack the necessary affidavit.⁸ Amendments of the bill may be allowed even after hearing, where necessary to do substantial justice.⁹

¹⁹National Bank v. Carpenter, 101 U. S. 568, 25 L. ed. 816. man, 13 Blatchf. 210, Fed. Cas. No. 2,894.

²⁰See post, § 986.

¹Lichtenauer v. Cheney, 3 Mc- 26 L. ed. 403.

⁷Washington R. R. v. Bradley, 10

²Phelps v. Elliott, 23 Blatchf. 470, Wall. 299, 19 L. ed. 894.

⁸Beaver v. C. A. Richardson & Co.

⁵Ross v. Carpenter, 6 McLean, 382, 118 Fed. 320.

⁹Graffam v. Burgess, 117 U. S. 191.

But amendments sought after the decision and just prior to the decree, have been refused.^{9½} The greatest liberality prevails in the allowing of amendments to make the pleadings show the court's jurisdiction if in fact jurisdiction exists;¹⁰ or to bring in or leave out a party.¹¹ But it is said that the purpose of amendment after replication must be "not to strengthen or enlarge the complainant's case, nor to change the character or quantity of the relief for which he has asked, but to enable the court to administer substantial justice."¹² The courts have a large discretion in the allowance or disallowance of amendments;¹³ but are indisposed to allow amendments changing the character of a bill, after a case is set for hearing.¹⁴ The court's discretion is not so easily moved after hearing¹⁵ the question in each case depends largely upon its special circumstances and "the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice."¹⁶ Under no circumstances should amendment be permitted after final decree; relief must then be had by supplemental bill.¹⁷

[c] Substitution of different cause of action.

The substitution of a different cause of action is an improper use of the right to amend;¹ especially if the statutory period of limitation has

29 L. ed. 844, 6 Sup. Ct. Rep. 686; *Neale v. Neales*, 9 Wall. 1, 19 L. ed. 590; *The Tremolo Patent*, 23 Wall. 518, 23 L. ed. 97; *Battle v. Mutual L. Ins. Co.* 10 Blatchf. 418, Fed. Cas. No. 1109; *Hamilton v. Southern N. etc. Co.* 13 Sawy. 113, 33 Fed. 562

^{9½}See *Clafin v Bennett*, 51 Fed. 701, 702; *Blair v. Harrison*, 57 Fed. 257, 6 C. C. A. 326.

¹⁰See *Howard v. De Cordova*, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 817; *Home Co. v. Nobles*, 63 Fed. 641; *Fisher v. Rutherford*, 1 Baldw. 188, Fed. Cas. No. 4,823; *Hilliard v. Brevoort*, 4 McLean, 25, Fed. Cas. No. 6,505; *Harvey v. Richmond. etc. Ry.* 64 Fed. 19; *Collinson v. Jackson*, 8 Sawy. 357, 14 Fed. 305.

¹¹*Walden v. Bodley*, 14 Pet. 156, 10 L. ed. 389; *Lewis v. Darling*, 16 How. 8, 14 L. ed. 819; *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Harrison v. Rowan*, 4 Wash. 202, Fed. Cas. No. 6,143; *Hubard v. Manhattan T. Co.* 87 Fed. 51, 30 C. C. A. 520. See ante. § 813 [j].

¹²*Bass v. Christian Feigensham*, 82 Fed. 261, refusing amendment in an infringement case enlarging the claim and changing the character or quantity of relief sought. See also ante, § 813 [j].

¹³*Neale v. Neales*, 9 Wall. 9, 19 L. ed. 590; *The Tremolo Patent*, 23 Wall. 527, 23 L. ed. 97; *National Bank v. Carpenter*, 101 U. S. 568, 25 L. ed. 816; *Roberts v. Northern P. R. R.* 158 U. S. 26, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Hardin v. Boyd*, 113 U. S. 761, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 871, 7 Sup. Ct. Rep. 788; *United States v. American B. T. Co.* 39 Fed. 717; *Jones v. Van Doren*, 130 U. S. 691, 32 L. ed. 1077, 9 Sup. Ct. Rep. 685; *Gubbins v. Laughtenschlager*, 75 Fed. 620.

¹⁴*The Tremolo Patent*, 23 Wall. 527, 23 L. ed. 97.

¹⁵*Gubbins v. Laughtenschlager*, 75 Fed. 620.

¹⁶*Hardin v. Boyd*, 113 U. S. 761, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771.

¹⁷*French v. Hay*, 22 Wall. 246, 22 L. ed. 854.

¹⁸*Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Hardin v. Boyd*, 113 U. S. 764, 28 L. ed. 1141, 15 Sup. Ct. Rep. 771; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Savage v. Worsham*, 104 Fed. 19.

expired.² A motion to strike such an amended bill from the files is proper.³ But it is not a statement of a different cause of action to amend the prayer by asking relief in the alternative;⁴ or to amend the prayer and omit allegations as to one party;⁵ or an amendment amplifying a denial of service of process.⁶

[d] Proceedings upon amended bill.

The 46th equity rule governs cases in which the bill is amended after answer filed.⁷ Where an amended bill is filed no new subpoena is necessary against parties already in court, but only against any new parties first joined in the amended bill.⁸ The general rule is that defendants have the same right to answer the amended bill as they had to answer the original.⁹ The court has no discretion to deny defendants a reasonable time in which to answer an amended bill.¹⁰ In Federal practice it is usual for the parties by agreement or for the court by special rule to fix the time within which an amended bill may be answered.¹¹ If plaintiff amends after he has taken a default it virtually vacates the default.¹² If defendant has answered before amendment, the 46th equity rule applies.¹³ If he has filed a plea or demurrer which has not been disposed of, he may doubtless make the same or any other attack upon the new pleading. But if a plea or demurrer to the original pleading has been disposed of, he cannot make the filing of the new pleading an excuse for raising points already disposed of on such plea or demurrer. Hence he can then only plead or demur where the amendments present new questions, and only to such new questions.¹⁴

[e] Effect of amendment.

Although a bill which has been amended is termed an amended bill, "the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it, for the original bill and amended bill constitute but one record; so much so that, when an original bill is fully answered and amendments are afterwards made to which defendant does not answer, the whole record may be taken *pro confesso* generally."¹⁷

²Judson v. Courier, 25 Fed. 705.

L. ed. 854; Blythe v. Hinckley, 84 Fed. 246.

³Oglesby v. Attrill, 4 Woods, 114, 14 Fed. 214.

⁴Hardin v. Boyd, 113 U. S. 764,

¹⁰Nelson v. Eaton, 66 Fed. 376, 378, 13 C. C. A. 523; Blythe v. Hinckley, 84 Fed. 246, and cases cited.

28 L. ed. 1411, 5 Sup. Ct. Rep. 771.

⁵See also Maynard v. Tilden, 28 Fed. 688.

¹¹Nelson v. Eaton, 66 Fed. 376, 378, 13 C. C. A. 523.

⁶Pendery v. Carleton, 87 Fed. 41, 30 C. C. A. 510.

¹²Nelson v. Eaton, 66 Fed. 376, 378, 13 C. C. A. 523.

⁷Mills v. Scott, 43 Fed. 452.

¹³Post, § 1007.

⁸See post, § 1007.

¹⁴Encly. Pl. & Pr. 490.

⁹French v. Hay, 22 Wall. 246, 22

L. ed. 854; Longworth v. Taylor, 1

¹⁷French v. Hay, 22 Wall. 246,

McLean, 514, Fed. Cas. No. 8,491.

¹⁰French v. Hay, 22 Wall. 246, 22

L. ed. 854; Excelsior P. Co. v. Brown, 74 Fed. 323; Blythe v. Hinckley, 84 Fed. 246.

§ 958. Amendment after answer—special replication not permissible.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may, in his discretion direct.

45th equity rule, promulgated March 1842.

Rule 11 of the equity rules of 1822¹ provided that "no special replication to an answer shall be filed, but by leave of the court, or one of the judges thereof, for cause shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without costs, at the discretion of the court." Rule 45 *supra* was obviously framed in modification of this earlier rule. But so far as respects amendment of the bill after answer, the subject is covered by the first portion of rule 29.² That rule expressly requires that leave to amend be first obtained;³ though if filed without objection the defect is waived.⁴ Rule 45 abolishes the special replication entirely;⁵ as respects both answer and plea.⁶ An amended bill or special replication is not necessary in order to avoid the effect of an amended answer which is, at most, only a more extended statement of the grounds of defense previously set forth.⁷

§ 959. Permission to amend lost if not availed of by the next rule day.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

30th equity rule adopted March 1842.

§ 960. Bills of revivor and proceedings thereon.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a

¹See 7 Wheat. VI., 5 L. ed. 367.

²Ante, § 954.

³Clements v. Moore, 6 Wall. 299, 18 L. ed. 786.

⁴Ibid.

⁵Taylor v. Benham, 5 How. 233, 12 L. ed. 131; Wilson v. Stolley, 4 McLean, 275, Fed. Cas. No. 1,963;

Coleman v. Martin, 6 Blatchf. 291, Fed. Cas. No. 2,986.

⁶See post, § 1009. Mason v. Hartford, etc. R. R. 10 Fed. 334.

⁷Southern P. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

56th equity rule, adopted March 1842.

[a] Bills of revivor.

There are also Federal statutory provisions respecting revivor in Federal causes generally.¹⁰ As suggested by the above rule a bill of revivor is proper whenever by death some party to a suit has become incapable of prosecuting or defending, or abatement results from "any other event" as where a female plaintiff has by marriage incapacitated herself from suing alone.¹¹ Bill of revivor is necessary where a suit abates, and supplemental bill where it merely becomes defective.¹² Such a bill does not commence a new suit, but continues the old one.¹³ Being a continuance of the former suit, the residence and citizenship of the parties introduced thereby are immaterial if jurisdiction validly attached under the original bill.¹⁴ But if defendant died before service of process upon him, his representatives or heirs can only be brought in by a bill in the nature of an original bill.¹⁵ Bill of revivor has been used in several cases where the abatement resulted from a dissolution of a corporation which was party to the suit.¹⁶ Privity in law and not merely in estate is necessary. That is, it lies only where there is some one who represents the former party such as an heir in the case of realty or the executor in case of personalty, and not in favor of a devisee, purchaser, assignee or other person having merely a privity of estate.¹⁷ A bill of revivor filed after a lapse of twelve years has been stricken out.¹⁸ The only question to be considered on bill of revivor after death, is, who is the executor and administrator, or

¹⁰Ante, §§ 814, 815.

¹¹Fitzpatrick v. Domingo, 4 Woods. 163, 14 Fed. 216. See Kennedy v. Bank of St. Georgia, 8 How. 610, 12 L. ed. 1218.

¹²Post, §§ 960, 961.

¹³Clarke v. Matthewson, 12 Pet. 172, 9 L. ed. 1041.

¹⁴Clarke v. Matthewson, 12 Pet. 172, 9 L. ed. 1041; Whyte v. Gibbes, 20 How. 542, 15 L. ed. 1016; Brooks v. Laurent, 98 Fed. 647, 39 C. C. A. 201. see ante, § 2 [u].

¹⁵United States v. Fields. 4

Blatchf. 326, Fed. Cas. No. 15,089.

¹⁶Hemmingway v. Stansel, 106 U. S. 399, 27 L. ed. 245, 1 Sup. Ct. Rep. 473; Chester v. Life Assn. 4 Fed. 487; Griswold v. Hilton, 87 Fed. 256.

¹⁷Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932, per Story, J.

¹⁸Hubbell v. Lankenau, 63 Fed. 881.

who is the heir, when that is ascertained the person succeeds by operation of law to the whole title of the deceased.¹⁹ The defendant may question the heirship or representation by plea or answer, but no answer is necessary if the heirship is not intended to be denied, and upon mere motion without answer, when the time for it is out, the cause will be revived as of course.²⁰

[b] Bill in the nature of bill of revivor.

A bill in the nature of a bill of revivor is available to those who have a privity in estate by deed with the original party, such as assignees, purchasers, and devisees, but no privity in law which would constitute them direct representatives.⁵ It lies at any stage of the proceeding when abatement occurs, both before and after decree.⁶ Such a bill is in some aspects original. "When a party claims title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs at law. As to these parties the suit is original; it does not merely revive the old suit, but it states new supplementary matters calling for an answer. So far then as it states such matter it is an original bill; and so far as it seeks to revive upon that matter it is in the nature of a bill of revivor."⁷ But as a transfer of an interest after suit brought by a party having the requisite diverse citizenship will not oust the jurisdiction,⁸ the original aspects of such a bill will not oust the jurisdiction though the new parties have not the requisite diverse citizenship.⁹

[c] Bills of revivor and supplement.

The authorities recognize the existence of bills of "revivor and supplement," and "supplemental bills in the nature of bills of revivor,"¹² but there seem to be few Federal cases in which either of these phrases is used or their exact significance discussed.¹³ The former is defined as a bill which revives a suit after abatement and also supplies a defect arising since its institution.¹⁴ In other words a bill of revivor and supplement is

¹⁹Slack v. Walcott, 3 Mason, 512, Fed. Cas. No. 12,932, per Story, J.; Sharon v. Terry, 13 Sawy. 387, 36 Fed. 353.

²⁰Slack v. Walcott, 3 Mason, 512, 513, Fed. Cas. No. 12,932, per Story, J.

⁵Slack v. Walcott, 3 Mason, 508, 512, Fed. Cas. No. 12,932, per Story, J.; Sharon v. Terry, 13 Sawy. 387, 36 Fed. 354.

⁶Slack v. Walcott, 3 Mason, 508, 512, Fed. Cas. No. 12,932, per Story, J.

⁷Slack v. Walcott, 3 Mason, 512, 513, Fed. Cas. No. 12,932, per Story, J.

⁸See ante, § 2. [u]

⁹Clarke v. Matthewson, 12 Pet. 164, 9 L. ed. 1041.

¹²See Story Eq. Pl. §§ 387, 627, Daniell, Ch. Pr. 1722, 1723.

¹³See Shainwald v. Lewis, 69 Fed. 495; Greenleaf v. Queen, 1 Pet. 148, 7 L. ed. 85; Tappan v. Smith, 5 Biss. 73, Fed. Cas. No. 13,748; Hazleton, etc. Co. v. Citizens St. Ry. 72 Fed. 329.

¹⁴Story, Eq. Pl. §§ 387, 627. This is perhaps illustrated by Metal S. Co. v. Crandall, 18 O. G. 1531, Fed. Cas. No. 9,493c where a complainant suing for infringement assigned his patent rights to a firm of which he was a member and afterwards died.

necessary when a suit has become both "defective" and "abated." A supplemental bill in the nature of a bill of revivor has been held necessary where a trustee defendant died and it was sought to revive against the new trustee appointed in his place.¹⁵

§ 961. Supplemental bills and proceedings thereon.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties),^[b] or for any other reason^[c]-^[d] a supplemental bill^[a] or a bill in the nature of a supplemental bill may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by the judge of the court.^[e]

57th equity rule, adopted March, 1842.

[a] Revivor and supplement distinguished.

From this rule, read in conjunction with the 56th rule it appears that bill of revivor is proper when a suit has "abated" and supplemental bill when a suit has merely become "defective." The distinction between supplemental bills and bills of revivor is therefore the distinction between a defective suit and an abated suit. That distinction is thus stated by Story: "If by any means, any interest of a party to the suit in the matters in litigation becomes vested in another, the proceedings are rendered defective, in proportion as that interest affects the suit; so that, although the parties to the suit may remain as before, yet the end of that suit cannot be obtained. Thus, for example, if the party become bankrupt pending the suit, then, according to the practice of chancery, the suit will be held to be defective; but the bankruptcy does not cause an abatement. And if such change of interest is occasioned by, or is the consequence of, the death of a party, whose interest is not determined by his death, or by the marriage of a female plaintiff, the proceedings become likewise abated or discontinued, either in part or in the whole."¹

[b] Supplemental bill for change of interest pending suit.

A change of interest pending suit should be brought before the court by supplemental bill.³ Where change occurs after final decree the transferee may maintain supplemental bill if he finds it necessary to invoke

¹⁵Greenleaf v. Queen, 1 Pet. 148,
7 L. ed. 85.

¹Story, Eq. Pl. § 329.

³Hoxie v. Carr, 1 Sum. 173, Fed.
Cas. No. 6,802; Tappan v. Smith,
5 Biss. 73, Fed. Cas. No. 13,748.

further action by the court.⁴ A change of interest arising by voluntary act of the parties, such as a sale, is as much within the above rule as change by operation of law.⁵ The transfer of complainants interest in a patent or copyright pending an infringement suit is a frequent occasion for a proceeding under the foregoing rule.⁶ The bill should be a supplemental bill where the transfer of interest is only partial and the transferer still retains an interest;⁷ as where a patent right is transferred pending suit for infringement but complainant retains the right to accrued damages.⁸ But it is properly an original bill in the nature of a supplemental bill where the entire right is transferred and the original party has no further interest in the matter.⁹

[c] Supplemental bill to bring in facts subsequent to commencement of suit.

Supplemental bill is commonly used to bring before the court matters occurring since the original was filed¹² although the cause could often scarcely be said to be defective in the sense of the foregoing rule, without it. Such matters cannot be introduced by amendment,¹³ but only by supplemental bill; and they cannot be introduced by supplemental bill after decree where capable of prior ascertainment.¹⁴ Formerly supplemental bill was used to bring in matter antedating the original bill which was not then known, but amendment is now the simpler method;¹⁵ although if a supplemental bill is necessary for some purposes a complainant has been permitted to incorporate therein matter which should strictly be amendment.¹⁶ A compromise pending suit or a release is properly set up by supplemental bill,¹⁷ though if a party fail to object to the presentation of the matter by simple petition, the error is not available on appeal.¹⁸ The extension of a patent pending an infringement suit is properly set

⁴Secor v. Singleton, 41 Fed. 725.

⁵Hazleton, etc. Co. v. Citizens St. Ry. 72 Fed. 325.

⁶Ross v. Fort Wayne, 58 Fed. 404; Baker v. Baker, 89 Fed. 673; Davis v. Smith, 105 Fed. 949.

⁷Campbell v. New York, 35 Fed. 14; Hoxie v. Carr, 1 Sum. 173, Fed. Cas. No. 6,802.

⁸Davis v. Smith, 105 Fed. 949.

⁹Campbell v. New York, 35 Fed. 14; Ross v. Fort Wayne, 58 Fed. 404; Hazleton, etc. Co. v. Citizens' St. Ry. 72 Fed. 325; Baker v. Baker, 89 Fed. 673; Miller v. Rogers, 29 Fed. 401.

¹²Sheffield, etc. Co. v. Newman, 77 Fed. 787, 23 C. C. A. 459; Kennedy v. State Bank, 8 How. 610, 12 L. ed. 1219; Jenkins v. Eldredge, 3 Story, 299. Fed. Cas. No. 7,267; Elect A. Co. v. Brush E. Co. 44 Fed. 607; Copen v. Fleisher, 1 Bond, 440,

Fed. Cas. No. 3,211; Jenkins v. International Bank, 127 U. S. 489, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196.

¹³Copen v. Fleisher, 1 Bond, 440, Fed. Cas. No. 3,211.

¹⁴Mosgrove v. Kountze, 4 McCrary, 561, 14 Fed. 315.

¹⁵See Jenkins v. Eldridge, 3 Story, 299, Fed. Cas. No. 7,267; Henry v. Trav. Ins. Co. 45 Fed. 299; Potts v. Creager, 71 Fed. 574.

¹⁶Mellor v. Smither, 114 Fed. 116, 52 C. C. A. 64. See Nevada, N. Co. v. National N. Co. 86 Fed. 486.

¹⁷Coburn v. Cedar, etc. Co. 138 U. S. 196, 34 L. ed. 876, 11 Sup. Ct. Rep. 258. Supplemental bill is the proper mode of pleading a curative deed executed pending suit: Reeve v. Northern Car etc. Co. 141 Fed. 821.

¹⁸Veazie v. Williams, 3 Story, 54, Fed. Cas. No. 16,906.

forth by supplemental bill, but it is otherwise when a reissue is obtained.¹⁹ A supplemental bill embodying new matter has been held not sustainable where the original was defective and afforded no ground for proceeding;²⁰ or when the new matter went to defeat and not sustain plaintiff's cause of action,¹ or where it changed the character of the suit;² or was antagonistic to the original;³ or had no connection with the substance of the original.⁴ So also it has been held that allegations of duress and threats respecting the conduct of the suit are not proper matters for supplemental bill.⁵

[d] — after interlocutory or final decree.

Supplemental bill is sometimes proper after decree interlocutory⁹ or final.¹⁰ Thus it is permitted where a party seeks the modification or annulment of a decree for newly discovered evidence and is then termed a supplemental bill in the nature of a bill of review.¹¹ So also it is used after decree for the purpose of carrying it into effect, as where a foreclosure purchaser is obliged to seek the aid of the foreclosing court in securing the fruits of his purchase.¹²

[e] Procedure upon supplemental bill.

Where a party petitions for leave to file a supplemental bill, the petition need not contain the intended new averments, although it should show the ground upon which the relief is asked.¹⁵ Counter affidavits must be examined and considered by the court.¹⁶ Permission to file is usually granted where probable cause appears and without exhaustive consideration of the merits.¹⁷ But it is discretionary¹⁸ if leave to file is not obtained defendant should move to strike it out and demur.¹⁹ Application after

¹⁹Reedy v. Scott, 23 Wall. 364, 23 L. ed. 109; Jones v. Barker, 11 Fed. 597; Fry v. Quinlan, 13 Blatchf. 205, Fed. Cas. No. 5,140.

²⁰Putney v. Whitmire, 66 Fed. 385; N. Y. S. & T. Co. v. Lincoln St. Ry. 74 Fed. 67; Mellor v. Smither, 114 Fed. 116, 52 C. C. A. 64.

¹Electric A. Co. v. Brush E. Co. 44 Fed. 607.

²Snead v. McCoull, 12 How. 407, 13 L. ed. 1043; Maynard v. Green, 30 Fed. 643; Electric A. Co. v. Brush E. Co. 44 Fed. 607.

³Maynard v. Green, 30 Fed. 643.

⁴Minnesota Ry. v. St. Paul Co. 6 Wall. 746, 18 L. ed. 856. See Higginson v. Chicago, etc. Ry. 102 Fed. 197, 200, 42 C. C. A. 254.

⁵Lyster v. Stickney, 4 McCrary, 109, 12 Fed. 609.

⁹Baker v. Baker, 89 Fed. 873; Municipal S. Co. v. Gamewell, etc. Co. 77 Fed. 452.

¹⁰Voorhies v. Blanton, 96 Fed. 497, Central T. Co. v. Western, etc. R.

R. 89 Fed. 24; Hazleton T. S. Co. v. Citizens St. Ry. Co. 72 Fed. 325; Secor v. Singleton, 41 Fed. 725.

¹¹Municipal S. Co. v. Gamewell, etc. Co. 77 Fed. 453. But it is held that where the decree is interlocutory the party should petition for rehearing for newly discovered evidence and not file such a bill; Potts v. Creager, 71 Fed. 574.

¹²Central T. Co. v. Western, etc. R. R. 89 Fed. 24, 28. See also as to ancillary proceedings to construe or enforce a decree. Ante, § 3 [].

¹⁵Parkhurst v. Kinsman, 2 Blatchf. 72, Fed. Cas. No. 10,758.

¹⁶Blandy v. Griffith, 6 Fish. Pat. Cas. 434, Fed. Cas. No. 1,530.

¹⁷Parkhurst v. Kinsman, 2 Blatchf. 72, Fed. Cas. No. 10,758; Oregon T. Co. v. Northern P. Co. 32 Fed. 428.

¹⁸Sheffield, etc. Co. v. Newman, 77 Fed. 787, 23 C. C. A. 459.

¹⁹Henry v. Travelers Ins. Co. 45 Fed. 299, 303.

a delay of eighteen months has been denied.²⁰ Supplemental bill filed five years after notice of a sale and after final decree has been held too late.¹ No new subpoena is necessary except against parties brought in by such bill.² A bill filed as original and in a separate suit may sometimes be treated as a supplemental bill in a pending suit between the same parties.³ A bill filed as supplemental has been treated as a supplemental answer to a cross bill.⁴ A supplemental bill having no relation to the original should be dismissed.⁵ A defense to the original bill set up and overruled is not available against the supplemental bill.⁶ The citizenship of parties is immaterial in a supplemental bill though jurisdiction was originally invoked upon grounds of diverse citizenship.⁷ The defendants have a right to answer a supplemental bill, as provided by the above rule.⁸

§ 962. Bills of supplement and revivor need not repeat allegations of original.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

58th equity rule, adopted March 1842.

This rule is from the English orders in chancery of 1841.¹⁰

§ 963. Cross bills for discovery and for relief.

Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

72nd equity rule, adopted March, 1842.

[a] This rule in general.

So far as the reported cases show, this rule has seldom required inter-

²⁰Blandy v. Griffith, 6 Fish. Pat. Cas. 434, Fed. Cas. No. 1530.

¹Henry v. Trav. Ins. Co. 45 Fed. 299. See Miller v. Clark, 49 Fed. 695, holding two months delay not unreasonable.

²Shaw v. Bill, 95 U. S. 14, 24 L. ed. 333; Mackintosh v. Flint, 34 Fed. 582.

³Electric A. Co. v. Brush E. Co. 44 Fed. 607.

⁴Minnesota Ry. v. St. Paul, Co. 6 Wall. 746, 18 L. ed. 856.

⁵Pentlarge v. Pentlarge, 22 Blatchf. 120, 22 Fed. 416.

⁶Miller v. Rogers, 29 Fed. 401; Minnesota Co. v. St. Paul Co. 2 Wall. 609, 17 L. ed. 886.

⁷Ante, § 3.

⁸Perkins v. Hendryx, 31 Fed. 523.

¹⁰Order 47. See ante, § 802 [b]

pretation in court. Cross bills for discovery are much less frequently used now than in 1842 when the equity rules were adopted; because plaintiff is now examinable as a witness.¹⁴ The decided cases have, however, established many principles respecting the nature and use and procedure upon cross bills, which require notice.

[b] Nature and uses of cross bill in general.

A cross bill is a bill "brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants¹⁵ in the same suit, or against both, touching the matters in question in the original bill."¹⁶ As indicated by the above rule, cross bill may be used to obtain a discovery or to obtain full relief to all parties touching the matters of the original bill.¹⁷ Formerly the plaintiff was not examinable as a witness, so that cross bill for discovery was a very important right of the defendant and frequently resorted to whereas it is now unnecessary.¹⁸ The cross bill itself must be equitable in character;¹⁹ not merely a claim for which there is adequate remedy at law.²⁰ In Federal equity practice a defendant must use cross bill and not the modern statutory counterclaim.³ It is auxiliary in character;⁴ and citizenship of parties thereto is immaterial.⁵ It must pertain to and grow out of the matters in the original bill and hence should not introduce new matters.⁶ But the mere fact that a matter belongs to the same general subject as the original bill is not sufficient to authorize cross bill thereon.⁷ It has been said, and repeated in many cases, that new parties may not be made by cross bills, because the

¹⁴See *Heath v. Erie Ry.* 9 Blatchf. 316, Fed. Cas. No. 6,307.

¹⁵See *Veach v. Rice*, 131 U. S. 317, 33 L. ed. 163, 9 Sup. Ct. Rep. 730.

¹⁶*Story Eq. Pl.* § 389. *Shields v. Barrow*, 17 How. 145, 15 L. ed. 158; *Morgans, etc. Co. v. Texas, C. Ry.* 137 U. S. 201, 11 Sup. Ct. Rep. 61, 34 L. ed. 636; *Rubber Co. v. Goodyear*, 9 Wall. 809, 19 L. ed. 587; *Weaver v. Alter*, 3 Woods, 154, Fed. Cas. No. 17,308; *Book v. Justice M. Co.* 58 Fed. 831; *Springeld M. Co. v. Barnard, etc. Co.* 81 Fed. 261, 26 C. C. A. 389.

¹⁷*Story, Eq. Pl.* § 389.

¹⁸*Heath v. Erie Ry.* 9 Blatchf. 316, Fed. Cas. No. 6,307.

¹⁹*Jackson v. Simmons*, 98 Fed. 768, 39 C. C. A. 514. But see *North, etc. Co. v. Lathrop*, 70 Fed. 429, 17 C. C. A. 175.

²⁰*Lautz v. Gordon*, 28 Fed. 264.

³*Brande v. Gilchrist*, 18 Fed. 465.

⁴*Cross v. De Valle*, 1 Wall. 14, 17 L. ed. 515; *Ayers v. Chicago*, 101 U. S. 187, 25 L. ed. 838.

⁵*First Nat. Bank v. Salem, etc. Co.*

31 Fed. 583; *Morgans, etc. Co. v. Texas C. Ry.* 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Peay v. Schenk 1 Woolw.* 175, Fed. Cas. No. 12450.

⁶*Ayers v. Carver*, 17 How. 595, 15 L. ed. 779; *Cross v. De Valle*, 1 Wall. 14, 17 L. ed. 515; *Ex parte Railroad*, 95 U. S. 225, 24 L. ed. 355; *Railway v. United States*, 101 U. S. 641, 25 L. ed. 1074; *Ayers v. Chicago*, 101 U. S. 187, 25 L. ed. 838; *Heath v. Erie Ry.* 9 Blatchf. 316, Fed. Cas. No. 6,307; *Forbes v. R. R. Co.* 2 Woods, 323, Fed. Cas. No. 4,926; *Goff v. Kelly*, 74 Fed. 327; *Lautz v. Gordon*, 28 Fed. 264. See *Bowker v. United States*, 186 U. S. 141, 46 L. ed. 1093, 22 Sup. Ct. Rep. 802; *Fidelity Co. v. Mobile St. R. Co.* 53 Fed. 852; *Gilmore v. Bort*, 134 Fed. 661.

⁷*Rubber Co. v. Goodyear*, 9 Wall. 810, 19 L. ed. 587. But see *Morgans, etc. Co. v. Texas C. Ry.* 137 U. S. 201, 202, 34 L. ed. 635, 636, 11 Sup. Ct. Rep. 61; *Sutherland v. Lake, etc. Co.* 1 Cent. Law J. 127, Fed. Cas. No. 13,643.

defendant has another remedy by objection for nonjoinder in the original bill.⁸ But this rule is denied by other cases which affirm the right of a defendant to make new parties where they are necessary to affirmative relief touching a matter in question in the original bill.⁹ Cross bill is necessary where defendant seeks affirmative relief against plaintiff,¹⁰ or against a codefendant.¹¹ But matter cannot be litigated between defendants by way of cross bill, which is foreign to the original bill;¹² or unless necessary to a complete decree on the original.¹³ The general rule is that the court cannot decree affirmatively in defendant's favor without it;¹⁴ although to this there are certain exceptions.¹⁵ Cross bill for discovery has been used to ascertain whether plaintiff was a real or nominal party.¹⁶

[c] Instances of its use.

In a suit to set aside an agreement for a conveyance, the latter cannot be established without a cross bill by defendant.¹ In suit to quiet title, cross bill to have the other title declared void² or a fraudulent conveyance set aside³ is proper. On bill to enjoin execution sale defendant may maintain a cross bill to have the judgment declared a lien.⁴ Defendant in a foreclosure suit has been permitted by cross bill to claim penalty for usurious interest.⁵ In suit to establish title through a certain deed, cross bill may set up a trust in that deed in defendants favor.⁶ A proceeding to

⁸*Shields v. Barrow*, 17 How. 145, 15 L. ed. 158, 163. Reaffirmed in: *Randolph v. Robinson*, 20 Fed. Cas. 262; *Adelbert Coll. v. Toledo, etc.* Ry. 47 Fed. 846; *Gregory v. Pike*, 67 Fed. 845, 15 C. C. A. 33; *Thruston v. Big, etc. Co.* 86 Fed. 485.

⁹*Brandon Mfg. Co. v. Prime*, 14 Blatchf. 374, Fed. Cas. No. 1,810; *Mercantile T. Co. v. Atlantic, etc. Ry.* 70 Fed. 525. See *Hildebrand v. Beasley*, 7 Heisk. 123; *Kanawha Lodge v. Swann*, 37 W. Va. 178, 16 S. E. 462.

¹⁰*Carnochan v. Christie*, 11 Wheat. 466, 467, 6 L. ed. 516.

¹¹*United States v. Union Pac. R.* 98 U. S. 612, 25 L. ed. 143; *Nelson v. Lowndes Co.* 93 Fed. 538, 35 C. C. A. 419.

¹²*Veach v. Rice*, 131 U. S. 317, 33 L. ed. 163, 9 Sup. Ct. Rep. 730.

¹³*Putnam v. New Albany*, 4 Biss. 365, Fed. Cas. No. 11,481; *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618; *Thruston v. Big Stone G. Imp. Co.* 86 Fed. 484; *Goff v. Kelly*, 74 Fed. 327; *Springfield v. Barnard, & L. M. Co.* 81 Fed. 261, 26 C. C. A. 389.

¹⁴*Weaver v. Alter*, 3 Woods, 152, Fed. Cas. No. 17,308.

¹⁵*United States v. Union P. R. R.*

98 U. S. 612, 25 L. ed. 143; *Wood v. Collins*, 60 Fed. 139, 8 C. C. A. 522; *Chapin v. Walker*, 2 McCrary, 175, 6 Fed. 794; *White v. Bower*, 48 Fed. 186; *Meissner v. Buek*, 28 Fed. 161. E. g. in suits for account, decree may go for a balance found due defendant, without any cross bill. See *Story, Eq. Pl. § 394*, note 4; and in suits for specific performance, performance may be decreed in conformity with the contentions of defendant without cross bill. *Story, Eq. Pl. § 394*. *Northern R. R. v. Ogdensburg, etc. R. R.* 18 Fed. 815 (see 20 Fed. 347); *Bradford v. Union Bank*, 13 How. 57, 14 L. ed. 50.

¹⁶*Young v. Pott*, 4 Wash. C. C. 521, Fed. Cas. No. 18,172.

¹*Carnochan v. Christie*, 11 Wheat. 466, 467, 6 L. ed. 516.

²*Schenck v. Peay*, 1 Woolw. 175, Fed. Cas. No. 12,450.

³*Remer v. McKay*, 38 Fed. 164.

⁴*Chicago, etc. Ry. v. Third Nat. Bank*, 134 U. S. 287, 288, 33 L. ed. 900, 10 Sup. Ct. Rep. 550.

⁵*Weathersbee v. American F. L. Co.* 77 Fed. 523.

⁶*Kingsbury v. Buckner*, 134 U. S. 677, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.

obtain the appointment of a new trustee has been deemed to justify cross bill by the beneficiaries for accounting, construction of the trust, etc.⁷ in infringement suit defendant may by cross bill establish his own equitable title;⁸ but may not himself allege infringement.⁹ And in a trustee's foreclosure suit bondholders cannot by cross bill claim relief for his alleged maladministration of the trust.¹⁰

[d] Filing and proceedings upon.

In general, it is optional with a defendant to file a cross bill or seek independent relief;¹¹ and the filing of cross bill will not be compelled.¹² It cannot be filed by a stranger to the litigation¹³ unless permitted to intervene.¹⁴ Cross bill cannot be filed until the original is answered.¹⁵ The old rule was that a cross bill should be filed before the taking of testimony upon the original bill as closed, unless some new matter such as a release arose afterwards.¹⁶ But courts are now more liberal in permitting them at a later stage of the proceedings to give defendants the benefit of a decree to which the facts show him entitled;¹⁷ though not to reopen a case for the taking of additional testimony.¹⁸ It is a matter within the discretion of the trial court.¹⁹ A cross bill has been entertained after answer though filed for the purpose of preventing a dismissal of the litigation by plaintiff.²⁰ The filing of a cross bill after the original has been heard and its merits passed upon is improper.²¹ It is proper for the trial court to refuse to permit a cross bill which would entail very lengthy and tedious investigations not strictly relevant to the matters in issue under the original bill.²² A cross bill must name defendants, process is necessary thereon and it must be served.²³ But substituted service is permissible as to parties al-

⁷Hogg v. Hoag, 107 Fed. 807.

⁸Brandon Mfg. Co. v. Prime, 14 Blatchf. 371, Fed. Cas. No. 1,810.

⁹Stonemetz Co. v. Brown Co. 46 Fed. 851.

¹⁰Gasquet v. Fidelity, etc. Co. 57 Fed. 80, 6 C. C. A. 253.

¹¹Sharon v. Hill, 10 Sawy. 394, 22 Fed. 28; Washburn, etc. Co. v. Scutt, 22 Fed. 711.

¹²Shields v. Barrow, 17 How. 145, 15 L. ed. 158.

¹³Thruston v. Big S. G. Co. 86 Fed. 484; Gregory v. Pike, 67 Fed. 837, 15 C. C. A. 33. See Bronson v. Railroad, 2 Wall. 283, 17 L. ed. 725.

¹⁴See Dickerman v. N. T. Co. 80 Fed. 456, 25 C. C. A. 549; Farmers L. & T. Co. v. San Diego C. Co. 40 Fed. 105.

¹⁵Allen v. Allen, Hempst. 58, Fed. Cas. No. 18,223. See the rule supra.

¹⁶Neal v. Foster, 13 Sawy. 236, 34 Fed. 499.

²See Neal v. Foster; Morgans, etc.

Co. v. Texas, C. Ry. 137 U. S. 201, 34 L. ed. 625, 11 Sup. Ct. Rep. 61.

³Rogers v. Riessner, 31 Fed. 591.

⁴Morgans, etc. Co. v. Texas C. Ry. 137 U. S. 201, 34 L. ed. 625, 11 Sup. Ct. Rep. 61.

⁵Pullmans P. Co. v. Central T. Co. 49 Fed. 261.

⁶Bronson v. Railroad, 2 Black, 532, 17 L. ed. 359.

⁷See Harrison v. Perea, 168 U. S. 320, 42 L. ed. 481, 18 Sup. Ct. Rep. 129.

⁸Washington R. R. v. Bradleys, 10 Wall. 302, 303, 19 L. ed. 894; Wood v. Collins, 60 Fed. 142, 8 C. C. A. 525; Hill v. Grocery Co. 78 Fed. 21, 23 C. C. A. 624; Turner v. Southern Home, etc. Assn. 101 Fed. 315, 316, 41 C. C. A. 379; Commercial Bank v. Sandford, 103 Fed. 98; Lowenstein v. Glidewell, 5 Dill. 325, Fed. Cas. No. 8,575.

ready in court.⁹ The original cause will not be heard until the cross bill is answered.¹⁰ A cross bill which is without effect after the dismissal of the original bill, should be dismissed.¹¹ But the mere dismissal of the original bill does not dispose of a cross bill seeking affirmative relief.¹² Although it is otherwise where the cross bill sets up only defensive matters.¹³ Where the cross bill and answers are filed, a decree disposing of the whole case should settle the issues raised in them.¹⁴ Sometimes a final decree disposing of the entire litigation may be drawn upon the lines of the cross bill.¹⁵ An answer to a cross bill filed by a person not named in the bill nor admitted as a defendant will be stricken out.¹⁶ When cross bill neither seeks discovery nor affirmative relief it may be dismissed;¹⁷ though courts have sometimes disregarded the circumstance that a pleading is improperly termed a cross bill.¹⁸

[e] Permission to file.

It is said that cross bill may be filed without leave of court and the question of its propriety be raised later by demurrer.² This would seem correct as respects cross bill prior to hearing or taking of testimony, but where sought at a later time it would certainly be the better practice to obtain leave.³ Leave must be obtained where strangers seek to intervene and file a cross bill;⁴ though the proceeding may be entertained without it;⁵ and the leave granted may be withdrawn where the cross bill is not properly germane.⁶

§ 964. Creditors bill against national bank stockholders.

When any national banking association shall have gone into liquidation under the provisions of section five thousand two hun-

⁹See *Fidelity, etc. Co. v. Mobile*, St. Ry. 53 Fed. 850, 852; *Segee v. Thomas*, 3 Blatchf. 11, Fed. Cas. No. 12,633; *Stonemetz v. Brown Co.* 46 Fed. 851; *Heath v. Erie Ry.* 9 Blatchf. 316, Fed. Cas. No. 6,307 (where the motion was for substituted service). But see contra, *Websted L. Co. v. Short*, 10 O. G. 1019, Fed. Cas. No. 17,343; *Sawyer v. Gill*, 3 Wood. & M. 97, Fed. Cas. No. 12,399.

¹⁰*Young v. Pott*, 4 Wash. C. C. 521, Fed. Cas. No. 18,172.

¹¹*Minnesota Ry. v. St. Paul Co.* 6 Wall. 747, 18 L. ed. 856.

¹²*Barnard v. Hartford, etc. Ry.* Fed. Cas. No. 1,003; *Jackson v. Simmons*, 98 Fed. 768, 39 C. C. A. 514. Defendant may be entitled to decree pro confesso on his cross bill: *Lowenstein v. Glidewell*, 5 Dill. 325, Fed. Cas. No. 8,575.

¹³*Gilmore v. Bort*, 134 Fed. 662, and cases cited.

¹⁴*Moore v. Huntington*, 17 Wall. 417, 21 L. ed. 642.

¹⁵*Blythe v. Hinckley*, 84 Fed. 228. See also *Blythe Co. v. Bankers Ins. Co.* 147 Cal. 82, 81 Pac. 281.

¹⁶*Putnam v. New Albany*, 4 Biss. 365, Fed. Cas. No. 11,481.

¹⁷*American, etc. Co. v. Marquam*, 62 Fed. 960.

¹⁸See *Lavis v. Consumers B. Co.* 106 Fed. 435.

²*Neal v. Foster*, 13 Sawy. 236, 34 Fed. 496.

³*Northern R. Co. v. Ogdensburgh, etc. R. R.* 20 Fed. 347; *Brush E. Co. v. Brush S. Co.* 43 Fed. 701.

⁴*Dickerman v. N. T. Co.* 80 Fed. 456, 25 C. C. A. 549.

⁵*Osborne v. Barge*, 30 Fed. 805.

⁶*Dickerman v. N. T. Co.* 80 Fed. 450, 25 C. C. A. 549.

dred and twenty of said [i. e., the revised] statutes, the individual liability of the shareholders provided for by section fifty-one hundreds and fifty-one of said statutes may be enforced by any creditor of said association by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

§ 2 of act June 30, 1876, c. 156, 19 Stat. 63, U. S. Comp. Stat. 1901, p. 3509.

The act of 1882 limiting Federal jurisdiction over national banks did not oust the jurisdiction conferred by this provision.⁷ It is unnecessary that the creditor first obtain judgment at law. Such a bill is not multifarious because seeking to enforce the liability and apply the proceeds.⁸

§ 965. Limit to taxable costs on bills in equity.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills . . . the regular taxable costs for every bill . . . shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill. . . .

25th equity rule, promulgated March, 1842.

The rule also includes taxable costs on answers.⁹

⁷George v. Wallace, 135 Fed. 286, 68 C. C. A. 40. Such a suit is also deemed one arising under Federal laws. Ibid. Suit for rent against the agent for the shareholders of an insolvent national bank is one to wind up its affairs: International T Co. v. Weeks, 203 U. S. —, 51 L. ed. (p. 69 of advance op.).
⁸Wyman v. Wallace, 201 U. S. 230. 50 L. ed. 738, 26 Sup. Ct. Rep. 495. Ibid.
⁹Post, § 1009.

CHAPTER 26.

EQUITY PROCEDURE (CONTINUED)—SUBPOENA, APPEARANCE, DEFAULT, DEMURRER AND PLEA.

- § 967. Process of subpoena.
- § 868. Subpoena in original suits in Supreme Court.
- § 969. Issuance of subpoena.
- § 970. Return day of subpoena.
- § 971. Mode of service of subpoena.
- § 972. Alias subpoena where original not executed.
- § 973. Service of subpoena to be by marshal or deputy or special appointee.
- § 974. Docket entry on return of subpoena as served.
- § 975. When defendant must appear,—entry of appearance.
- § 976. Nominal parties defendant need not appear—right to costs.
- § 977. Taking bill pro confesso—attachment against defendant in default.
- § 978. Entry and vacating decree taken pro confesso.
- § 979. Demurrer and plea in general.
- § 980. Certificate and affidavit to accompany plea or demurrer.
- § 981. Setting plea or demurrer for argument—issue on plea—effect of decision for defendant thereon.
- § 982. Effect of failure to set down for argument or take issue.
- § 983. Demurrer or plea not to be overruled because less extensive than might be.
- § 984. —because the answer also partly covers same matters.
- § 985. Costs on plea or demurrer overruled—defendant then to answer.
- § 986. Costs where demurrer or plea allowed—amendment of bill—reply to plea.

§ 967. Process of subpoena.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill.

Part of 7th equity rule, adopted March, 1842.

The rule also provides as to the proper process in execution of orders and decrees.¹ The form and style of the processes of Federal courts are provided by Congress.² So also there are general rules as to the places where Federal process may be served and the mode of service, and substituted service which are applicable to the process of subpoena in equity.³

¹Post, § 1095.

³Ante, §§ 851-859.

²Ante, § 836.

The general rule is that process can only be served within the district over which the court has jurisdiction.⁴ A notice or order to persons to appear in a suit is not subpoena nor effective to make them parties and bound by decree.⁵

§ 968. Subpoena in original suits in Supreme Court.

Process of subpoena, issuing out of this court [i. e., the Supreme Court] in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

Supreme Court rule 5, part 3.

The rule was originally promulgated August 12, 1796;⁶ but revised and corrected at the December term 1858.⁷ In one early case it became necessary to enforce its provisions against the State of New York.⁸

§ 969. Issuance of subpoena.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

11th equity rule, adopted March 1842.

The above rule superseded the provision of the fourth of the equity rules of 1822 that "the plaintiff shall file his bill before or at the time of taking out the subpoena."¹¹

§ 970. Return day of subpoena.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case

⁴Ante, § 853.

721 How. 6.

⁵Young v. Montgomery, etc. R. R.
2 Woods, 606, Fed. Cas. No. 18,166.

⁸See New Jersey v. New York, 3
Pet. 461, 7 L. ed. 742, 5 Pet. 284,

⁶1 Cranch 17, 3 Dall. 320, 1 Wheat.
15, 1 Pet. 6.

8 L. ed. 127.

117 Wheat. 6, 5 L. ed. 375.

of husband and wife defendants, or a joint subpoena against all the defendants.

12th equity rule, adopted March 1842.

By the 17th rule defendants appearance day is the rule day to which the process is returnable, provided he was served twenty days prior thereto.¹³ The rule of 1822 which this superseded provided that "all process shall be made returnable to the next succeeding term, or to any intermediate rule day, at the election of the party praying the same."¹⁴

§ 971. Mode of service of subpoena.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

13th equity rule, as amended, May, 1872.

[a] In general

The corresponding provision of the rules of 1822 declared that "if the party be not found, a copy served by the person leaving the same shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling house or usual place of abode."¹⁵ The rule in its present form dates from May 3, 1872 at which time the rule as adopted in 1842, was amended¹⁶ so as to prevent service upon a husband alone being sufficient service upon husband and wife.¹⁷ There is no special Federal statute respecting service of process in equity, but the general limitations upon service of Federal process outside the district where issued, apply as fully to equity as to common law process.¹⁸ Equity process cannot be served beyond the district¹⁹ except where the Federal statutes so permit as to Federal process generally,²⁰ as under the provisions of an act of 1875.²¹ The rule must be strictly followed.²² Under the early rules service upon the husband alone was good service upon husband and wife.²³ Service by leaving subpoena at the place of abode, with an adult member of the family is sufficient;²⁴ but not with "an adult person who is a resi-

¹³Post, § 975.

¹⁴Rule 2 of equity rules of 1822, 7 Wheat. 6, 5 L. ed. 375.

¹⁵See Rule 2 of Equity rules of 1822, 7 Wheat. 6, 5 L. ed. 375.

¹⁶See 21 Wall. 5.

¹⁷See O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 842.

¹⁸See §§ 853 [d], 854 et seq.

¹⁹Jobbins v. Montague, 5 Ben. 425, Fed. Cas. No. 7,329; Parsons v. Howard, 2 Woods, 1, Fed. Cas. No. 10,777; Reid v. Rochereau, 2 Woods, 151, Fed.

Cas. No. 11,669; Hyslop v. Hoppock, 5 Ben. 533, Fed. Cas. No. 6,989.

²²Ante, §§ 854, et seq.

²³Ante, § 856; Brown v. Pegram, 143 Fed. 701.

²⁴Hyslop v. Hoppock, 5 Ben. 533, Fed. Cas. No. 6,989; O'Hara, v. McConnell, 93 U. S. 150, 23 L. ed. 842.

²⁵Robinson v. Cathcart, 2 Cranch, C. C. 590, Fed. Cas. No. 11,946.

²⁶O'Hara v. McConnell, 93 U. S. 151, 23 L. ed. 842; Phoenix Co. v. Wulf, 9 Biss. 285, 1 Fed. 775.

dent of the place of abode" of defendant.⁸ Appearance waives defect in service of process.⁹

[b] When service of subpoena upon attorney sufficient.

When the bill upon which subpoena issues is ancillary to some proceeding upon the law side of the court,¹¹ or ancillary or auxiliary to a suit in equity, so that the party to be served is already in attendance upon court and represented by attorney, valid service of the process may be had upon such attorney or solicitor.¹² Thus subpoena on a bill to restrain proceedings upon the law side may be served on the attorney for the plaintiff at law where such plaintiff is nonresident;¹³ so also in case of injunction against waste where the party is in court with suit of slander of title;¹⁴ or in case of bill for reformation of an insurance policy in aid of an action at law.¹⁵ Cross bill may be served upon the solicitor of parties defendant thereto who are already in court.¹⁶ When a bill is original as to same parties, although as to others it is ancillary or supplemental in character, substituted service of the subpoena cannot be made upon such new parties.¹⁷ And where the bill is strictly original or the proceeding wherein the party to be served was in court by attorney, has so far determined that he would no longer be so deemed in attendance, service upon that attorney is not proper.¹⁸ It is necessary to obtain an order on motion, authorizing service upon the attorney, and to make a showing as to the reason for not making personal service;¹⁹ and the bill should show merit on its face or the order will not be made.²⁰

§ 972. Alias subpoena where original not executed.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, toties

⁸Blythe v. Hinckley, 84 Fed. 228.

⁹Ante, § 860.

¹¹See ante, § 3.

¹²See generally Dunn v. Clark, 8 Pet. 3, 8 L. ed. 845, ante, § 3 [k].

¹³Bartlett v. Sultan, 19 Fed. 346; Crellin v. Ely, 7 Sawy. 532, 13 Fed.

420; Sawyer v. Gill, 3 Woodb. & M. 97, Fed. Cas. No. 12,399; Read v. Consequa, 4 Wash. C. C. 174, Fed. Cas. No. 11,606; Seegee v. Thomas, 3 Blatchf. 11, Fed. Cas. No. 12,633; Cortes Co. v. Thannhauser, 20 Blatchf. 59, 9 Fed. 228; Bush v. United States, 13 Fed. 628, 8 Sawy. 322; Gregory v. Pike, 79 Fed. 520, 25 C. C. A. 48.

¹⁴Hitner v. Suckley, 2 Wash. C. C. 465, Fed. Cas. No. 6,543.

¹⁵Abraham v. North G. F. I. Co. 37 Fed. 731. 3 L.R.A. 188.

¹⁶Segee v. Thomas, 3 Blatchf. 11, Fed. Cas. No. 12,633; Fidelity, etc. Co. v. Mobile St. Ry. 53 Fed. 850. See ante, § 963 [d].

¹⁷Bowen v. Christian, 16 Fed. 729; Shainwald v. Davids, 69 Fed. 702, 703.

¹⁸See Eckert v. Bauert, 4 Wash. C. C. 370, Fed. Cas. No. 4,266; Ward v. Seabry, 4 Wash. C. C. 426, Fed. Cas. No. 17,161; Sawyer v. Gill, 3 Woodb. & M. 97, Fed. Cas. No. 12,399.

¹⁹Pacific R. R. v. Missouri P. R. R. 1 McCrary, 647, 3 Fed. 772; Gregory v. Pike, 79 Fed. 521, 25 C. C. A. 48; Bronson v. Keokuk, 2 Dill. 498, Fed. Cas. No. 1,928.

²⁰Muhlenberg Co. v. Citizens' Nat. Bank, 65 Fed. 537.

quoties against such defendant, if he shall require it, until due service is made.

14th equity rule, adopted, March 1842.

Alias subpoena is the same as the original, except that after the words "you are hereby," are inserted the words "as you have heretofore been" commanded, etc.

§ 973. Service of subpoena to be by marshal or deputy or special appointee.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

15th equity rule, adopted, March, 1842.

In Federal practice process is generally served by the marshal or his deputy;³ and he may appoint a special deputy.⁴ So the court may on application by a party, appoint some person to make service.⁵ It is the marshal's duty to serve process as soon as he reasonably can.⁶ He must exercise his judgment;⁷ and is liable for injury arising from failure to do so himself;⁸ or by his deputy.⁹

§ 974. Docket entry on return of subpoena as served.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

16th equity rule.

§ 975. When defendant must appear,—entry of appearance.

The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when

³United States v. Montgomery, 2 3 L. ed. 194; Winter v. Ludlow, 30 Dall. 335, 1 L. ed. 404. Ante, § 857, Fed. Cas. 331.
note. See also ante, §§ 853, 644, 663. ⁷Wortman v. Conyngham, 1 Pet.

⁴See Jewett v. Garrett, 47 Fed. C. C. 241, Fed. Cas. No. 18,056.
625; Hyman v. Chales, 4 McCrary, ⁸Life, etc. v. Adams, 9 Pet. 573, 9 L. ed. 234; Harriman v. Rockaway.

246, 12 Fed. 855. ⁵Fed. 461.
⁹Jobbins v. Montague, 5 Ben. 425, 5 Fed. 461.
Fed. Cas. No. 7,329. ⁹United States, v. Moore, 2 Brock.

⁶Kennedy v. Brent, 6 Cranch, 191, 307, Fed. Cas. No. 5,802.

the process is returnable. The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

17th equity rule, adopted, March, 1842.

[a] In general.

The corresponding provision of the earlier rules of 1822 declared that "the day of appearance shall be the rule day after the process is returned executed, or after the second return of a copy left if the process shall not be executed, when the process is returnable to the rules, or the rule day next succeeding the term where the process shall be returnable to a term of the court"¹² A party may of course appear without any service of process and thereby waive the same;¹³ and he may appear and file his answer before the return day of the subpoena.¹⁴ Appearance may either be in person¹⁵ or by attorney.¹⁶

[b] Formal entry.

Strict conformity with the above rule requires praecipe to the clerk directing him to enter defendants appearance on the order book; but in practice "appearances are merely formally entered as such, notwithstanding our equity rule;¹⁷ the solicitor simply entering his name on the docket and appearing by whatever step he may take in pleading."¹⁹ If a person wishes to appear merely to object to the jurisdiction or the mode of requiring it, he should, by praecipe and his motion papers unequivocally declare that his appearance is merely special.²⁰

§ 976. Nominal parties defendant need not appear—right to costs.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to ap-

¹²Rule 6, Equity Rules of 1822, 7 5 L. ed. 719; *Goodyear v. Chaffee*, 3 Wheat. 6, 5 L. ed. 375.

¹³*Segee v. Thomas*, 3 Blatchf. 11, Fed. Cas. No. 12,633; *Nelson v. Moon*, 3 McLean, 319, Fed. Cas. No. 10,111; *Carrington v. Brents*, 1 McLean, 167, Fed. Cas. No. 2,446. See ante, § 860.

¹⁴*Heyman v. Uhlman*, 34 Fed. 686. ¹⁵*Gracie v. Palmer*, 8 Wheat. 699.

¹⁶*Knox v. Summers*, 3 Cranch. 496, 2 L. ed. 510. ¹⁷*Romaine v. Insurance Co.* 28 Fed. 637, 638.

²⁰See ante, § 860.

pear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

54th equity rule, promulgated March, 1842.

§ 977. Taking bill pro confesso—attachment against defendant in default.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.^[a]-^[b]

18th equity rule, as amended October, 1878.

[a] History of the provision.

The practice respecting decree pro confesso has undergone several changes since equity rules were first adopted. By the rules of 1822 if defendant did not answer within three months after his appearance day plaintiff could take decree pro confesso, which became absolute at the next term unless cause was then shown by defendant.⁴ Plaintiff also had an option of moving the court for a commission to take depositions, or of bringing in defendant to answer, by attachment.⁵ These rules were construed as further requiring that plaintiff obtain a rule upon defendant to answer, before the court could grant the decree.⁶ The rules of 1842 as originally adopted modified the earlier rules by providing that if defendant did not demur, plead or answer on or before the rule day next succeeding his appearance

⁴Rule 6, Equity Rules 1822 7
Wheat. 6, 5 L. ed. 375.

⁵Rule 10, Equity Rules 1822, 7
Wheat. 6, 5 L. ed. 375.

⁶Pendleton v. Evans, 4 Wash. C.
C. 336, 391, Fed. Cas. No. 10,920,
10,921; Halderman v. Halderman,
Hemp. 407, Fed. Cas. No. 5,908.

the plaintiff might enter an order in the order book that the bill be taken pro confesso and the matter thereof decreed at the next succeeding term;⁷ and did away with the necessity for special rule upon defendant to answer.⁸ On October 28, 1878, the rule was amended into its present form,⁹ and the necessity for waiting until the next term for an absolute decree was done away with.¹⁰

[b] Construction and operation.

Decree pro confesso under this rule is not a decree as of course in conformity with the prayer of the bill, nor merely such as complainant chooses to make it.¹¹ But the court should make only such decree as is proper in law under the allegations of the bill taken as true.¹² To order that the bill be taken pro confesso, is to order it to stand as if its statements were confessed to be true, and a decree pro confesso is a decree based on such statements assumed to be true. It is as binding and conclusive as any other decree.¹³ On appeal the allegations of the bill cannot be questioned, but only their sufficiency to support the decree.¹⁴ On decree pro confesso in an infringement suit, only the amount of damages and profits are to be ascertained upon reference to a master and not questions of the patent's validity.¹⁵ A decree pro confesso may be had if defendant being sued fails to appear, or having appeared, fails to answer, plead or demur, or if he fails to answer after a former plea, demurrer or answer is overruled or declared insufficient.¹⁶ Decree pro confesso may be entered after an ineffective attempt to plead, e. g., by filing a demurrer lacking the necessary affidavit,¹⁷ as well as where there is a total failure. Decree pro confesso entered after striking defendant's answer from the files as a punishment for contempt, is a denial of due process of law.¹⁸ Although the rule expressly provides that the plaintiff may proceed ex parte after entry of order for a decree pro confesso, it has been held that a defendant who is

⁷Rule 18, 19 of Equity Rules of 1842, see 16 Pet. —; O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 842; Boudinot v. Symmes, Wall. C. C. 139, Fed. Cas. No. 1,695.

⁸See O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 842.

⁹See 97 U. S. 8.

¹⁰See also next section.

¹¹Ohio Central R. R. v. Central T. Co. 133 U. S. 90, 33 L. ed. 563, 10 Sup. Ct. Rep. 237.

¹²Thompson v. Wooster, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; Sturtevant v. National F. Works, 88 Fed. 614, 32 C. C. A. 57; Wong Him v. Callahan, 119 Fed. 383.

¹³Thompson v. Wooster, 114 U. S. 104, 29 L. ed. 107, 5 Sup. Ct. Rep. 788; Hefner v. Northwestern R. Co.

123 U. S. 756, 31 L. ed. 313, 8 Sup. Ct. Rep. 341.

¹⁴Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 108, 5 Sup. Ct. Rep. 788; Dobson v. Hartford Co. 114 U. S. 446, 29 L. ed. 179, 5 Sup. Ct. Rep. 948.

¹⁵Reedy v. Western E. Co. 83 Fed. 709, 28 C. C. A. 27; Thomson v. Wooster, 114 U. S. 114, 29 L. ed. 105, 5 Sup. Ct. Rep. 788.

¹⁶Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 108, 5 Sup. Ct. Rep. 788; Southern P. Co. v. Temple, 59 Fed. 17.

¹⁷Sheffield F. Co. v. Witherow, 149 U. S. 576, 37 L. ed. 355, 13 Sup. Ct. Rep. 936.

¹⁸Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

before the court though in default, should be given notice of the application for the decree.¹ And it has been said that the court should never decree pro confesso against a defendant, though in default, if then in court with an answer.² The cause need not be set for hearing at a regular term after entry of the order pro confesso, but the matter may be decreed "at any time" after thirty days from such entry.³

§ 978. Entry and vacating of decree taken pro confesso.

When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

19th equity rule, as amended October, 1878.

This rule, together with rule 18, was amended into its present form on October 28, 1878.⁶ The earlier provisions on the subject of decree pro confesso have already been referred to.⁷ Prior to this amendment, decree pro confesso only became absolute at the next term.⁸ It is said that a default will usually be set aside on motion on condition that defendant plead to the merits and go to trial;⁹ though terms will be imposed.¹⁰ Under the present rules this is only so during the term at which decree was rendered;¹¹ although a decree taken pro confesso on a cross bill which does not finally dispose of the entire controversy has been held not within that principle, because as the decree is interlocutory and not final, the court does not lose control over it with the expiration of the term.¹² There should

¹Bennett v. Hoefner, 17 Blatchf. 341, Fed. Cas. No. 1,320; Southern P. Co. v. Temple, 59 Fed. 17. But see Price v. Boden, 39 Fla. 222, 22 So. 658.

²Halderman v. Halderman, Hemp. 407, Fed. Cas. No. 5,908, but the court will impose terms.

³Thompson v. Wooster, 114 U. S. 104, 29 L. ed. 108, 5 Sup. Ct. Rep. 788. And see the next section.

⁶97 U. S. 8.

⁷See ante, § 977 [a].

⁸See Pendleton v. Evans, 4 Wash.

C. C. 336, Fed. Cas. No. 10,920; Boudinot v. Symmes, Wall. C. C. 139. Fed. Cas. No. 1,695; O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 842.

⁹Kemball v. Stewart, 1 McLean, 332, Fed. Cas. No. 7,682.

¹⁰Halderman v. Halderman, Hemp. 407, Fed. Cas. No. 5,908.

¹¹Austin v. Riley, 55 Fed. 833; Stuart v. St. Paul, 63 Fed. 644; Schofield v. Horse, etc. Co. 65 Fed. 433.

¹²Blythe v. Hinckley, 84 Fed. 234. See also Blythe Co. v. Bankers Ins. Co. 147 Cal. 82, 81 Pac. 281.

be a showing of a meritorious defense,¹³ and application should be made at the earliest possible moment.¹⁴ Where default is prematurely entered¹⁵ or there was no due service of subpoena,¹⁶ it may be set aside on motion.

§ 979. Demurrer and plea in general.

The defendant may at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur^{[a]-[e]} or plead^{[f]-[j]} to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue;^[k] but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.^[k]

32nd equity rule.

[a] In general—time of filing.

This rule is the same as rule 18 of the equity rules of 1822, except that "in every case" is substituted for "in any case;" "the bill specially charges" is substituted for "the bill charges"; and "facts" is substituted for "fact."²⁰ There is no difference between dilatory pleas and pleas in bar as to the time when they must be filed.¹ It is defendant's duty under rule 18 to demur or plead at the rule day after his appearance;² but by this rule defendant may do so afterwards provided order for decree pro confesso has not been entered.³ This rule as to demurrer and plea to bills applies also to demurrer and plea to cross bills.⁴ There is no such thing as demurrer to an answer.⁵ The proper practice is to set the cause for hearing on bill and answer;⁶ and a demurrer filed has been treated as an application to

¹³Schofield v. Horse Co. 65 Fed. 437. See Harvey v. Richmond Co. 64 Fed. 19, where belated demurrer was permitted.
¹⁴See Southern P. Co. v. Temple, 59 Fed. 17; Stuart v. St. Paul, 63 Fed. 644.

¹⁵Comly v. Buchana, 81 Fed. 58.

¹⁶Fellows v. Hall, 3 McLean, 281, Fed. Cas. No. 4,722.

¹⁷Blythe v. Hinckley, 84 Fed. 241.

¹⁸See 7 Wheat. 7, 5 L. ed. 376.

¹⁹Ewing v. Blight, 3 Wall. Jr. 139, Fed. Cas. No. 4,589.

²⁰See ante, § 977.

¹Hayman v. Keally, 3 Cranch C. C. 325, Fed. Cas. No. 6,265; Oliver v. Decatur, 4 Cranch, C. C. 458, Fed. Cas. No. 10,494; Mason v. Jones, 1 H. & H. 323, Fed. Cas. No. 9,239.

²See Greenwalt v. Duncan, 16 Fed. 35, 5 McCrary, 132; Brandon M. Co. v. Prime, 14 Blatchf. 371, Fed. Cas. No. 1,810; Hunt v. Oliver, Fed. Cas. No. 6,894.

³Banks v. Manchester, 128 U. S. 251, 32 L. ed. 428, 9 Sup. Ct. Rep. 36; Walker v. Jack, 88 Fed. 576, 31 C. C. A. 462; Adams v. Bridgewater Co. 6 Fed. 179; Crouch v. Kerr, 38 Fed. 549.

⁴Barrett v. Twin, etc. Co. 111 Fed. 45.

set down the cause upon bill and answer.⁷ A demurrer filed without leave and after answer and submission, is too late.⁸

[b] Nature and effect of demurrer.

Demurrer admits all facts well pleaded.¹² But cannot itself introduce new facts.¹³ It does not admit conclusions of law contained in the bill;¹⁴ as, the alleged construction of an instrument therein set forth,¹⁵ or allegations that an act was "colorable" or a "scheme" or a "breach" or a "fraud";¹⁶ or that rates are "unjust and unreasonable."¹⁷ An allegation in obvious conflict with the record in another suit made part of the bill will be regarded as a mere conclusion of law, not admitted by demurrer.¹⁸ However, reasonable deductions are admitted by demurrer as well as matters expressly alleged;¹⁹ and matters alleged are admitted, though complainant might have left them to be set up in the answer.²⁰ Allegations of fact in demurrer must be disregarded.¹

[c] Grounds of demurrer.

When the bill shows on its face a want of equity,⁵ or that complainants claim is barred by laches⁶ or by the statute of limitations, the point may be raised by demurrer. But the demurrer should be special and not general demurrer for want of equity.⁷ So if multifariousness is apparent

⁷Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498. See Ormsby v. Union P. R. R. 4 Fed. 170, where special demurrer made to part of answer.

⁸Newman v. Moody, 19 Fed. 858.

¹²Pullman C. Co. v. Missouri P. Ry. 115 U. S. 596, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Angle v. Chicago, etc. Ry. 151 U. S. 10, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Dillon v. Bernard, Holmes, 386, Fed. Cas. No. 3,915.

¹³Stewart v. Masterson, 131 U. S. 158, 33 L. ed. 114, 9 Sup. Ct. Rep. 682; Lamb v. Starr, 1 Deady, 350, Fed. Cas. No. 8,021; Puget Sound Bank v. King Co. 57 Fed. 433; Star Ball, etc. Co. v. Klahn, 145 Fed. 834.

¹⁴Pullman C. Co. v. Missouri Pac. Ry. 115 U. S. 596, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Preston v. Smith, 26 Fed. 884.

¹⁵Dillon v. Barnard, 21 Wall. 437, 22 L. ed. 673.

¹⁶Fogg v. Blair, 139 U. S. 127, 35 L. ed. 104, 11 Sup. Ct. Rep. 476.

¹⁷Reagan v. Farmers L. & T. Co. 154 U. S. 401, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047.

¹⁸Cornell v. Green, 43 Fed. 105. See Ulman v. Jaeger, 67 Fed. 980.

¹⁹Amory v. Lawrence, 3 Cliff. 523. Fed. Cas. No. 336.

²⁰Post v. Beacon Co. 89 Fed. 1, 32 C. C. A. 151.

¹Star Ball, etc. Co. v. Klahn, 145 Fed. 834.

⁵Farley v. Kittson, 120 U. S. 303, 30 L. ed. 698, 7 Sup. Ct. Rep. 534.

⁶Maxwell v. Kennedy, 8 How. 222, 12 L. ed. 1051; Rhode Island v. Massachusetts, 15 Pet. 272, 10 L. ed. 721; Lansdale v. Smith, 106 U. S. 392, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Speidel v. Henrici, 120 U. S. 387, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; Bryan v. Kales, 134 U. S. 135, 33 L. ed. 829, 10 Sup. Ct. Rep. 435; Copen v. Flesher 1 Bond. 440, Fed. Cas. No. 3, 211; Hubbard v. Manhattan T. Co. 87 Fed. 51, 30 C. C. A. 520.

⁷National Bank v. Carpenter, 101 U. S. 568, 25 L. ed. 815; Coddington v. Pensacola, etc. R. R. 103 U. S. 412, 26 L. ed. 401; Nash v. Ingalls, 101 Fed. 645, 41 C. C. A. 545; Wisner v. Ogden, 4 Wash. C. C. 631, Fed. Cas. No. 17,914; Nicholas v. Murray, 5 Sawyer. 320, Fed. Cas. No. 10,223.

upon the face of the bill, the party suffering therefrom,⁸ may take advantage of it by demurrer;⁹ and if sought to be claimed at all it must be either by demurrer, plea or answer.¹⁰ Want of jurisdiction apparent on the face of a bill is ground for demurrer.¹¹ Formerly that question had to be raised by demurrer or plea, but the statute now permits it to be raised later or to be noticed by the court.¹² Want of certainty in a bill is properly raised by demurrer and not by motion;¹³ and the demurrer must be special and not general.¹⁴ The fact that a portion of the relief demanded is barred by limitations may be raised by demurrer.¹⁵ A defect of parties apparent on the face of a bill should be taken advantage of by demurrer;¹⁶ otherwise by plea or answer.¹⁷ Demurrer for want of parties should name such parties.¹⁸ Formal defects in a bill arising from noncompliance with requirements of the equity rules and appearing on the face of the bill may be questioned by demurrer;¹⁹ or motion to strike out.²⁰ They are otherwise waived,¹ although the same is not true as to demurrer for want of equity.²

But the propriety of issuing *ne exeat* cannot be raised by demurrer;⁶ nor can questions of laches or the statute of limitations be disposed of on demurrer where the bill avers excuses for laches,⁷ or it is a mixed question of law and fact.⁸

[d] Special demurrer must be specific.

When specially demurring defendant should distinctly designate and properly refer to the parts demurred to.¹⁰ Demurrer to "so much as sets up a special contract" is not specific enough.¹¹ So demurrer for want of necessary parties should name them.¹²

⁸Hill v. Bonaffon, 2 Wkly. 356, Fed. Cas. No. 6,488.

⁹Bunnell v. Stoddard, 2 A. L. R. 145, Fed. Cas. No. 2,135;

¹⁰Oliver v. Paitt, 3 How. 402, 11 L. ed. 622; Barney v. Latham, 103 U. S. 215, 26 L. ed. 514; Hefner v. Northwestern, etc. Ins. Co. 123 U. S. 751, 31 L. ed. 309, 8 Sup. Ct. Rep. 337.

¹¹Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; Pond v. Vermont Val. R. R. 12 Blatchf. 280, Fed. Cas. No. 11,265.

¹²See ante § 818 [a].

¹³Einstein v. Schrubly, 89 Fed. 540.

¹⁴Pacific L. S. Co. v. Hanley, 98 Fed. 327.

¹⁵Memphis v. Postal Tel. Co. 145 Fed. 602 (C. C. A.)

¹⁶Pelham v. Edelmeyer, 15 Fed. 264, 21 Blatchf. 188.

¹⁷Sheffield, etc. Co v. Newman, 77 Fed. 787, 23 C. C. A. 459.

¹⁸Dwight v. Central etc. R. R. 9 Fed. 785.

¹⁹Dwight v. Humphreys, 3 McLean, 104, Fed. Cas. No. 4,216, where bill not signed by counsel. Pelham v. Edelmeyer, 15 Fed. 262, 21 Blatchf. 188.

²⁰See Roach v. Hulings, 5 Cranch C. C. 637, Fed. Cas. No. 11,874.

¹Woodworth v. Edwards, 3 Woodb. & M. 120, Fed. Cas. No. 18,014.

²Foster v. Swasey, 2 Woodb. & M. 217, Fed. Cas. No. 4,984 permitting that at the hearing and after answer.

⁶Shainwald v. Lewis, 69 Fed. 487.

⁷Ulman v. Jaeger, 67 Fed. 980.

⁸Beekman v. Hudson, etc. Ry. 35 Fed. 3.

¹⁰Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Chicago, etc. R. R. v. Macomb, 2 Fed. 18.

¹¹Ormsby v. Union Pac. Ry. 4 Fed. 170.

¹²Dwight v. Central & R. R. 9 Fed. 785, 20 Blatchf. 200.

[e] Demurrer for want of equity and ore tenus.

The general demurrer in chancery is demurrer for want of equity. Demurrer that the bill does not state facts sufficient to constitute a cause of action is not used.¹³ The gist of such a demurrer is either that there is no right of action or ground of relief at all¹⁴ or else that adequate remedy exists at law. General demurrer has been held sufficient to raise the question of a misjoinder of party plaintiff.¹⁵ But demurrer for want of equity will not be sustained where the facts alleged show some ground of equitable relief.¹⁶ Where the vagueness of a bill in certain of its material allegations left the exact facts uncertain, demurrer has been overruled.¹⁷ Sometimes also a court of equity will decline to decide doubtful questions of law upon demurrer, where a minute variation between the allegations of the bill and the facts which the proofs might disclose, would perhaps vitally change the legal aspect of the case; but under such circumstances will overrule the demurrer without prejudice to the right to raise the same questions at the hearing.¹⁸ Demurrer ore tenus is only permissible where there is a demurrer of record to the whole bill;¹⁹ and it is said it must be coextensive with such record demurrer.²⁰

[f] Nature and effect of plea.

The proper office of a plea is to present some distinct fact which of itself creates a bar to the suit, or to the part to which the plea applies, and thus avoid the necessity of making the discovery asked for, and the expenses of going into the evidence at large.⁴ It does not, like an answer, meet all the allegations of a bill;⁵ nor, like a demurrer, admit those allegations with a view to denying the equity of the bill. Yet it must be a complete bar to the bill or to so much of it as it is directed⁶ It must completely cover the whole bill if it is interposed to the whole.⁷ This does not mean that it must meet allegations of the bill seriatim, and in default thereof be accompanied by an answer, but merely that it must meet the whole subject to which it applies and professes to cover, or it will be

¹³Nicholas v. Murray, 5 Sawy. 320, Fed. Cas. No. 10,223.

¹⁴Gallagher v. Roberts, 1 Wash. C. C. 320, Fed. Cas. No. 5,194.

¹⁵Consolidated R. M. Co. v. Coombs, 39 Fed. 25.

¹⁶Hodges v. North M. R. R. 4 Dill. 104 Fed. Cas. No. 6,561; Failey v. Talbee, 55 Fed. 892; Pacific L. S. Co. v. Hanley, 98 Fed. 327.

¹⁷See Union R. R. v. Meier, 28 Fed. 9.

¹⁸Kansas v. Colorado, 185 U. S. 144, 145, 46 L. ed. 846, 22 Sup. Ct. Rep. 552.

¹⁹Story Eq. Pl. 464.

²⁰Equitable L. I. Co. v. Patterson, 1 Fed. 127.

⁴Farley v. Kitson, 120 U. S. 303.

30 L. ed. 688, 7 Sup. Ct. Rep. 534; United States v. California & O. L. Co. 148 U. S. 39, 37 L. ed. 354, 13 Sup. Ct. Rep. 458; Farley v. Hill, 150 U. S. 574, 37 L. ed. 1186, 14 Sup. Ct. Rep. 186.

⁵Beard v. Bowler, 2 Bond. 13, Fed. Cas. No. 1,180; Kirkpatrick v. White, 4 Wash. C. C. 595, Fed. Cas. No. 7,850; Simms v. Lyle, 4 Wash. C. C. 301, Fed. Cas. No. 12,891.

⁶Milligan v. Milledge, 3 Cranch, 228, 2 L. ed. 417; Rhode Island v. Massachusetts, 14 Pet. 271, 10 L. ed. 423; Piatt v. Oliver, 1 McLean, 303, Fed. Cas. No. 11,114.

⁷Sims v. Lyle, 4 Wash. C. C. 301, Fed. Cas. No. 12,891.

bad.⁸ Sometimes a plea may consist of no more than a denial of an allegation of the bill,⁹ as, for instance, a denial of the diverse citizenship averred.¹⁰ Though generally it contains new matter.¹¹ If the defect is apparent on the face of the bill it should be met by demurrer and not plea;¹² and a plea for multifariousness apparent on the face of the bill will be overruled.¹³

[g] Issue raised by plea set down for argument.

Where without reply plaintiff sets down the plea for argument, all the facts well pleaded are considered as admitted.¹⁴ The setting of it for argument is in the nature of a demurrer to the plea.¹⁵ The question then is whether the fact or facts therein alleged are sufficient to constitute a bar.¹⁶ It does not reach the question of the general equity of a bill, as does demurrer;¹⁷ and defendant cannot make a plea effective to secure a decision upon the merits of the case by denying therein the equity of the bill.²⁰ The disposal of a plea set down for argument is elsewhere considered.¹

[h].—the use of pleas.

It has been said that "a plea is a very perilous experiment, and is generally unsuccessful."² The tendency of modern practice is undoubtedly to a less frequent use of the plea in bar, or to the merits of a bill. By the 39th equity rule a defendant can as well avail himself of such defenses in his answer, without the penalty formerly incurred, of being obliged to make full answer and discovery.³ Yet there are still many occasions where it is a convenient mode of disposing of a case without the delay and expense of a hearing. Federal cases have recognized it as a proper mode of raising the issue of want of diverse citizenship or of other jurisdictional fact,⁵ if not apparent on the face of the bill; or of want of proper parties.⁶ It is a proper mode of showing that plaintiff is bank-

⁸Sims v. Lyle, 4 Wash. C. C. 301, Fed. Cas. No. 12,891. ⁹Fed. Cas. No. 9,988; Burrell v. Hackley, 35 Fed. 833 and cases cited.

¹⁰Rhino v. Emery, 79 Fed. 485.

¹¹Burnham v. Rangely, 1 Wood. & M. 17, Fed. Cas. No. 2,176.

¹²Matthews v. Lalance etc. M. Co. 2 Fed. 234, 18 Blatchf. 84.

¹³Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; Garrett v. New York, etc. Co. 29 Fed. 129.

¹⁴McCloskey v. Barr, 38 Fed. 165.

¹⁵Mellus v. Thompson, 1 Cliff. 125, Fed. Cas. No. 9,405; Parton v. Prang, 3 Cliff. 537. Fed. Cas. No. 10,784; Gallagher v. Roberts, 1 Wash. C. C. 320, Fed. Cas. No. 5,194; United States v. California, etc. Co. 148 U. S. 31, 37 L. ed. 356, 13 Sup. Ct. Rep. 458.

¹⁶Myers v. Dorr, 13 Blatchf. 22, 111, Fed. Cas. No. 6,003; Gold-

¹⁷Stead v. Course, 4 Cranch, 413, 2 L. ed. 663.

¹⁸Farley v. Kitson, 120 U. S. 303, 30 L. ed. 688, 7 Sup. Ct. Rep. 534.

¹⁹Rhode Island v. Massachusetts, 14 Pet. 257-259, 10 L. ed. 423.

²⁰Post, § 981 [b].

²¹Kindersley, V. C. in Manby v. Richardson, (Dec. 17, 1862).

²²See post, § 996.

²³Pond v. Vermont R. R. 12 Blatchf. 280, Fed. Cas. No. 11,265; Burnham v. Rangeley, 1 Woodb. & M. 17, Fed. Cas. No. 2,176. See Garrett v. New York T. Co. 29 Fed. 129.

²⁴Hammond v. Hunt, 4 Ban. & A.

rupt and therefore his assignee should sue in his stead;⁷ or that defendant has no interest in the subject-matter of the suit;⁸ or that another action is pending.⁹ But it is in general not necessary to enable defendant to raise the defense of laches, neglect or acquiescence, or the statute of limitation.¹⁰

[i] Form and sufficiency—several pleas.

The averments of a plea in bar must be so clear, positive and distinct that complainant may take issue on its validity.¹¹ A plea that defendant is "the sole owner in fee simple" may be a statement of a mere conclusion of law and bad.¹⁴ A plea containing a negative pregnant is bad.¹⁵ A plea is bad that is merely argumentative, and in addition to stating the contradictory fact, should directly negative and traverse inconsistent allegation in the bill.¹⁶ A plea should not be ambiguous,¹⁷ nor uncertain nor tender an immaterial issue.¹⁸ When a plea is objectionable in form a motion to strike it out is proper, rather than the setting of it for argument.¹⁹ It is the general rule that only one plea should be filed unless by leave of court;²⁰ and that a plea ought not to contain more defenses than one. Various facts, therefore, can never be pleaded in one plea, unless they are all conducive to a single point on which the defendant means to rest his defense.¹ A plea is multifarious which avers an accord and satisfaction and a prescriptive right;² or want of diverse citizenship, want of due service, and another action pending,³ or two separate former adjudica-

smith v. Gilliland, 24 Fed. 154; 10 Sawy. 606; Tobin v. Walkinshaw, 1 McAll. 26, Fed. Cas. No. 14,068. But see United States v. Gillespie, 6 Fed. 803.

⁷Kittredge v. Claremont Bank, 3 Story, 590, Fed. Cas. No. 7,858.

⁸Williams v. Empire T. Co. 17 A. L. Reg. 698, Fed. Cas. No. 17,720.

⁹Pierce v. Feagans, 39 Fed. 587.

¹⁰Credit Co. v. Arkansas C. R. R. 15 Fed. 46, 5 McCrary, 23; Lakin v. Sierra B. R. R. 25 Fed. 337; Johnson v. Florida R. R. 18 Fed. 821; Leavenworth Co. v. Chicago, etc. R. R. 18 Fed. 209, 5 McCrary, 508; Pratt v. California M. Co. 24 Fed. 869.

¹¹McCloskey v. Barr, 38 Fed. 165.

¹⁴McCloskey v. Barr, 38 Fed. 165.

¹⁵Rhino v. Emery, 79 Fed. 483.

¹⁶McDonald v. Salem C. Co. 31 Fed. 577, 12 Sawy. 492.

¹⁷Emma S. M. Co. v. Emma S. M. Co. 7 Fed. 401.

¹⁸Computing S. Co. v. Moore, 139 Fed. 197.

¹⁹Sharp v. Reissner, 9 Fed. 447, 20 Blatchf. 10; Chisholm v. Johnson,

84 Fed. 385; Union S. Co. v. Phila. etc. R. R. 69 Fed. 833.

²⁰Gilbert v. Murphy, 100 Fed. 161; Bunker Hill, etc. Co. v. Shoshone Co. 109 Fed. 504, 47 C. C. A. 200; Lamb v. Starr, Deady, 350, Fed. Cas. No. 8,021; Wheeler v. McCormick, 8 Blatchf. 267, Fed. Cas. No. 17,498; Newby v. Oregon, etc. Ry. 18 Fed. Cas. p. 43. And more than one will only be allowed for obvious necessity: Lamb v. Starr, Deady, 350, Fed. Cas. No. 8,021. See Garrett v. New York T. Co. 29 Fed. 129; United States v. Gillespie, 6 Fed. 803; Emma S. M. Co. v. Emma S. M. Co. 7 Fed. 401; Miller v. Rickey, 123 Fed. 604 and cases cited.

¹Rhode Island v. Massachusetts, 14 Pet. 259, 10 L. ed. 446; Gaines v. Masseaux, 1 Woods, 118, Fed. Cas. No. 5,176; Hostetter Co. v. E. G. Lyons, 99 Fed. 736; Miller v. Rickey, 123 Fed. 607; Giant P. Co. v. Safety etc. Co. 19 Fed. 509; Knox Co. v. Rairdon Co. 87 Fed. 969.

²Rhode Island v. Massachusetts, 14 Pet. 259, 10 L. ed. 446.

³Briggs v. Stroud, 58 Fed. 718.

tions,⁴ or prior patent and abandonment.⁵ If a plea contains more than one point the court will put defendant to his election as to which to stand upon,⁶ or else perhaps order the pleas to stand as an answer.⁷ But a single defense sought to be raised by plea may result from a number of distinct facts, and if so a plea setting them forth is not duplicitous.⁸

[j] Demurrer, plea, and answer to different parts of an entire bill.

Plea in bar to the whole bill must sometimes be supported by an answer;¹¹ and plea which is only intended as a bar to a part of a bill, must always be accompanied by demurrer or answer to the rest.¹² Since a demurrer to the whole bill will be overruled if any part is good,¹³ it is essential that demurrer be confined to such parts of a bill as are alleged to be insufficient in law, and that the defendant meet the remainder either by answer or plea or both. Thus the discovery parts of a bill may be good, although all the remainder is demurrable and if so demurrer to the whole must be overruled.¹⁴ However, if the relief is the principal part of the bill and discovery only incidental, a demurrer to the whole bill may be sustained if the plaintiff is not entitled to the relief sought.¹⁵ Demurrer to part followed by answer to the rest is proper and allowable,¹⁶ but there is no rule in equity allowing a party to demur, plead and answer to the whole bill at the same time;¹⁷ nor allowing a plea to be filed with an answer which extends to all matters covered by it.¹⁸ Nor will a party ordinarily be permitted to file a demurrer to the whole bill and several pleas at the same time,¹⁹ or demurrer to the whole bill and answer to the whole.²⁰ If he does so the answer is then deemed a waiver of the demurrer,¹ or defendant may be required to elect.² If defendant demurs to

⁴Fayerweather Will Cases, 103 Fed. 548.

⁵Societe Fabr. v. Lueders, 105 Fed. 633.

⁶Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374.

⁷Reissner v. Anness, 12 O. G. 842, Fed. Cas. No. 11,686.

⁸MacVeagh v. Denver C. W. Co. 85 Fed. 74, 29 C. C. A. 33; Hazard v. Durant, 25 Fed. 26.

¹¹See *infra*, note [k].

¹²Ferguson v. O'Hara, Pet. C. C. 493, Fed. Cas. No. 4,740.

¹³Livingston v. Story, 9 Pet. 658, 9 L. ed. 255; Pacific R. R. v. Missouri Pac. R. R. 111 U. S. 520, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Stewart v. Masterson, 131 U. S. 158, 33 L. ed. 114, 9 Sup. Ct. Rep. 682; United States v. Southern P. Co. 40 Fed. 611; Merriam v. Holloway P. Co. 43 Fed. 450; Buerk v. Imhaeuser, 8 Fed. 457; La Croix v. May, 15 Fed. 236;

Mercantile T. Co. v. Rhode Island Co. 36 Fed. 863; Northern P. R. R. v. Roberts, 42 Fed. 734.

¹⁴Livingston v. Story, 9 Pet. 658, 9 L. ed. 264.

¹⁵Johnson v. Ford, 109 Fed. 501.

¹⁶Pierpont v. Fowle, 2 Wood. & M. 23, Fed. Cas. No. 11,152; Crescent City Co. v. Butchers, etc. Co. 12 Fed. 225.

¹⁷Crescent, etc. Co. v. Butchers, etc. 12 Fed. 225.

¹⁸Grant v. Phoenix, etc. Ins. Co. 121 U. S. 115, 30 L. ed. 905, 7 Sup. Ct. Rep. 841.

¹⁹United States v. American B. T. Co. 30 Fed. 523.

²⁰Strang v. Richmond, etc. R. R. 101 Fed. 511, 41 C. C. A. 474.

¹Strang v. Richmond, etc. R. R. 101 Fed. 511, 41 C. C. A. 474; Hayes v. Dayton, 8 Fed. 702, 18 Blatchf. 420.

²Hayes v. Dayton, 8 Fed. 702, 18 Blatchf. 420.

part and answers as to the rest, the demurrer is not thereby waived.³ By the 37th rule, if a party now answers part of a bill to which he has demurred, it is provided that that shall not be ground for overruling the demurrer.⁴ The 39th rules permitting matter available as plea in bar or to the merits to be set up in the same way in the answer has had a tendency to discourage the practice of filing demurrer, plea in bar and answer to different parts of a bill, since defenses can be safely and advantageously made by answer.

[k] Answer in support of plea.

Sometimes a plea requires answer in its support. The above rule makes this essential in case of plea to part of a bill charging fraud or combination.⁵ So, where a plea is intended to meet merely a part of the bill it is of course necessary that there be answer or demurrer to the rest.¹⁰ Where a plea is interposed as a complete bar, there may be allegations in the bill bearing upon the fact alleged in the plea, which will be taken as admitted unless answered. Hence the rule is that defendant must also answer to those facts in a bill which would be evidence to dispute his plea;¹¹ and to interrogatories bearing upon the fact alleged in his plea. Ordinarily a plea denying the diverse citizenship alleged need not be supported by answer;¹² nor a plea of the statute of limitations.¹³ A plea to the whole bill stating nothing but legal conclusions, accompanied by answer to the whole, may be disregarded.¹⁴ The filing of an answer to the whole bill is a waiver of the plea.¹⁵

§ 980. Certificate and affidavit to accompany plea or demurrer.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

31st equity rule, promulgated March, 1842.

Plea or demurrer unaccompanied by the proper certificate and affidavit, should be disregarded.¹ There is no equity rule requiring a certificate of

³Pierpont v. Fowle, 2 Wood. & M. 23, Fed. Cas. No. 11,152.

⁴See post, § 984.

⁵See post, § 996.

⁹See Lewis v. Baird, 3 McLean, 56, Fed. Cas. No. 8,316; Huntington v. Laidley, 79 Fed. 865. Note the wording of Rule 39, post, § 996, as to answer in support of plea.

¹⁰See supra, note[j]; Sims v. Lyle, 4 Wash. C. C. 301, Fed. Cas. No. 12,891.

¹¹Dwight v. Central R. R. 9 Fed. 785, 20 Blatchf. 200; Hilton v. Guy-

ot, 42 Fed. 249; Rhino v. Emery, 79 Fed. 486; Playford v. Lockard, 65 Fed. 870; but not others: Hatch v. Bancroft, 67 Fed. 802.

¹²McDonald v. Salem C. F. Co. 31 Fed. 577, 12 Sawy. 492.

¹³West Portland, etc. Co. v. Lownsdale, 17 Fed. 205, 9 Sawy. 106.

¹⁴Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402; Marshall v. Otto, 59 Fed. 249.

¹⁵Huntington v. Laidley, 79 Fed. 865.

¹American S. Co. v. Wire. Co. 90

counsel that an answer to the merits is well founded in law.² Where the plea of a corporation is accompanied by the requisite affidavit, the affixing of the corporate seal to the plea may be dispensed with.³ If instead of disregarding a plea lacking the certificate and demurrer, or moving to strike it from the files,⁴ plaintiff sets it down for hearing, this has been held a waiver of the defect.⁵ And it is too late to raise the question for the first time on appeal.⁶ Where the plea is joint it should ordinarily be verified by all the defendants.⁷

§ 981. Setting plea or demurrer for argument—issue on plea—effect of decision for defendant thereon.

The plaintiff may set down the demurrer or plea to be argued,^{[a] [b]} or he may take issue on the plea.^[c] If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.^[c]

33rd equity rule, promulgated March, 1842.

[a] Setting plea or demurrer for argument.

This rule is the same as rule 19 of the equity rules of 1822.¹¹ In the case of demurrer the proper course is to set it for argument unless it is so defective in form that it may be stricken out on motion or disregarded.¹² Where justice demands it, the court may overrule a demurrer and require an answer, reserving to the defendant the right to raise the same issues.¹³ A plea may similarly be disregarded or stricken out for certain formal defects;¹⁴ but in their absence, plaintiff has a choice between setting it down for argument to test its legal sufficiency or taking issue by replication upon the facts which it alleges.¹⁵ The nature of the issue raised by setting it for argument has already been considered.¹⁶ If the plea or demurrer is

Fed. 599; *National Bank v. Insurance Co.* 104 U. S. 55, 76, 26 L. ed. 693; *Secor v. Singleton*, 3 McCrary, 230, 9 Fed. 809; *Filer v. Levy*, 17 Fed. 610; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 37 L. ed. 853, 13 Sup. Ct. Rep. 936; *Preston v. Finley*, 72 Fed. 850.

²*McGorray v. O'Connor*, 87 Fed. 586, 31 C. C. A. 114.

³*Fayerweather v. Hamilton Coll.* 103 Fed. 546.

⁴The proper course; see *Brazoria Co. v. Youngstown B. Co.* 80 Fed. 13, 25 C. C. A. 306, and cases cited.

⁵*Goodyear v. Toby*, 6 Blatchf. 130, Fed. Cas. No. 5,585. For a similar rule at law see *Griswold v. Bacheller*, 77 Fed. 857; *Commercial Bank v. Slocomb*, 14 Pet. 60, 10 L. ed. 354; *Com-*

puting S. Co. v. Moore, 139 Fed. 197.

⁶*Brazoria Co. v. Youngstown B. Co.* 80 Fed. 13, 25 C. C. A. 306.

⁷*Computing S. Co. v. Moore*, 139 Fed. 197.

¹¹See 7 *Wheat. V. et seq.*, 5 L. ed. 376.

¹²See ante, § 980; see *Roach v. Hulings*, 5 Cranch. 637, Fed. Cas. No. 11,874.

¹³*Rankin v. Miller*, 130 Fed. 229.

¹⁴See ante, § 980; § 979[i]; *Union S. Co. v. Philadelphia, etc. R. R.* 69 Fed. 833.

¹⁵*Myers v. Dorr*, 13 Blatchf. 22, Fed. Cas. No. 9,988; *Daniels v. Benedict*, 97 Fed. 374, 38 C. C. A. 592; *Gibberson v. Cook*, 124 Fed. 987; *Hatch v. Bancroft* 1. Co. 67 Fed. 302.

¹⁶Ante, § 979[g].

allowed rule 35 governs as to costs and amendment of the bill;¹⁷ and after plea allowed, plaintiff may file a replication.¹⁸ If the demurrer or plea is overruled or the plea is decided for plaintiff on replication rule 34 governs as to the costs and the necessity that defendant then answer.¹⁹ If complainant fails to reply to a plea or set it or a demurrer down for argument, the penalty is the dismissal of his bill.²⁰ It is irregular to file replication to answer supporting a plea, and ignore the plea.¹ It is improper to demur to a plea; the mode of testing its legal sufficiency is by setting it down for argument,² that being the legal equivalent.³ The setting of a plea or demurrer for argument is a waiver of certain formal defects therein.⁴

[b] Disposal of plea set for argument.

Courts of chancery exercise a large discretion in dealing with pleas in order to avoid the injustice to a plaintiff often involved in determining the cause under the technical rules which apply to them.⁷ If the issue raised by plea approaches closely to the issue upon the merits as it would be presented by answer, it is customary to overrule the plea and require defendant to answer without prejudice to the right to raise the same defenses therein.⁸ A good illustration of this practice is often afforded by infringement suits where plea of non-infringement is interposed.⁹ A plea may be good in part and bad in part.¹⁰ In that event it will be overruled in part and declared good in part with leave for plaintiff to file a replication.¹¹ Rule 34 governs the further proceedings where a plea is overruled;¹² and rule 35 where the plea is sustained.¹³

[c] Taking issue on the plea and effect of finding in defendant's favor.

If complainant elects to take issue on the truth of the fact or facts alleged in the plea, rather than upon its legal sufficiency, he should file a replication traversing the allegations.¹⁶ Special replication is no longer

¹⁷Post, § 986.

¹⁸Post, § 986[b].

¹⁹See post, § 985.

²⁰Post, § 982.

¹See *Beals v. Illinois, etc. R. R.* 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314.

²*Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518.

³*Burrell v. Hackley*, 35 Fed. 833; see ante, § 979[g].

⁴See *Farmers' L. & T. Co. v. Chicago, etc. Ry.* 61 Fed. 543; *Good-year v. Tobey*, 6 Blatchf. 130, Fed. Cas. No. 5,585.

⁷*Rhode Island v. Massachusetts*, 14 Pet. 257, 10 L. ed. 445.

⁸See *Rhode Island v. Massachusetts*, 14 Pet. 257, 10 L. ed. 445; *Chisholm v. Johnson*, 84 Fed. 385; and see *Briggs v. Stroud*, 58 Fed.

718; *Gilbert v. Murphy*, 100 Fed. 161.

⁹*Chisholm v. Johnson*, 84 Fed. 385; *Sharp v. Reissner*, 9 Fed. 447, 20 Blatchf. 10; *Korn v. Weibush*, 33 Fed. 51; see *Knox Co. v. Rairdon, etc. Co.* 87 Fed. 969.

¹⁰*Wythe v. Palmer*, 3 Sawy. 412, Fed. Cas. No. 18,120; *Kirkpatrick v. White*, 4 Wash. C. C. 595, Fed. Cas. No. 7,850; *Rhino v. Emery*, 79 Fed. 483.

¹¹*Rhino v. Emery*, 79 Fed. 483.

¹²Post, § 985.

¹³Post, § 986.

¹⁶See *Myers v. Dorr*, 13 Blatchf. 23, Fed. Cas. No. 9,988; *McAlee v. Lewis*, 75 Fed. 734; *Earll v. Metropolitan St. Ry.* 87 Fed. 528; *Soderberg v. Armstrong*, 116 Fed. 709.

permissible.¹⁷ Formerly a party who took issue upon a plea instead of disputing its legal sufficiency, was deemed to have admitted that the plea was a bar if true; so that if its truth was found dismissal of the bill followed as matter of course.¹⁸ The Supreme Court adopted that principle from the English chancery practice in a case decided in 1821, and observed: "It is not perceived that any serious mischief can arise from it. Counsel will generally be able to decide on the merits of any defense which may be spread on a plea, and if insufficient it is not probable that they will do otherwise than set it down for argument. Nor will they ever take issue upon it but in a case which presents a very clear and sufficient defense, if the facts be proved."¹⁹ But rule 19 of the equity rules, adopted in the following year contained the proviso which has been preserved in the rule now in force that the facts, if found for defendant, "shall avail him as far as in law and equity they ought to avail him." The authorities seem to agree that this proviso has modified the earlier rule.²⁰ The question is, how far it has affected or modified that rule. Upon the one hand the court must consider the inequity of compelling a defendant to go to the expense of proving his plea; and upon the other, the inequity of having a case turn upon the existence or non-existence of facts which are perhaps not material or properly controlling. It was this latter consideration which has been deemed responsible for the rule.¹ It may safely be said that the Federal courts will no longer consider the filing of replication to a plea so conclusive an admission of its legal sufficiency as to debar them from examining its merits and overruling it if bad in substance;³ or from considering other facts adduced by complainant to avoid its effect.⁴ The court is not necessarily required to dismiss the bill, though the plea be proven true.⁵ "Under the existing rule the court may, upon final hearing, do, at least, what, under the old rule, might have been done when the benefit of a plea was saved to the hearing."⁶ But of course if the plea meets and satisfies all the claims of the bill, it ought to avail defendant

¹⁷Mason v. Hartford, etc. R. R. 10 Fed. 334.

¹⁸Story Eq. Pl. § 697; Hughes v. Blake, 6 Wheat. 453, 5 L. ed. 303; Gernon v. Bocaline, 2 Wash. C. C. 199, Fed. Cas. No. 5,366; see Cottle v. Krentz, 25 Fed. 494, and Birdseye v. Heilner, 27 Fed. 289, overlooking the change in the rule.

¹⁹Hughes v. Blake, 6 Wheat. 472, 5 L. ed. 308.

²⁰Pearce v. Rice, 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. Rep. 130; Green v. Bogue, 158 U. S. 478, 499, 39 L. ed. 1061, 15 Sup. Ct. Rep. 983; Elgin, etc. Pump Co. v. Nichols, 65 Fed. 217, 12 C. C. A. 580; Soderberg v. Armstrong, 116 Fed. 710; Farley v. Kittson, 120 U. S. 314, 30 L. ed. 684, 7 Sup. Ct. Rep. 534; but see Rhode Island v. Massachusetts, 14

Pet. 210, 10 L. ed. 423, decided while the rules of 1822 were in force.

¹Green v. Bogue, 158 U. S. 499, 39 L. ed. 1061, 15 Sup. Ct. Rep. 983.

³Matthews v. Lalance & G. M. Co. 2 Fed. 235, 18 Blatchf. 84; Green v. Bogue, 158 U. S. 478, 39 L. ed. 1061, 15 Sup. Ct. Rep. 975; Soderberg v. Armstrong, 116 Fed. 709; American G. Co. v. Edison P. Works, 68 Fed. 451; but see contra: Daniels v. Benedict, 97 Fed. 374, 38 C. C. A. 592; Gibberson v. Cook, 124 Fed. 987; Myers v. Dorr, 13 Blatchf. 22, Fed. Cas. No. 9,988.

⁴Elgin, etc. Co. v. Nichols, 65 Fed. 215, 12 C. C. A. 578.

⁵Pearce v. Rice, 142 U. S. 28, 35 L. ed. 930, 931, 12 Sup. Ct. Rep. 130.

⁶Pearce v. Rice, 142 U. S. 42, 35 L. ed. 930, 931, 12 Sup. Ct. Rep. 130.

so as to require final decree thereon in his favor.⁷ If upon the replication to the plea the facts are found partly for complainant and partly for defendant the court may, under this rule, mould its relief accordingly.⁸ Upon decision for plaintiff on replication to the plea he was formerly entitled to decree forthwith, the defendant being debarred from answer and other defenses, but under rule 34 the court should now rule defendant to answer.⁹ It is irregular to file replication only to the answer supporting a plea and not to the plea as well.¹⁰

§ 982. Effect of failure to set down for argument or take issue.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

38th equity rule, promulgated March, 1842.

Under the equity rules of 1822 this penalty only attached where plaintiff did not reply or set for hearing before the second term after the filing of the plea or demurrer.¹⁴ A bill will not be dismissed under this rule unless the party had proper notice under rule 41⁵ of the filing of the plea or demurrer,¹⁶ or where the plea or demurrer was defective as respects certificate or affidavit.¹⁷ The rule does not apply to a case where the demurrer has been overruled and there is no plea.¹⁸ Plaintiff cannot insist on the imposition of this penalty against him when defendant has waived it and the cause has proceeded to decree in defendant's favor.¹⁹ The court may refuse to dismiss under this rule where no regular rule day is observed and the practice has grown up of entertaining and disposing of demurrers informally, and on every day of the term.²⁰ It has been said that the object of this rule and of rule 33¹ was to speed a cause during vacation.²

⁷Horn v. Detroit D. Co. 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 218; see McAleer v. Lewis, 75 Fed. 734.

⁸See Earll v. Metropolitan St. Ry. 87 Fed. 528.

⁹Westervelt v. Library Bureau, 118 Fed. 824, 55 C. C. A. 436; see post, § 985.

¹⁰See Beals v. Illinois R. R. 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314.

¹⁴Rule 21 of Eq. Rules of 1822, 7 Wheat. VI, et seq. 5 L. ed. 376; see Poultney v. Lafayette, 3 How. 81, 11 L. ed. 503; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784.

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¹⁵Ante, § 940.

¹⁶Newby v. Oregon, etc. R. R. 1 Sawy. 63, Fed. Cas. No. 10,145.

¹⁷National Bank v. Insurance Co. 104 U. S. 54, 26 L. ed. 693.

¹⁸Poultney v. Lafayette, 3 How. 81, 11 L. ed. 503.

¹⁹Chicago, etc. R. R. v. Union R. M. Co. 109 U. S. 702, 27 L. ed. 1081, 3 Sup. Ct. Rep. 594.

²⁰See Electrolibration Co. v. Jackson, 52 Fed. 773.

¹Ante, § 981.

²Electrolibration Co. v. Jackson, 52 Fed. 773.

§ 983. Demurrer or plea not to be overruled because less extensive than might be.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

36th equity rule, promulgated March, 1842.

The 32nd rule permits defendant to demur to part, plead to part and answer as to the rest.⁵ The part of the bill which is not met by plea or demurrer must of course be met by answer.

§ 984. — because the answer also partly covers same matters.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

37th equity rule, promulgated 1842.

The 32nd rule permits defendant to demur, plead and answer to different parts of a bill.⁸ This rule and the 36th rule are first found in the equity rules of 1842 and do not appear in the earlier rules of 1822.⁹ The object of this rule¹⁰ is to avoid the effect of the principle that answer is a waiver of a plea or demurrer to the same matter.¹¹ It saves a defendant from the effect of that principle where his answer extends to "some part" of the same matter, but not where the answer extends to the whole of the matter covered by the plea or demurrer.¹² This rule does not apply where a plea or demurrer extends to the whole bill;¹³ and plea or demurrer cannot be filed at the same time with an answer to the whole.¹⁴ If a plea be filed with an answer to the whole bill, it is superseded;¹⁵ or may be ordered to stand as part of the answer.¹⁶ Sometimes a plea requires answer in its support;¹⁷ but in such cases the principle that answer is waiver of the plea was not available in equity practice prior to the above rule,¹⁸ so that there is no need to invoke it to avoid that consequence.

⁵Ante, § 979.

⁸Ante, § 979.

⁹See Hayes v. Dayton, 18 Blatchf. 420, 8 Fed. 702.

¹⁰Huntington v. Laidley, 79 Fed. 867.

¹¹Ferguson v. O'Harra, Pet. C. C. 493, Fed. Cas. No. 4,740; Sims v. Lyle, 4 Wash. C. C. 301, Fed. Cas. No. 12,891; Stearns v. Page, 1 Story, 204, Fed. Cas. No. 13,339.

¹²Grant v. Phoenix M. L. I. Co. 121 U. S. 115, 30 L. ed. 908, 7 Sup. Ct. Rep. 841; Huntington v. Laidley,

79 Fed. 867; Mercantile T. Co. v. Missouri, etc. Ry. 84 Fed. 383.

¹³Huntington v. Laidley, 79 Fed. 867; see Mercantile T. Co. v. Missouri, etc. Ry. 84 Fed. 383.

¹⁴Ante, § 979 [j].

¹⁵Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402; Marshal v. Otto, 59 Fed. 249.

¹⁶Lewis v. Baird, 3 McLean, 56, Fed. Cas. No. 8,316.

¹⁷Ante, § 979[k].

¹⁸See Lewis v. Baird, 3 McLean, 56, Fed. Cas. No. 8,316.

§ 985. Costs on plea or demurrer overruled—defendant then to answer.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay.^[a] And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him pro confesso, and the matter thereof proceeded in and decreed accordingly.^[b]

34th equity rule, promulgated March, 1842.

[a] The old rule—allowance of costs.

Rule 20 of the equity rules of 1822 provided that "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly."¹ So, rule 22 declared that costs should "be paid as where an answer is adjudged insufficient."² A plea that is palpably bad will be overruled with costs.³ But a defendant will be deemed to have had "good ground" for interposing plea or demurrer if he has acted in good faith and with a reasonable belief that it was meritorious.⁴

[b] Defendant to answer on demurrer or plea overruled or disproved.

The above rule provides that defendant shall answer only upon the overruling of demurrer or plea. It does not expressly apply to a case where plaintiff has taken issue of fact upon a plea and has prevailed; i. e., where the plea has been "disproved." The old rule was that after plea to the merits was disposed on an issue of fact, defendant could set up no other defense and decree thereupon went against him. It seems, however, that rule 34 applies to a plea disproved, and requires the court to direct defendant to answer as in the case of plea overruled because insufficient in law.⁷ In other words rule 34 alters the old chancery practice in that respect.

¹See 7 Wheat. X. 5 L. ed. 376.

²See 7 Wheat. X. 5 L. ed. 376.

³See *Matthews v. L. & G. M. Co.* 2 Fed. 235, 236, 18 Blatchf. 84.

⁴*Chisholm v. Johnson*, 84 Fed. 384.

⁷*Westervelt v. Library Bureau*, 118 Fed. 824, 55 C. C. A. 436; *Farley v.*

Kittson, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534; *Dalzell v. Manufacturing Co.* 149 U. S. 315, 326, 327, 37 L. ed. 749, 13 Sup. Ct. Rep. 886; *Stead v. Course*, 4 Cranch, 413, 2 L. ed. 663.

The defendant may answer as of right, if plea or demurrer be overruled⁸ and a decree pro confesso will not be entered on overruling of plea, unless the court is satisfied that it was interposed for delay.⁹ Where defendant failed to answer in the sixty days allowed him after demurrer overruled or at the rule day following the overruling of a subsequent plea in abatement, there was no error in ordering decree pro confesso.¹⁰ The defendant should however be ruled to answer.¹¹

§ 986. Costs where demurrer or plea allowed—amendment of bill—reply to plea.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.^{[a]-[b]}

35th equity rule, promulgated March, 1842.

[a] Costs and amendment.

Rule 22 of the equity rules of 1822 provided that "upon a plea or demurrer being . . . adjudged good, the defendant shall have his costs;"¹⁵ but there was no provision of the earlier rules for amendment of the bill. Permission to amend is discretionary¹⁶ under this rule, and not matter of right.¹⁷ Unreasonable delay in obtaining leave and amending is good ground for refusal of leave to file.¹⁸ A party must show he has asked permission to amend before he can review the question on appeal.¹⁹ Where plaintiff asks permission to amend, to explain the laches which led the court to sustain the demurrer, it is sometimes the court's duty to grant such permission.²⁰ So where demurrer is sustained for misjoinder of parties plaintiff, the decree may very properly grant leave to amend by striking out the party objected to;¹ or permit dismissal as to him, on motion.²

⁸Wooster v. Blake, 7 Fed. 816.

⁹American, etc. Co. v. Leeds, etc. Co. 140 Fed. 981.

¹⁰McGregor v. Vermont L. & T. Co. 104 Fed. 709, 44 C. C. A. 146.

¹¹Under the early rules this was prerequisite to entry of decree pro confesso, though defendant had not appeared at all: Halderman v. Halderman, Hemp. 407, Fed. Cas. No. 5,908; see ante, § 977[a].

¹⁵See 7 Wheat. X. 5 L. ed. 376.

¹⁶National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Ketchum v. Driggs, 6 McLean, 13, Fed. Cas. No. 7,735; Dwight v. Humphreys, 3 McLean, 104, Fed. Cas. No. 4,216; Allis Co. v. Withlacoochee, 105 Fed.

682, 44 C. C. A. 673; Boston, R. R. v. Parr, 98 Fed. 484.

¹⁷National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Hunt v. Rousmaniere, 2 Mason, 342, Fed. Cas. No. 6,898.

¹⁸Allis Co. v. Withlacoochee, 105 Fed. 682, 44 C. C. A. 673; Boston R. R. v. Parr, 98 Fed. 484.

¹⁹National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815.

²⁰Lant v. Manley, 75 Fed. 634 21 C. C. A. 457.

¹Victor T. M. Co. v. American G. Co. 118 Fed. 50.

²Walker v. Powers, 104 U. S. 245, 26 L. ed. 729.

If instead it is absolute, it should be without prejudice to another suit.³

[b] Right to reply to plea sustained as legally sufficient.

While the equity rules nowhere provide in terms that plaintiff may reply to a plea which, having been set down for argument, has been held sufficient in law, it is settled that plaintiff has the right thereupon by reply to take issue upon its truth.⁵

³House v. Mullen, 22 Wall. 42, 22 v. Dalles M. R. Co. 140 U. S. 616, 35 L. ed. 838. L. ed. 565, 11 Sup. Ct. Rep. 988;

⁵Rhode Island v. Massachusetts, 14 MacVeagh v. Denver, etc. Co. 85 Fed. Pet. 257, 10 L. ed. 445; United States 75, 29 C. C. A. 33.



CHAPTER 27.

EQUITY PROCEDURE (CONTINUED)—ANSWER, REPLICATION AND ISSUE.

- § 996. The answer—matters pleadable in bar may be included.
- § 997. Signing and verification of answer.
- § 998. Interrogatories not necessary to obtain full answer.
- § 999. What interrogatories need not be answered.
- § 1000. Answer not evidence where answer on oath waived.
- § 1001. Exceptions to answer—time for taking—formal requisites.
- § 1002. —setting exceptions for hearing unless answer amended.
- § 1003. —answer on allowance of exceptions and penalty for failure.
- § 1004. Payment of costs upon exceptions allowed or overruled.
- § 1005. Setting cause for hearing on bill and answer.
- § 1006. Amendment of answer and supplemental answer.
- § 1007. New or supplemental answer after amendment of bill.
- § 1008. Full costs not allowed if separate answer by solicitor for several defendants unnecessary.
- § 1009. Limit of taxable costs on answer.
- § 1010. Replication—time of filing—issue.

§ 996. The answer—matters pleadable in bar may be included.

The rule, that if a defendant submits to answer he shall answer fully^{[a]-[d]} to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery.^[e] And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form^[f]) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense.^[e] Thus, for example, a bona fide purchaser for a valuable consideration, without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to

make any further answer or discovery of his title than he would be in any answer in support of such plea.^[a]

39th equity rule, promulgated March, 1842.

[a] The answer in general.

Rule 23 of the equity rules of 1822 provided that "The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill."¹ It will be observed that rule 39 *supra* provides for answer in lieu of plea only and not in lieu of demurrer. It provides for the substitution of answer for plea, only in cases of plea in bar or to the merits; and it does away with the necessity which existed under the early rule, that defendant answer fully even though his plea set up a bar to the relief.² However it is not to be construed as forbidding the setting up in the answer of matter which is strictly in abatement.³ It merely leaves the pleader in such a case, under the rule which requires him to answer fully.⁴ An answer in equity has two distinct purposes, viz.: the setting up of the defense, and the discovery of facts in response to plaintiff's interrogatories. It is a pleading, and also an important feature of the proof. However, the discovery feature of the answer, once of very great importance, is now of but slight and infrequent value, since the modern statutes everywhere permit the parties to be called as witnesses.⁵ Its evidential value is still further restricted by rule 41,⁶ which permits plaintiff to destroy its force in that respect, by waiver of answer under oath, and by rule 39 *supra* abrogating the need for full answer if defendant sets up matter available as plea in bar. The answer now may sometimes be no more than a plea.⁷ Hence it is that the rules testing the sufficiency of answer, observed at a time when the answer was an important part of the proof, are not now safe guides in the majority of cases.⁸

[b] Form and effect of answer in general.

A fact admitted by answer need not be proved.¹² If undenied an allegation of the bill is presumed true.¹³ If the answer after admitting allegations of the bill, sets up facts in avoidance they must be proven.¹⁴ An admission in an answer cannot supply the omission of a material fact in

¹See 7 Wheat. X. 5 L. ed. 376.

²See *Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173.

³E. g. Rule 52, deals with the case where the answer suggests a defect of parties: post, § 1025.

⁴*Infra*, note [c].

⁵*Ex parte Boyd*, 105 U. S. 657, 26 L. ed. 1204; *Field v. Hastings*, 65 Fed. 280.

⁶Post, § 1000.

⁷See *Stimson v. Rawson*, 62 Fed.

⁸*Field v. Hastings*, 65 Fed. 280.

¹²*Clarke v. White*, 12 Pet. 190, 9 L. ed. 1046; *Clements v. Moore*, 6 Wall. 315, 18 L. ed. 786.

¹³*Harpending v. Dutch R. Church*, 16 Pet. 487, 10 L. ed. 1029.

¹⁴*Clarke v. White*, 12 Pet. 190, 9 L. ed. 1046; *Clements v. Moore*, 6 Wall. 315, 18 L. ed. 786; *Bush v. Marshall*, 6 How. 289, 12 L. ed. 440; *Randall v. Phillips*, 3 Mason, 378, Fed. Cas. No. 11,555.

the bill so as to justify relief thereon.¹⁵ If a charge made upon information and belief in an answer, is not supported by proof at the hearing it is to be deemed unproven.¹⁶ The defense of payment or set off is not required to be pleaded according to any particular form.¹⁷ An answer may set up all matters of defense in bar or to the merits of the bill;¹⁸ and matters of law as well as fact.¹⁹ It may set up several defenses but they should be separately and clearly alleged.²⁰ If they are inconsistent the result is to deprive the defendant of the benefit of either.¹ A joint answer is permissible if all the parties swear to it.² An answer need not be accompanied by the certificate of merits required in the case of plea and demurrer.³ It may not be excepted to because not properly entitled.⁴ A paper on file may from circumstances be presumed to be the answer although no endorsement of filing appears thereon.⁵ An answer should be responsive,⁶ though this does not mean that new matter or a defense founded thereon is to be held objectionable because irresponsible.⁷ Answer must not be impertinent,⁸ or irrelevant,⁹ or scandalous. But the fact that it is rambling and verbose¹⁰ is not ground for motion to strike out.

[c] The general rule—full answer necessary.

It is still the general rule that defendant must answer fully. "The material allegations in the bill of complaint ought to be answered, and admitted or denied, if the facts are within the knowledge of the respondent, and, if not, he ought to state what his belief is upon the subject, if he has any; and if he has none, and cannot form any, he ought to say so,¹¹ and call upon the plaintiff for proof of the alleged facts or waive that branch of the controversy."¹² It is not proper to ignore allegations of the bill by

¹⁵Jackson v. Ashton, 11 Pet. 249, 9 L. ed. 698.

¹⁶Monroe C. Co. v. Becker, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217.

¹⁷Bausman v. Denny, 73 Fed. 69.

¹⁸Holton v. Guinn, 65 Fed. 450; Von Schroder v. Brittain, 98 Fed. 169.

¹⁹Farmers' L. & T. Co. v. Northern P. R. R. 76 Fed. 15.

²⁰Graham v. Mason, 4 Cliff. 88, Fed. Cas. No. 5,671; and not introduced by expanding denials of allegations in the bill: Osgood v. Oloe Co. 69 Fed. 291.

¹Ozark Co. v. Leonard, 24 Fed. 660.

²Davis v. Davidson, 4 McLean, 136, Fed. Cas. No. 3,631.

³Bailey Co. v. Young, 12 Blatchf. 199, 1 Ban. & A. 362, Fed. Cas. No. 751.

⁴McGorray v. O'Connor, 87 Fed. 586, 31 C. C. A. 114; Osgood v. Aloe, etc. Co. 69 Fed. 291.

⁵Boyd v. Wyley, 18 Fed. 355.

⁶See Comstock v. Herron, 45 Fed. 660; Prentiss Co. v. Godchaux, 66 Fed. 234, 13 C. C. A. 420.

⁷Adams v. Bridge Co. 6 Fed. 179; see Gunnell v. Bird, 10 Wall. 308, 19 L. ed. 913; Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129; Whittemore v. Patten, 84 Fed. 51; Florida Co. v. Finlayson, 74 Fed. 671; Langdon v. Goddard, 3 Story 13, Fed. Cas. No. 8,061; Osgood v. Aloe Co. 69 Fed. 291; Barrett v. Twin, etc. Co. 111 Fed. 45.

⁸Langdon v. Goddard, 3 Story, 13, Fed. Cas. No. 8,061.

⁹See Miller v. Buchanan, 5 Fed. 366.

¹⁰Stokes v. Farnsworth, 99 Fed. 836.

¹¹See In re Holladay, 27 Fed. 830.

¹²Brown v. Pierce, 7 Wall. 211, 19 L. ed. 136; Peters v. Tonopah M. Co. 120 Fed. 588; Commonwealth T. Co. v. Cummings, 83 Fed. 767; Brooks

omitting all notice of them;¹⁵ nor to deny generally all allegations not admitted.¹⁶ Defendant need not answer every detail of evidence which plaintiff has included in his bill, provided he meets every allegation essential to plaintiff's case.¹⁷ He need not answer immaterial allegations.¹⁸ A general answer is sufficient to general allegations.¹⁹ An averment in the answer that defendant "does not admit" certain facts has been held not ground for exception.²⁰ A denial of fraud is insufficient without a denial of the facts from which fraud is inferred.¹ Denial upon information and belief is sufficient if defendant has no personal knowledge.² Denial according to "recollection and belief" is insufficient where allegation is direct that the thing was done by defendant.³ A want of knowledge of allegations as to which defendant's knowledge, if any, must be direct and personal, must be expressly averred and denial on information and belief is insufficient.⁴ But a mere statement that defendant has no knowledge is neither an admission nor a denial.⁵ An answer that defendant had "no knowledge, information and belief" is insufficient where the question was as to his knowledge, remembrance, information and belief.⁶ A literal denial will not be taken as an admission at the hearing, although on exception it might have been held insufficient.⁷ Answers to interrogatories must be responsive;⁸ and if responsive cannot be impertinent.⁹ Where an answer is false in fact, upon a material fact as to which defendant could have made no mistake, it may be wholly disregarded.¹⁰ If the answer is not full plaintiff's remedy is by exception;¹¹ and if after repeated exceptions the defendant still fails to make proper disclosure, the bill may be taken pro confesso as to that portion.¹²

[d]—answer by corporation.

Although a corporation cannot be required to answer under oath, it can be required to answer and must answer fully;¹⁵ and its answer may

v. Byam, 1 Story 296, Fed. Cas. No. 1,947.

¹⁵Commonwealth T. I. Co. v. Cummings, 83 Fed. 767.

¹⁶Field v. Hastings, 65 Fed. 279.

¹⁷Holton v. Guinn, 65 Fed. 450.

¹⁸Hardeman v. Harris, 7 How. 729, 12 L. ed. 889; Peters v. Tonopah M. Co. 120 Fed. 588.

¹⁹Parsons v. Cumming, 1 Woods, 461, Fed. Cas. No. 10,775.

²⁰Schultz v. Phenix I. Co. 77 Fed. 390. This case was reversed on the merits: Phenix Ins. Co. v. Schultz, 80 Fed. 337, 25 C. C. A. 453.

¹Wormeley v. Wormeley, 1 Brock. 330, Fed. Cas. No. 18,047.

²Slater v. Maxwell, 6 Wall. 274, 18 L. ed. 796; Robinson v. Mandell, 3 Cliff. 169, Fed. Cas. No. 11,959. But it does not require two witnesses in rebuttal: Earle v. Art L. P. Co. 95 Fed. 544.

³Taylor v. Luther, 2 Sum. 228, Fed. Cas. No. 13,796.

⁴Kittredge v. Claremont Bank, 1 W. & M. 244, Fed. Cas. No. 7,859.

⁵Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947.

⁶Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947.

⁷United States v. Ferguson, 54 Fed. 28.

⁸Walker v. Derby, 5 Biss. 134, Fed. Cas. No. 17,068; Sargent v. Larned, 2 Curt. 340, Fed. Cas. No. 12,364.

⁹Lowndale v. Portland, Deady, 1, Fed. Cas. No. 8,578; Chapman v. School Dist. Deady, 108, Fed. Cas. No. 2,607.

¹⁰Scammon v. Hobson, 1 Hask. 406, Fed. Cas. No. 12,434.

¹¹See post, § 1101.

¹²Hale v. Con. Ins. Co. 20 Fed. 344.

¹⁵Gamewell Co. v. New York, 31

be excepted to for insufficiency in that respect.¹⁶ When a bill requires answer as to information and belief, a defendant corporation must by its officers make full inquiries before answering.¹⁷ A corporation cannot any more than an individual defendant, deny merely upon information and belief where knowledge must be personal and direct if it exist at all, and want of knowledge should be averred.¹⁸ Where the answer of a corporation is upon the oath of an officer having personal knowledge as to the matters alleged, it is evidence within the rule requiring two witnesses or one and corroborating circumstances to overcome it;¹⁹ otherwise where the officer has not personal knowledge.²⁰

[e] Where full answer unnecessary.

Under rule 44, interrogatories which are improper and therefore demurrable, need not be answered;³ although the pleader should specify the reasons for such failure to answer. Under rule 39 *supra*, defendant is excused from answering fully to the allegations or interrogatories of a bill where his answer sets up the equivalent of a plea in bar or to the merits. This rule takes from plaintiff the benefit of full answer and leaves him with the burden of proving his bill. His compensation is the right to summon defendant as a witness. It results from this rule that where the answer sets up a bar to the bill, it is no longer ground of exception that it does not fully answer the whole bill.⁴ However, if the matter set up in bar is at variance with allegations in the bill, defendant should meet those allegations in the answer, just as a plea in bar sometimes requires answer to variant allegations of the bill, to be filed in support of the plea.⁵ Otherwise plaintiff might set down the case on bill and answer, whereupon the allegations of the bill would avail against the answer which failed to meet them. The mode of proceeding and the effect of different modes, where a defendant has filed other than a full answer in reliance upon rule 39, is thus stated by Mr. Justice Bradley: "If the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs, according to the exigency of the case. If the bar set up should be insufficient as such, I

Fed. 312; *Colgate v. Compagnie Francaise*, 23 Blatchf. 86, 23 Fed. 82.

¹⁶*National, etc. Co. v. Interchangeable, etc. Co.* 83 Fed. 26; *contra United States v. McLaughlin*, 24 Fed. 823.

¹⁷*Kittredge v. Claremont Bank*, 1 W. & M. 244, Fed. Cas. No. 7,859.

¹⁸*Burpee v. First Nat. Bank*, 5 Biss. 405, Fed. Cas. No. 2,185.

¹⁹*Gantt v. Cox, etc. Co.* 199 Pa. St. 208, 48 Atl. 992; *Carpenter v. Providence, etc. Ins. Co.* 4 How. 219, 11 L. ed. 931.

²⁰*Savings & L. Soc. v. Davidson*, 97 Fed. 696, 38 C. C. A. 365.

³*Post*, § 999; *Fuller v. Knapp*, 24 Fed. 100; *Fed. etc. Co. v. International, etc. Co.* 119 Fed. 385; *Boyer v. Keller*, 113 Fed. 580.

⁴*Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173; *Samples v. City Bank*, 1 Woods, 523, Fed. Cas. No. 12,278.

⁵*See ante*, § 979[k]. This is obvious from the wording of rule 39, *supra*.

think the complaint would be entitled to except, as for want of a full answer.⁶ To avoid answering the exceptions, the defendant, in such case, would require leave of the court before he could amend the bar set up in the answer. If, instead of excepting, the complainant should go to proofs, the burden would be on him to prove his bill, and on the defendant to prove his bar, each being entitled to examine the other as a witness. If on the other hand, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true and the bar therein as proved; and though insufficient as a defense, the complainant could not have a decree unless the answer admitted those allegations of the bill on which the prayer for relief was founded.⁷ It is proper practice for a defendant answering by matter in bar to claim it in his answer as such bar and as excuse under this rule, for failure to answer in full.⁸

It had been held that this rule cannot be invoked by a defendant who by answer sets upon every conceivable matter in defense, since a plea sets up some single, distinct conclusive defense.⁹ Nor does the rule authorize the raising of a defense in the answer which has already been adjudged bad on plea.¹⁰

[f] Pleas in abatement—to the jurisdiction, character of parties, etc.

Pleas in abatement are excluded from the operation of the 39th rule.¹⁵ It was formerly the rule that where the bill averred the requisite diverse citizenship defendant could not controvert the allegation by answer but was required by rule 39 to file a special plea.¹⁶ But this rule was changed by the passage of an act of 1875.¹⁷ A defect of parties may be taken advantage of by answer.¹⁸

[g] Procedure after answer filed—where answer insufficient.

If an answer is defective in any of the requisite formalities, plaintiff may move to strike it out or take it off the file.¹ Plaintiff may set the cause for hearing on bill and answer if of opinion that by the uncontroverted allegations of the bill, the admissions of the answer, and the legal insufficiency of any affirmative matter therein, he is entitled to a decree.²

⁶E. g. see *McClaskey v. Barr*, 40 Fed. 563.

⁷*Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173.

⁸See *Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173.

⁹*National, etc. Co. v. Interchangeable, etc. Co.* 83 Fed. 26.

¹⁰*Pentlarge v. Pentlarge*, 22 Fed. 412, 22 Blatchf. 120.

¹⁵*United States v. Gillespie*, 6 Fed. 803.

¹⁶*Wickliffe v. Owings*, 17 How. 51, 15 L. ed. 44; *Pond v. Vermont, etc. R. R.* 12 Blatchf. 280, Fed. Cas. No. 11,265; *Holmes v. Oregon, etc. R. R.* 9 Fed. 238, 7 Sawy. 380.

¹⁷See Ante, § 818; *Nashua R. R. v. Lowell R. R.* 136 U. S. 373, 34 L. ed. 367, 10 Sup. Ct. Rep. 1,007; *Bland v. Fleeman*, 29 Fed. 672; *Edison Co. v. United States Co.* 35 Fed. 136; *Simon v. House*, 46 Fed. 319; *Missouri R. R. v. Meeh*, 69 Fed. 755, 16 C. C. A. 510, 30 L.R.A. 250.

¹⁸See post, § 1025.

¹See *Bailey W. M. Co. v. Young*, 12 Blatchf. 199, Fed. Cas. No. 751; *Putnam v. New Albany*, 4 Biss. 365, Fed. Cas. No. 11,481; *Allen v. Mayor, etc.* 18 Blatchf. 239, 7 Fed. 483.

²See post, § 1005.

If the answer is not full or contains impertinent, or scandalous matter the proper course is to take exceptions thereto;³ and not to move to strike out.⁴ If none of these objections are available plaintiff should proceed to replication and issue;⁵ unless he desires to amend his bill.⁶ Demurrer to an answer is never proper.⁷

§ 997. Signing and verification of answer.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.

59th equity rule, as amended 1889.

The amendment of March 5, 1889¹⁰ to the rule as promulgated in March 1842 consisted in the addition of the words "or before any notary public." Answers do not require certificate of merits by the counsel, as in the case of demurrers and pleas.¹¹ Since the amendment of 1889 it would seem that an answer may be verified abroad before a notary public duly certified by a United States consular officer, or by a secretary of legation or consular officer himself.¹² The early rule was that an answer from beyond the seas must be taken by a commissioner under a dedimus from the court.¹³ By rule 91 affirmation in lieu of oath is valid.¹⁴ Plaintiff may waive the requirement of answer under oath.¹⁵ An answer must be signed by counsel unless taken before commissioners.¹⁶ The general rule is that an answer must be signed by the party as well as by counsel,¹⁷ although the equity rules do not expressly require it. A corporation answering a bill of discovery should do so under its corporate seal.¹⁸

§ 998. Interrogatories not necessary to obtain full answer.

It shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

Order of Dec. 1850, repealing 40th equity rule promulgated March, 1842.

³See post, § 1001.

⁴Stokes v. Farnsworth, 99 Fed. 837.

⁵See post, § 1005.

⁶Ante, § 957.

⁷See ante, § 979[a].

¹⁰See 129 U. S. 701.

¹¹McGorray v. O'Connor, 87 Fed. 586, 31 C. C. A. 114.

¹²See R. S. § 1750, U. S. Comp. Stat. 1901, p. 1196.

¹³Read v. Consequa, 4 Wash. C. C. man, 66 Fed. 184.

335, Fed. Cas. No. 11,607; Herman v. Herman, 4 Wash. C. C. 555, Fed. Cas. No. 6,407.

¹⁴See ante, § 938.

¹⁵See post, § 1000.

¹⁶Davis v. Davidson, 4 McLean, 136, Fed. Cas. No. 3,631.

¹⁷Story Eq. Pl. § 875; Holton v. Guinn, 65 Fed. 450.

¹⁸Continental Nat. Bank v. Heil-

At the December term 1850¹ it was "ordered that the fortieth rule . . . be and the same is hereby repealed and annulled. And it shall not hereafter be necessary" etc., as stated above. The 40th rule originally provided that "A defendant shall not be bound to answer any statement or charge in the bill, unless especially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent." There was no similar provision in the rules of 1822.² The rule as originally adopted was construed in several cases.³ While a party must now, without interrogatories, answer as fully as the rules of equity pleading require,⁴ it is still advisable to propound interrogatories especially if discovery is part of the purpose of the bill.⁵

§ 999. What interrogatories need not be answered.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

44th equity rule promulgated March, 1842.

Where a defendant declines to answer some of the interrogatories he should specify each and state the reason for declining to answer with the same distinctness as though he had demurred.⁶ If defendant claims that answer to an interrogatory would disclose trade secrets he should so state.⁷ It is of course also proper for defendant to demur specially to improper interrogatories.¹⁰

§ 1000. Answer not evidence where answer on oath waived.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, through under oath, except such part thereof as shall be directly responsive to

¹See 10 How. V.

²See 7 Wheat. V. et seq. 5 L. ed. 375.

³See Treadwell v. Cleveland, 3 McLean, 283, Fed. Cas. No. 14,155; Langdon v. Goddard, 3 Story, 13, Fed. Cas. No. 8,061.

⁴Ante, § 996[c].

⁵Parsons v. Cummings, 1 Woods, 461, Fed. Cas. No. 10, 775. See Bail-

ey W. M. Co. v. Young, 12 Blatchf. 199, Fed. Cas. No. 751 (1874), where the original rule 40 is apparently treated as in force.

⁶Boyer v. Keller, 113 Fed. 580.

⁷Federal, etc. Co. v. International, etc. Co. 119 Fed. 385.

¹⁰Coop v. Development Inst. 47 Fed. 899, 901.

such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section three of the act of Congress of July 2, 1864.¹⁵

Amendment of 41st equity rule, promulgated at December term, 1871.

The original rule was concerned with the form of interrogatories¹⁶ and is not affected by this amendment. Prior to the amendment, the rules of equity pleading made the answer evidence for defendant, even a defendant corporation¹⁷ to be overcome only by two witnesses or one witness and corroborating circumstances,¹⁸ unless plaintiff waived answer under oath and defendant accepted the waiver.¹⁹ The attempted waiver could be thwarted if defendant answered under oath notwithstanding it.²⁰ Hence complainant could not prevail where defendant's answer was under oath and uncontradicted¹ or impugned only by one witness.²

This rule still applies where plaintiff fails to waive answer on oath; and he must produce two witnesses, or one and corroborating circumstances to overthrow verified answer.³ But since the enactment of the law of 1864,* permitting parties to be summoned as witnesses there has been an obvious propriety in recognizing the superior value of testimony procured by oral examination, and relegating the answer to the rank of an ordinary pleading. Hence by waiving answer under oath plaintiff can now destroy the evidential value of the answer; except for purposes of a hearing

¹⁵See post, § 1735, et seq.

¹⁶See ante, § 951.

¹⁷See ante, § 996[d].

¹⁸Tobey v. Leonard, 2 Cliff. 40, Fed. Cas. No. 14,067; Gilman v. Libbey, 4 Cliff. 447, Fed. Cas. No. 5,445; Hayward v. Nat. Bank, 4 Cliff. 294, Fed. Cas. No. 6,273; Gernor v. Bocaline, 2 Wash. C. C. 199, Fed. Cas. No. 5,366; Walker v. Derby, 5 Biss. 134, Fed. Cas. No. 17,068.

¹⁹Patterson v. Gaines, 6 How. 588, 12 L. ed. 553.

²⁰Holbrook v. Black, 18 L. R. 89, Fed. Cas. No. 6,590; Heath v. Erie Ry. 8 Blatchf. 347, Fed. Cas. No. 6,306; see Amory v. Lawrence, 3 Cliff. 524, Fed. Cas. No. 336, and Stewart v. Allen, 47 Fed. 400, which fail to note change in rule since 1871.

¹Lenox v. Prout, 3 Wheat. 520, 4 L. ed. 449; Union Bank v. Geary, 5

Pet. 98, 8 L. ed. 60; Higbee v. Hopkins, 1 Wash. C. C. 230, Fed. Cas. No. 6,466; Carpenter v. Prov. W. I. Co. 4 How. 185, 11 L. ed. 931; Hughes v. Blake, 1 Mason, 515, Fed. Cas. No. 6,845; Langdon v. Goddard, 2 Story, 267, Fed. Cas. No. 8,060; Gould v. Gould, 3 Story, 516, Fed. Cas. No. 5,637; Greeley v. Smith, 3 Story, 659, Fed. Cas. No. 6,722.

²Towne v. Smith, 1 W. & M. 115, Fed. Cas. No. 14,115; Delano v. Winsor, 1 Cliff. 501, Fed. Cas. No. 3,754; Pomeroy v. Manin, 2 Paine, 476, Fed. Cas. No. 11,260.

³Slessinger v. Buckingham, 17 Fed. 454, 8 Sawy. 469; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; Monroe C. Co. v. Becker, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217; Walcott v. Watson, 53 Fed. 429.

⁴Post § 1735, et seq.

upon bill and answer,⁵ or of its use, if verified, as an affidavit upon incidental interlocutory motions.⁶ Where plaintiff waived answer under oath it was settled prior to the amendment of the 43rd rule, that interrogatories might be ignored, and such is still the law.⁷ If a bill seeks discovery plaintiff should therefore never waive answer under oath. While plaintiff has no right to have interrogatories answered if he waives oath, it would seem that he has a right to have his bill otherwise fully answered⁸ according to the rules of equity pleading,⁹ unless defendant's answer comes within the exception to the rule requiring full answer;¹⁰ and that exception will be to an answer where oath is waived, for insufficiency.¹¹ The amendment of 1871 permitting plaintiff to destroy the evidential value of the answer, nowhere states that the settled equity rule as to full answer is to be disregarded in such a case, and the analogy drawn from the rule as to answers by corporations which though not under oath were always required to be full,¹² is against the contention. There is convenience and advantage in the rule that unverified answer should still be full and specific though in such a case not evidence but a pleading merely.¹³ Exception for impertinence may lie although answer under oath is waived.¹⁴ Though unverified answer is no longer evidence for defendant, the burden still rests upon plaintiff to prove the allegations of his bill,¹⁵ just as in the case of general issue at law.¹⁶

§ 1001. Exceptions to answer—time for taking—formal requisites.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exceptions shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

61st equity rule, promulgated March 1842.

⁵See post, § 1005.

⁶United States v. Workingman's, etc. Co. 54 Fed. 994, 26 L.R.A. 158.

⁷Union Bank v. Geary, 5 Pet. 99, 112, 8 L. ed. 60; Huntington v. Saunders, 120 U. S. 80, 30 L. ed. 580, 7 Sup. Ct. Rep. 357; Excelsior W. P. Co. v. Seattle, 117 Fed. 140, 55 C. C. A. 156; Tillinghast v. Chace, 121 Fed. 435.

⁸Uhlmann v. Brewing Co. 41 Fed. 369; Whittemore v. Patten, 81 Fed. 527, and cases cited; National, etc. Co. v. Interchangeable, etc. Co. 83 Fed. 26. But see contra: Tillinghast v. Chace, 121 Fed. 435.

⁹Ante, § 996[c].

¹⁰Ante, § 996[e].

¹¹Whittemore v. Patten, 81 Fed. 527; National, etc. Co. v. Interchangeable, etc. Co. 83 Fed. 26. But see contra: Tillinghast v. Chace, 121 Fed. 435.

¹²Ante, § 996[d].

¹³See Whittemore v. Patten, 81 Fed. 527.

¹⁴Barrett v. Twin C. P. Co. 111 Fed. 46.

¹⁵Stewart v. Allen, 47 Fed. 400.

¹⁶See Union Bank v. Geary, 5 Pet. 99, 112, 8 L. ed. 60.

[a] The rule of 1822.

Rule 14 of the equity rules of 1822 provided that "If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave rule with the clerk to make a better answer within two calendar months." The defendant could then amend or stand upon the sufficiency of his answer and set it for argument at the next term.¹

[b] Remedy by exception distinguished from others.

The different courses open to a plaintiff after answer filed have already been stated.² One of them is the filing of exceptions where the answer is insufficient. "Insufficient" in this sense means not complete, or full, or specific, or otherwise in conformity with the rules as to full answer elsewhere stated.³ "Insufficient" is also applied to the legal insufficiency of the entire answer as a defense, and of such defect plaintiff will usually take advantage by setting the cause down on bill and answer;⁴ and should not do so by exception.⁵ So if the answer is formally defective, as in being improperly entitled the remedy is motion to strike out and not exception.⁶ Answer filed in support of a plea is not subject to exception, but plaintiff should either reply or set down the plea for argument.⁷ The exception for insufficiency only raises the questions where a sufficient discovery has been made whether averments have been fully answered and whether averments excepted to are scandalous or impertinent.⁸ A demurrer to an answer is improper.⁹

[c] Matters for exception.

An exception that allegations which support the equity of the bill are neither answered, admitted, or denied, is good, and will be sustained.¹³ A denial on information and belief of any of the facts in the bill, is a good ground of exception where defendant's knowledge must be direct and personal.¹⁴ It seems the better rule that exception lies for insufficiency although answer under oath is waived.¹⁵ An early case held that after exception for impertinence had been taken and allowed, exception for insufficiency could

¹Wheat. VI. et seq. 5 L. ed. 376.

²Ante, § 996 [g].

³Barrett v. Twin C. P. Co. 111 Fed. 46; see ante, § 996 [c].

⁴United States v. McLaughlin, 24 Fed. 823; see post, § 1005.

⁵Exception seems not a proper mode of taking issue as to the legal sufficiency of the answer as a defense: In re Sandford F. & T. Co. 160 U. S. 257, 40 L. ed. 417, 16 Sup. Ct. Rep. 293; Barrett v. Twin C. P. Co. 111 Fed. 46; Stokes v. Farnsworth 99 Fed. 837; Walker v. Jack, 88 Fed. 576, 31 C. C. A. 462.

⁶Osgood v. Aloe Co. 69 Fed. 291;

⁷Hatch v. Bancroft, 67 Fed. 802; ante, § 996 [g].

⁸Pennsylvania Co. v. Bay, 138 Fed. 204.

⁹Ibid.

¹³Hardeman v. Harris, 7 How. 726, 12 L. ed. 889; Read v. Consequa, 4 Wash. C. C. 335, Fed. Cas. No. 11,607.

¹⁴Bradford v. Geiss, 4 Wash. C. C. 513, Fed. Cas. No. 1,768.

¹⁵Uhlmann v. Brewing Co. 41 Fed. 369; Whittemore v. Patten, 81 Fed. 527; National, etc. Co. v. Inter. etc. Co. 83 Fed. 26; contra Tillinghast v. Chace, 121 Fed. 435; and see ante, § 1000 note.

then be filed;¹⁶ but the present rule seems to require all exceptions to be filed at the same time.¹⁷ Neither this rule nor the earlier one specifically recognizes exception to an answer for impertinence, although the cases have permitted exception upon that ground where matter was clearly not material or relevant.¹⁸

[d] Form and disposal of exceptions, waiver and admission thereof.

An exception for insufficiency should state the charges in the bill and the answer thereto, verbatim, that the court may properly judge it.¹ The exceptions may be amended by adding a prayer thereto.² In deciding upon exceptions the answer will be liberally construed, having regard to the case made by the bill;³ and if the allegations of the bill are general the answer may be equally so.⁴ Going to trial on the merits is waiver of an exception; and if plaintiff does not except for failure to deny allegations in the bill, the allegations are not deemed admitted but he must prove them.⁵

§ 1002. — setting exceptions for hearing unless answer amended.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

63rd equity rule, promulgated March, 1842.

Rule 14 of the equity rules of 1822 permitted defendant within two months after exception to put in an amended answer without costs; or if he deemed his answer sufficient or neglected to amend, permitted plaintiff to set down the exceptions for argument at the next term. But after the

¹⁶*Patriotic Bank v. Washington Bank*, 5 Cranch C. C. 602, Fed. Cas. No. 10,806.

¹⁷But see *Barrett v. Twin C. P. Co.* 111 Fed. 46.

¹⁸*Barrett v. Twin C. P. Co.* 111 Fed. 46; *Chapman v. School Dist. Deady*, 108, Fed. Cas. No. 2,607; see *Patriotic Bank v. Washington Bank*, 5 Cranch C. C. 602, Fed. Cas. No. 10,806.

¹*Brooks v. Byam*, 1 Story, 296, Fed. Cas. No. 1,947; *Bower Co. v. Wells Co.* 43 Fed. 391; *Schultz v. Phoenix Ins. Co.* 77 Fed. 375.

²*Whittemore v. Patten*, 84 Fed. 51.

³*Griswold v. Hill*, 1 Paine, 390, Fed. Cas. No. 5,835.

⁴*Parsons v. Cummings*, 1 Woods, 461, Fed. Cas. No. 10,775.

⁵*Lovell v. Johnson*, 82 Fed. 206.

expiration of two months "on any second insufficient answer put in," no further or other answer was allowable except on payment of costs.⁸ Exceptions should be set for hearing on the rule day before the judge.⁹ Reference to a master before that time is a waiver of them;¹⁰ and plaintiff may withdraw them upon leave obtained, and reply forthwith.¹¹ If the exceptions are disallowed plaintiff has a right to file a replication and it would be improper to order dismissal without according that right.¹²

§ 1003. — answer on allowance of exceptions and penalty for failure.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.

64th equity rule, promulgated March 1842.

If answers to interrogatories are evasive defendant will be ordered to make full disclosure and pay the costs of the hearing.¹⁵ Under Rule 16 of the equity rules of 1822 a second insufficient answer entailed a penalty of double costs it being further provided that "defendant may be examined upon interrogatories, and committed until he or she answer them; or the plaintiff may move the court to take so much of his bill as is not answered as confessed and may file his replication, obtain commissions, and proceed to hearing in the usual manner."¹⁶ It is improper for the court to enter final decree against defendant upon the sustaining of exceptions, unless defendant elect to stand upon his answer.¹⁷

§ 1004. Payment of costs upon exceptions allowed or overruled.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the pre-

⁸Rule 14, see 7 Wheat. VI. et seq. U. S. 258, 40 L. ed. 417, 16 Sup. Ct. 5 L. ed. 376. Rep. 293.

⁹La Vega v. Lapsley, 1 Woods, 428, ¹⁵Langdon v. Goddard, 3 Story, 13, Fed. Cas. No. 8,123. Fed. Cas. No. 8,061.

¹⁰Ibid.

¹¹Penn v. Butler, Wall. C. C. 4, ¹⁶See 7 Wheat. X. et seq. 5 L. ed. Fed. Cas. No. 10,931. 376.

¹²In re Sandford F. & T. Co. 160 U. S. 258, 40 L. ed. 417, 16 Sup. Ct. Rep. 293.

vailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

65th equity rule, promulgated March 1842.

Rule 15 of the equity rules of 1822 provided similarly for payment by one party to the other of "such costs as shall be allowed by the court."¹⁹

§ 1005. Setting cause for hearing on bill and answer.

Plaintiff may set a cause down for hearing upon bill and answer. The effect is to admit the truth of all matter well pleaded in the answer, but to deny its legal sufficiency. It is consequently a proper proceeding where plaintiff believes that an answer in the nature of a confession and avoidance is no defense, or that the answer contains enough admissions, either express or because of insufficient denials, to entitle him to the relief prayed; and sometimes it is proper where the answer is in the nature of a plea in bar under Rule 39.

Author's section.

While the equity rules contain no express provision for setting a cause down¹ upon bill and answer the right to follow that course is deducible from rule 60. It is a well recognized and proper mode of preceeding under certain circumstances.² At a hearing upon bill and answer the averments of the answer are to be taken as true.³ Allegations of fact in the bill denied in due form in the answer are to be taken as disproved, and material averments of fact in the answer stand admitted;⁴ whether responsive or not.⁵ But legal conclusions in the answer or allegation at variance with facts of which the court takes judicial notice, are not admitted.⁶ It raises the same question as would a demurrer to the answer, which however is never proper.⁷ Sometimes when demurrer is improperly interposed the court will treat it as an application to set down for hearing on bill and answer;⁸ or strike it out and give leave so to set the cause down.⁹ The question at

¹⁹⁷ Wheat, X. et seq. 5 L. ed. 376.

¹Post, § 1006; see *Banks v. Manchester*, 128 U. S. 251, 32 L. ed. 428, 9 Sup. Ct. Rep. 36.

²See instances: *Lake E. Ry. v. Indianapolis Nat. Bank*, 65 Fed. 690; *United States v. Trans-Missouri F. Assoc.* 58 Fed. 58, 77. 24 L.R.A. 73. 7 C. C. A. 15; *Banks v. Manchester*, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36.

³*Leeds v. Marine Ins. Co.* 2 Wheat. 384, 4 L. ed. 268; *Banks v. Manchester*, 128 U. S. 451, 32 L. ed. 428, 9

Sup. Ct. Rep. 36; *United States v. Flournoy, etc. Co.* 71 Fed. 577.

⁴*United States v. Trans-M. F. Assoc.* 58 Fed. 77, 7 C. C. A. 15, 24 L. R.A. 73.

⁵*Lake E. R. R. v. Indianapolis Bank*, 65 Fed. 690.

⁶*United States v. Flournoy, etc. Co.* 71 Fed. 577.

⁷See ante, § 979[a].

⁸*Grether v. Wright*, 75 Fed. 744, 23 C. C. A. 498.

⁹*Crouch v. Kerr*, 38 Fed. 550.

such a hearing is the legal sufficiency of the answer.¹⁰ But if it appear that the bill itself is fatally defective decree may be for dismissal of the bill;¹¹ although sometimes it would seem plaintiff should be allowed to file a replication if the decision is against him.¹² If the answer be held legally insufficient, it will generally be in order to direct decree for plaintiff forthwith;¹³ although there might be circumstances under which defendant should be permitted to amend.¹⁴ Where the answer sets up matter in the nature of plea in bar or to the merits under rule 39,¹⁵ it was intimated by Mr. Justice Bradley in a case at circuit that although the bar was legally insufficient, plaintiff could not prevail at a hearing, upon bill and answer "unless the answer admitted those allegations of the bill on which the prayer for relief was founded."¹⁶

§ 1006. Amendment of answer and supplemental answer.

After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank or correcting a date, or reference to a document or other small matter, and be resworn at any time before a replication is put in or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses or qualifying or altering the original statements except by special leave of the court or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may in his discretion require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.^{[a]-[b]}

60th equity rule promulgated March 1842.

¹⁰*Banks v. Manchester*, 128 U. S. 251, 32 L. ed. 429, 9 Sup. Ct. Rep. 36; *United States v. Flournoy*, 71 Fed. 577.

¹¹See *Bullinger v. Mackey*, 14 Blatchf. 355, Fed. Cas. No. 2,126; *United States v. Trans-M. F. Assoc.* 58 Fed. 58, 7 C. C. A. 15, 24 L.R.A. 73, where that was done.

¹²See *In re Sandford F. & T. Co.* 160 U. S. 258, 40 L. ed. 417, 16 Sup. Ct. Rep. 293, where, however, the answer was questioned on a general exception to its sufficiency and not by setting down. In *Bullinger v. Mackey*, 14 Blatchf. 355, Fed. Cas. No. 2,126, leave to file replication was refused.

¹³See *Lake Erie Ry. v. Indianapolis Bank*, 65 Fd. 690; *United States v. Flournoy*, etc. Co. 71 Fed. 579.

¹⁴Where exceptions are sustained to an answer the right to amend is absolute: *In re Sandford*, etc. Co. 160 U. S. 258, 40 L. ed. 417, 16 Sup. Ct. Rep. 293; ante, § 1003; rule 60 (post, § 1006) deals with amendment after the case is set down upon bill and answer, but not after decision.

¹⁵Ante, § 996.

¹⁶*Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173, quoted in extenso ante, § 996 [e].

[a] Rules as to amendment in general.

The rules of 1822 contained no provision respecting amendment of answers. There is a Federal statute respecting amendments and directing the courts to disregard mere formal defects, which applies in equity as well as at law; and the above rule must be read in connection therewith.¹⁹ Amendment of the answer after exception filed is governed by rules 63 and 64.²⁰ After replication or the setting of the case for hearing on bill and answer, permission to amend the answer is a matter within the sound discretion of the court.¹ That discretion should be exercised with a view to promoting substantial justice.² Mistakes of dates, matters of form, and verbal inaccuracies may generally be corrected at any time,³ or the defect may be disregarded under the provisions of the Federal statute.⁴ But other amendments are less easily obtained as a cause approaches its final disposition;⁵ especially where want of diligence is evident.⁶ Yet the granting of leave to amend after a hearing on exceptions to the master's report, is a matter of discretion, not reviewable on appeal.⁷ Amendment changing the character of the answer will rarely be admitted after hearing;⁸ or an amendment for the purpose of introducing matter known to defendant, when the answer was filed;⁹ or an amendment contrary to an express stipulation of the counsel.¹⁰ "Where the party relies upon new facts which have come to his knowledge since the answer was put in, or where it is manifest that he has been taken by surprise, or where the mistake or omission is manifestly a mere inadvertence and oversight, there is generally less reason to object to the amendment than there is where the whole bearing of the facts and evidence must have been well known before the answer was put in."¹¹

[b] New or supplemental answer.

The strict distinctions drawn between amended and supplemental bills,¹⁴ do not seem to prevail in the nomenclature of answers. A supplemental answer seems to have been first used by Lord Thurlow in lieu of the older method of taking the original answer from the files and substituting a new

¹⁹Ante, § 813.²⁰Ante, § 1002, 1003.

¹Smith v. Babcock, 3 Sum. 583, Fed. Cas. No. 13,008, per Story, J.; Caster v. Wood, 1 Bald. 289, Fed. Cas. No. 2,505; Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50; Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402.

²Calloway v. Dobson, 1 Brock. 119, Fed. Cas. No. 2,325; Smith v. Babcock, 3 Sum. 583, Fed. Cas. No. 13,008, per Story J.

³Smith v. Babcock, 3 Sum. 583, Fed. Cas. No. 13,008; Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

⁴Ante, § 813.

⁵Gubbons v. Laughtenschlager, 75 Fed. 615; Schultz v. Phenix Ins. Co. 75 Fed. 375.

⁶India R. Co. v. Phelps, 8 Blatchf. 85, Fed. Cas. No. 7,025.

⁷Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402.

⁸Waldon v. Bradley, 14 Pet. 156, 10 L. ed. 398; see Smith v. Babcock, 3 Sum. 583, Fed. Cas. No. 13,008.

⁹See Suydam v. Truesdale, 6 McLean, 459, Fed. Cas. No. 13,656.

¹⁰Schultz v. Phenix Ins. Co. 75 Fed. 375.

¹¹Smith v. Babcock, 3 Sum. 583, Fed. Cas. No. 13,008, per Story, J.

¹⁴Ante, § 961.

one, a practice which sometimes resulted in flat contradiction between the two sworn documents. On filing supplemental answer the original still stands subject to the explanations contained in the supplement.¹⁵ Where the original contained a mistake which is sought to be corrected, it is important that the supplement contain an explanation of the supposed mistake,¹⁶ and in such cases supplemental answer is preferable to an amendment of the original, at least where answer is under oath. Supplemental answer is also proper where new matter of defense is discovered after the putting in of the original;¹⁷ new matter thereafter arises or which defendant desires to have brought to the courts attention,¹⁸ such as a release.¹⁹ However, if a less formal mode of introducing such matters is not objected to at the time, it is no ground of objection on appeal.²⁰ The practice of destroying the evidential character of the answer by waiver of verification.¹

§ 1007. New or supplemental answer after amendment of bill.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

46th equity rule, promulgated March 1842.

The use "amendment" and "supplemental answer" has already been referred to.⁵ An amended answer to an amended bill which repeats matter in the original answer has been held so far impertinent.⁶

§ 1008. Full costs not allowed if separate answer by solicitor for several defendants unnecessary.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and

¹⁵See Story Eq. Pl. 901.

¹⁶Smith v. Babcock, 3 Sum. 583, Fed. Cas. No. 13,008.

¹⁷Suydam v. Truesdale, 6 McLean, 459, Fed. Cas. No. 13,656; Caster v. Wood, 1 Bald. 289, Fed. Cas. No. 2,565.

¹⁸See Williams v. Gibbes, 20 How. 535, 541, 15 L. ed. 1013.

¹⁹See Kelsey v. Hobby, 16 Pet. 277, 10 L. ed. 964.

²⁰Kelsey v. Hobby, 16 Pet. 277, 10 L. ed. 964; Coburn v. Cedar V. L. Co. 138 U. S. 196, 222, 34 L. ed. 876, 11 Sup. Ct. Rep. 258.

¹Ante, § 1000.

⁵Ante, § 1006[b].

⁶Gier v. Gregg, 4 McLean, 202, Fed. Cas. No. 5,406.

other proceedings were necessary or proper, and ought not to have been joined together.

§ 62nd equity rule promulgated March, 1842.

The rules of 1822 contained no similar provision.

§ 1009. Limit of taxable costs or answer.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of . . . answers, the regular taxable costs for every . . . answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every . . . answer.

25th equity rule promulgated March, 1842.

The rule also includes taxable costs on bills.¹⁰

§ 1010. Replication—time of filing—issue.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter;^[b] and in all cases where the general replication is filed the causes shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed,^[b] unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed nunc pro tunc, the plaintiff submitting to speed the cause, and to such other terms as may be directed.^[a]

66th equity rule, promulgated March, 1842.

[a] Replication in general.

Replication to a plea is elsewhere considered¹³ special replication for the purpose of introducing new matter in avoidance of a substantive defense in the answer or plea was allowable under the rules of 1822, though only upon leave first obtained.¹⁴ But the rules of 1842 abolished the special replication;¹⁵ and if filed it may now be stricken out on motion.¹⁶

¹⁰ Ante, § 964.

¹³ Ante, § 981[c].

¹⁴ Rule 11, 7 Wheat. VI. 5 L. ed. 376; See early cases thereon: Dupont v. Mussy, 4 Wash. C. C. 128.

Fed. Cas. No. 4185; Vattier v. Hinde, 7 Pet. 252, 8 L. ed. 676.

¹⁵ Ante, § 958.

¹⁶ Mason v. Hartford, etc. R. R. 10 Fed. 334.

Plaintiff need only file general replication and the cause is then deemed "to all intents and purposes at issue, without any rejoinder or other pleading on either side." However, there are various other courses open to a plaintiff after the filing of the answer.¹⁷ Replication puts in issue all matters well alleged in the answer,¹⁸ not responsive to the bill.¹⁹ If none be filed the answer must be deemed true and plaintiffs can offer no evidence to contradict facts well alleged in the answer.²⁰ New matter in a replication may now be treated as surplusage.¹ Where defendant has filed a plea, and answer in its support, it is irregular for plaintiff to file a replication only to the supporting answer; his course is either to reply to the plea and answer² or else set the cause for argument³ on the bill, plea, and supporting answer.⁴ Replication is unnecessary after answer to bill of revivor.⁵ If parties proceed to final hearing without objection for want of a replication, the defect is waived and not available on appeal.⁶ The replication cannot be used to perform the office of exceptions.⁷

[b] Time for filing.

Construing this rule in connection with the 61st,¹⁰ it has recently been held that plaintiff has until the second rule day after answer, in which to file his replication.¹¹ If not seasonably filed motion to dismiss should be granted;¹² as of course.¹³ But if a belated replication is filed without leave the court has discretion to permit it to stand;¹⁴ and it is said that the filing of replication out of time is and should be indulged.¹⁵ Each answer as filed must be seasonably replied to regardless of the state of the cause as to other defendants.¹⁶ Where motion to strike the answer from the files is pending the suit will not be dismissed for want of replication.¹⁷ The filing of replication has been permitted at the final hearing where testimony has been taken without any objection for want thereof.¹⁸

¹⁷See ante, § 996[g].

¹⁸Brown v. Pierce, 7 Wall, 212, 19 L. ed. 134.

¹⁹Humes v. Scruggs, 94 U. S. 24, 24 L. ed. 51.

²⁰Brown v. Pierce, 7 Wall. 212, 19 L. ed. 134.

¹Warren v. Van Brunt, 19 Wall. 646, 22 L. ed. 219.

²See ante, § 981[c].

³See ante, § 981[a].

⁴See Beals v. Illinois, etc. R. R. 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314.

⁵Fretz v. Stover, 22 Wall. 204, 22 L. ed. 769; Mason v. Hartford, etc. R. R. 19 Fed. 56.

⁶Brown v. Pierce, 7 Wall. 212, 19 L. ed. 134; Fretz v. Stover, 22 Wall. 204, 22 L. ed. 769; Clements v. Moore, 6 Wall. 299, 18 L. ed. 786.

⁷Robinson v. American, etc. Co. 135 Fed. 693, 68 Fed. 331.

¹⁰Ante, § 1001.

¹¹Hendrickson v. Bradley, 85 Fed. 508, 29 C. C. A. 303; but see Heyman v. Uhlman. 34 Fed. 686.

¹²Blue, etc. Co. v. Floyd-Jones, 26 Fed. 817.

¹³Robinson v. Satterlee, 3 Sawy. 134, Fed. Cas. No. 11,967.

¹⁴Fischer v. Hayes, 6 Fed. 76, 19 Blatchf. 26; see Coleman v. Martin, 6 Blatchf. 291, Fed. Cas. No. 2,986.

¹⁵Hendrickson v. Bradley, 85 Fed. 509, 510, 29 C. C. A. 303.

¹⁶Coleman v. Martin, 6 Blatchf. 291, Fed. Cas. No. 2,986.

¹⁷Allis v. Stowell, 5 Fed. 203, 10 Biss. 57; Fischer v. Wilson, 16 Blatchf. 220, Fed. Cas. No. 4,812.

¹⁸Jones v. Brittan, 1 Woods, 667, Fed. Cas. No. 7,455; In re Thomas, 45 Fed. 787.

CHAPTER 28.

EQUITY PROCEDURE (CONTINUED)—PARTIES.

- § 1019. When nonjoinder of necessary or proper parties unobjectionable.
- § 1020. If very numerous all parties need not be joined.
- § 1021. When trustees may be sued without joining beneficiaries.
- § 1022. When heir at law a proper or unnecessary party.
- § 1023. Joint and several obligors may be severally sued.
- § 1024. Guardians and *prochein amis*.
- § 1025. Objection for defect of parties—hearing where objection taken in the answer.
- § 1026. Objection for defect of parties at the hearing.

§ 1019. When nonjoinder of necessary or proper parties unobjectionable.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties;^[a] and in such cases the decree shall be without prejudice to the rights of the absent parties.^[b]

47th equity rule, promulgated March, 1842.

[a] In general.

This rule is to be read in connection with R. S. § 737¹ which expressly excuses the joinder of parties who are “neither inhabitants of nor found within the district in which suit is brought and do not voluntarily appear.” In so far as covering the same ground as R. S. § 737 the equity rule is of course subordinate thereto; although it better expresses what is actually intended by R. S. § 737.² The 47th rule deals also with nonjoinder of persons within the jurisdiction who lack the requisite diversity of citizenship.³ The Federal courts classify parties according to rules of their own

¹Ante, § 817.

S. 611, 37 L. ed. 577, 13 Sup. Ct. Rep.

²See *Swan L. Co. v. Frank*, 148 U. 691.

³See ante, § 817[b].

as proper or formal, necessary and indispensable; and the words "necessary or proper parties" in the above rule have a meaning which has become well settled in Federal jurisprudence.⁴ It is the policy of the Federal courts to protect the constitutional right⁵ of resort to a Federal tribunal in controversies between citizens of different States whenever there is a controversy, however, involved in other disputes, that can be separated and there settled. They will therefore dispense with necessary parties who should be joined, but cannot without ousting their jurisdiction;⁶ although they act in such cases in the exercise of discretion.⁷ They never allow a contention that a merely formal party should be joined where the result would be a divestiture of their jurisdiction.⁸ But this does not mean that ordinarily and where no question of such divestiture is involved, the Federal courts will disregard the usual right to join formal parties or the usual rule that all persons materially interested in the subject matter of a suit should be made parties in order to prevent multiplicity of suits and insure a final decree.⁹ On the contrary it is recognized that necessary parties must be joined,¹⁰ in all cases where such joinder will not oust their jurisdiction. They will also range parties to a dispute as plaintiffs or defendants, according to their essential relation to a controversy so that the alignment will show diverse citizenship.¹¹

But that is as far as they can go. If joinder of an indispensable party without whom no decree could be made, would oust the jurisdiction, the

⁴Ibid.

⁵Ante, § 2[q] et seq.

⁶Hunter v. Robbins, 117 Fed. 920; Williams v. Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425; Mallow v. Hinde, 12 Wheat. 197, 6 L. ed. 599; Harrison v. Urann, 1 Story 64, Fed. Cas. No. 6,146; Joy v. Wirtz, 1 Wash. C. C. 517, Fed. Cas. No. 7,554; Drake v. Goodridge, 6 Blatchf. 151, Fed. Cas. No. 4,062; Tug River Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415; Union, etc. Co. v. Dangberg, 81 Fed. 73; Sioux C. R. R. v. Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73; Insurance Co. v. Svendsen, 74 Fed. 346; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 292; Cameron v. McRoberts, 3 Wheat. 591, 4 L. ed. 467; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; McGahan v. Bank 156 U. S. 236, 39 L. ed. 403, 15 Sup. Ct. Rep. 347.

⁷California v. Southern P. Co. 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591; Mechanics' Bank v. Seton, 1 Pet. 306, 7 L. ed. 152; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 292.

⁸Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; Carneal v. Banks, 10 Wheat. 181, 6 L. ed. 297; Ward v.

Arredondo, 1 Paine, 410, Fed. Cas. No. 17,148; Anthony v. Campbell, 112 Fed. 212, 50 C. C. A. 195; Cleveland T. Co. v. Stone, 105 Fed. 794; Mackay v. Gabel, 117 Fed. 873; Fisher v. Shropshire, 147 U. S. 133, 37 L. ed. 109, 13 Sup. Ct. Rep. 201.

⁹Mechanics' Bank v. Seton, 1 Pet. 306, 7 L. ed. 152; Ribon v. Railroad, 16 Wall. 450, 21 L. ed. 369; Caldwell v. Taggart, 4 Pet. 202, 7 L. ed. 828.

¹⁰Caldwell v. Taggart, 4 Pet. 190, 7 L. ed. 828; Morgan v. Morgan, 2 Wheat. 298, 4 L. ed. 245; Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184; Mandeville v. Riggs, 2 Pet. 487, 7 L. ed. 493; Van Reimsdyk v. Kane, 1 Gall. 371, Fed. Cas. No. 16,871; West v. Randall, 2 Mass. 181, Fed. Cas. No. 17,424; Bowman v. Wathen, 2 McLean, 379, Fed. Cas. No. 1,740.

¹¹See ante, § 2[q]; Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2,133; Parsons v. Lyman, 4 Blatchf. 432, Fed. Cas. No. 10,779; Brown v. Pac. M. S. Co. 5 Blatchf. 526, Fed. Cas. No. 2, 025; Campbell v. James, 2 Fed. 338, 18 Blatchf. 92; Lalance v. Haberman M. Co. 93 Fed. 197.

cause must be dismissed or remanded to the State court whence it came.¹² Where a defect of parties might be cured by amendment it will not be proper to order dismissal without giving opportunity for the absent party to be brought in.¹³ The court should grant leave to make new parties;¹⁴ unless it is apparent that the new party would oust the jurisdiction.¹⁵ The dismissal when made should be without prejudice.¹⁶

[b] Persons not parties not to be affected by decree.

This proposition was well settled prior to the adoption of the above rule or of the act of 1839 which is now R. S. § 737.¹⁷ It rests upon the fundamental principle that no persons rights shall be adjudicated unless actually or constructively before the court.²⁰ The rights of absent parties are to be reserved.¹

§ 1020. If very numerous all parties need not be joined.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it.^[a] But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.^[b]

48th equity rule, promulgated March, 1842.

¹²Riddle v. Mandeville, 5 Cranch, 322, 3 L. ed. 114; Russell v. Clark, 7 Cranch, 64, 3 L. ed. 271; Marshal v. Beverly, 5 Wheat. 313, 5 L. ed. 97; Connecticut v. Pennsylvania, 5 Wheat. 424, 5 L. ed. 125; Harding v. Handy, 11 Wheat. 132, 133, 6 L. ed. 429; Mellow v. Hinde, 12 Wheat. 193, 6 L. ed. 599; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Herndon v. Ridgway, 17 How. 425, 15 L. ed. 100; Bank v. Carrollton R. R. 11 Wall. 624, 20 L. ed. 82; Traders' Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832; Ribon v. Railroad, 16 Wall. 446, 21 L. ed. 367; Young v. Cushing, 4 Biss. 456, Fed. Cas. No. 18,156; First Nat. Bank v. Smith, 6 Fed. 215; Collins Mfg. Co. v. Ferguson, 54 Fed. 721; Shingleur v. Jenkins, 111 Fed. 452.

¹³Milligan v. Milledge, 3 Cranch, 228, 2 L. ed. 417, 420; Hoxie v. Carr, 1 Sumn. 173. Cas. No. 6,802.

¹⁴Hunt v. Wickliffe, 2 Pet. 201, 7 L. ed. 397; Dandridge v. Washington's Ex. 2 Pet. 370, 7 L. ed. 454; Bank v. Carrollton R. R. 11 Wall. 624, 20 L. ed. 82; see Hoe v. Wilson, 9 Wall. 504, 19 L. ed. 762; see Taylor v. Holmes, 14 Fed. 515; Collins Mfg. Co. v. Ferguson, 54 Fed. 722; Consolidated W. Co. v. Babcock, 76 Fed. 252; Shields v. Barrow, 17 How. 145, 15 L. ed. 158.

¹⁵See Minnesota v. Northern Sec. Co. 184 U. S. 235, 46 L. ed. 499, 22 Sup. Ct. Rep. 308.

¹⁶Dandridge v. Washington, 2 Pet. 378, 7 L. ed. 454.

¹⁹See ante, § 817[d]; Finley v. Bank of U. S. 11 Wheat. 304, 6 L. ed. 480; Coiron v. Millaudon, 19 How. 113, 15 L. ed. 575.

²⁰Ante, § 817[c].

¹Calhoun v. St. Louis, etc. Co. 14 Fed. 9, 9 Biss. 330.

[a] In general.

In an early case at circuit the learned Story thus stated the rule: "Where the parties are very numerous and the court perceives that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases if the bill purports to be not merely on behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree."⁵ He referred to it also in an early supreme court decision.⁶ It is an exception to the rule that all indispensable parties must be joined.⁷ It is applicable where the parties on both sides are numerous, as, in case of dispute between two factions of a church body.⁸ There must be some interest common to a numerous class;⁹ and each such common interests if there be more than one, must be represented.¹⁰ There must be such a representation as to insure a fair trial in behalf of all.¹¹ And the court will permit other parties to come in while the cause is in fieri and take the benefit of the decree, or show it to be erroneous, and award a rehearing; or will entertain a bill or petition to bring the rights of nonparties more distinctly before the court if there be uncertainty or danger of injury or injustice.¹² Under this rule certain stockholders may be permitted to sue for a very numerous class similarly interested;¹³ and a few bondholders may sue for all;¹⁴ or certain creditors may maintain creditor's bill on behalf of all.¹⁵ Strike leaders may be sued in order to reach a body of

⁵West v. Randall, 2 Mason, 181, 41 L. ed. 648, 17 Sup. Ct. Rep. 262. Fed. Cas. No. 17,424.

⁶Mandeville v. Riggs, 2 Pet. 487, 7 L. 494; see later cases: Brown v. Pacific M. S. S. Co. 5 Blatchf. 525 Fed. Cas. No. 2,025; Campbell v. Railroad, 1 Woods, 368, Fed. Cas. No. 2,366, per Bradley, J.; Wilmer v. Atlanta, etc. R. R. 2 Woods, 447 Fed. Cas. No. 17,776; McIntosh v. Pittsburg, 112 Fed. 707; Wood v. Dummer, 3 Mason, 317, Fed. Cas. No. 17,944, per Story, J.; Stevens v. Smith, 126 Fed. 711.

⁷Ante, § 817[b]-[c]; see McIntosh v. Pittsburg, 112 Fed. 707; West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424.

⁸Smith v. Swormstedt, 16 How. 302, 14 L. ed. 942; see Society of Shakers v. Watson, 68 Fed. 730, 15 C. C. A. 632, 641; see Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944. Where some creditors sued some stockholders.

⁹Scott v. Donald, 165 U. S. 116,

¹⁰Smith v. Swormstedt, 16 How. 302, 14 L. ed. 942.

¹¹McArthur v. Scott, 113 U. S. 392, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; Christian v. Atlantic, etc. R. R. 133 U. S. 241, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; Stevens v. Smith, 126 Fed. 711.

¹²West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424; Campbell v. Railroad, 1 Woods, 368, Fed. Cas. No. 2,366; Coann v. Atlanta, etc. Co. 14 Fed. 4; 4 Woods, 503; Alger v. Anderson, 78 Fed. 733.

¹³Brown v. Pacific M. S. S. Co. 5 Blatchf. 525, Fed. Cas. No. 2,025.

¹⁴Campbell v. Railroad Co. 1 Woods, 368, Fed. Cas. No. 2,366; Coann v. Atlanta, etc. R. R. 14 Fed. 4, 4 Woods, 503; Wilmer v. Atlanta, etc. R. R. 2 Woods, 447, Fed. Cas. No. 17,776.

¹⁵West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424.

strikers.¹⁶ There are also cases where a very numerous body of heirs may be sued by joining a few representatives.¹⁷ A suit against an unincorporated association of dealers which names the association together with a large number of its individual members and its officers, is sufficient.¹⁸ Where some persons who should be named defendants are unknown to plaintiff, as in the case of unknown heirs, it has been deemed permissible under this rule to join those known and allege want of knowledge as to others.¹⁹

[b] Decree where a few sue or defend for all not binding on non parties.

The concluding portion of the above seems to modify the general doctrine that parties not named may yet be bound, on the principle of representation, to the fullest extent,² although the cases have sometimes declared that a suit by or against some in behalf of all, will be binding upon all, notwithstanding this rule.³ This provision against prejudicing the rights of non parties in the decree where a suit is by or against some in behalf of all, certainly does not prohibit the whole class, when plaintiffs, from taking the benefit of a decree obtained by some for all; nor prevent a plaintiff, obtaining decree against some representatives of a numerous class of defendants, from bringing in others than the individuals named by supplemental proceedings, and making his decree effective against them after they have had opportunity to defend against it.⁴ It permits others of the class to come in while the cause is still in fieri and object to proceedings taken and relief sought by parties claiming to represent the class⁵ although those coming in and seeking the benefits of a decree are undoubtedly bound by such decree.⁶ It seems clear that this rule was not intended to impair the binding force of a decree upon quasi parties such as cestui que trust who are duly represented in court by their trustee.⁷

§ 1021. When trustees may be sued without joining beneficiaries.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the

¹⁶American, etc. Wire Co. v. Wire, etc. Union, 90 Fed. 606, 607.

¹⁷See Stevens v. Smith, 126 Fed. 711.

¹⁸United States v. Coal Dealers' Assn. 85 Fed. 252, 260; compare American, etc. W. Co. v. Wire, etc. Union, 90 Fed. 606.

¹⁹Alger v. Anderson, 78 Fed. 744.

²American, etc. Wire Co. v. Wire Drawers' Union, 90 Fed. 605.

³See Campbell v. Railroad, 1

Woods, 368. Fed. Cas. No. 2,366; McIntosh v. Pittsburg, 112 Fed. 707.

⁴American, etc. Wire Co. v. Wire Drawers' Union, 90 Fed. 605.

⁵Coann v. Atlanta C. Co. 14 Fed. 4, 4 Woods, 503.

⁶Campbell v. Railroad, 1 Woods, 368, Fed. Cas. No. 2,366; Calhoun v. St. Louis Ry. 14 Fed. 10, 9 Biss. 330.

⁷See Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843.

same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

49th equity rule, promulgated March, 1842.

There seems to be but few direct references to the foregoing provision, among the reported cases. In one case it was referred to for an analogy respecting cases where an executor may be sued without joining the devisees.⁸ The general rule is that in suits respecting the trust property, brought either by or against the trustee, the cestui que trust as well as the trustee, are necessary parties;⁹ and that the trustees as well as beneficiaries are necessary parties to a suit to defeat the trust, especially where they have large powers respecting the trust estate.¹⁰ To this general rule there are well-established exceptions, one of which is expressed by the 49th rule supra. The cases have further held that if suit is brought by trustee to recover the trust property or to reduce it to possession and in nowise affects his relation with his cestui que trust, it is unnecessary to make the latter parties.¹¹ Nor are the beneficiaries necessary parties to a suit by a stranger against the trustee, to defeat the trust, or by the trustee against strangers to enforce it.¹² This is true where the trustee has such powers or is under such obligations in the execution of the trust, that the beneficiaries will be bound by what is done by and against him;¹³ but is subject to exception where the trustee holds a mere naked legal title for the benefit of himself and another.¹⁴ Bondholders are not necessary parties in a suit by or against the trustee and yet will be bound by the judgment rendered.¹⁵ Creditors are bound by judgments against an

⁸See *Chew v. Hyman*, 7 Fed. 14, 10 Biss. 240, holding devisees necessary parties in foreclosing a mortgage given by the testator.

⁹*Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469; *Ross v. Ft. Wayne*, 63 Fed. 469, 11 C. C. A. 288; *Wescott v. Wayne*, 11 Fed. 303; *Smith v. Portland*, 30 Fed. 737; *Griswold v. Bacheller*, 75 Fed. 473.

¹⁰*O'Harra v. McConnell*, 93 U. S. 154, 23 L. ed. 840; *McArthur v. Scott*, 113 U. S. 396, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Kerrison v. Stewart*, 93 U. S. 160, 23 L. ed. 843; *Woodward v. McConaughy*, 106 Fed. 760, 45 C. C. A. 602.

¹¹*Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469; *Wescott v. Wayne*, 11 Fed. 303. The trustees are the real

plaintiffs: *Knapp v. Railroad Co.* 20 Wall. 123, 22 L. ed. 328.

¹²*Kerrison v. Stewart*, 93 U. S. 160, 23 L. ed. 843; *Talley v. Cur-tain*, 54 Fed. 48, 4 C. C. A. 177.

¹³*Kerrison v. Stewart*, 93 U. S. 160, 23 L. ed. 843; *Vetterlein v. Barnes*, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 441; *Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 112; *Rejall v. Greenhood*, 92 Fed. 945, 35 C. C. A. 97.

¹⁴See *Rand v. Walker*, 117 U. S. 344, 29 L. ed. 907, 6 Sup. Ct. Rep. 770; *Steinkuhl v. York*, 2 Flip. 380, Fed. Cas. No. 13,356; *Chaffin v. Hull*, 49 Fed. 526.

¹⁵*Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 112; *Beals v. Illinois, etc. R. R.* 133 U. S.

assignee for their benefit.¹⁶ An assignee of a patent may sue for infringement without joining the assignor.¹⁷

The court may in its discretion, order beneficiaries to be made parties;¹⁸ and in suit against their trustee, they may be admitted as parties without amendment of the complaint.¹⁹

§ 1022. When heir at law a proper or unnecessary party.

In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

50th equity rule, promulgated March, 1842.

§ 1023. Joint and several obligors may be severally sued.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

51st equity rule promulgated March, 1842.

If an obligation or liability is both joint and several, plaintiff has his option to save individually or jointly.³ An individual defendant has no right to say that plaintiff must sue severally if he has elected to sue jointly.⁴ But if plaintiff has once had judgment either joint or several that ends his right of election.⁵ If a liability is only joint and not also several, all living joint obligees must be joined.⁶

§ 1024. Guardians and prochein amis.

Guardians ad litem to defend a suit may be appointed by the

295, 33 L. ed. 611, 10 Sup. Ct. Rep. 316; Kent v. Lake, etc. Co. 144 U. S. 90, 36 L. ed. 358, 12 Sup. Ct. Rep. 655; Credit Co. v. Arkansas R. R. 15 Fed. 52, 5 McCrary 23; Farmers' L. & T. Co. v. Kansas R. R. 53 Fed. 185; Clyde v. Richmond, etc. R. R. 55 Fed. 448; Woods v. Woodson, 100 Fed. 519, 40 C. C. A. 525.

¹⁶Rejall v. Greenhood, 92 Fed. 947, 35 C. C. A. 97; Vetterlein v. Barnes, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 442.

¹⁷Union T. Co. v. Walker E. Co. 122 Fed. 815.

¹⁸Kerrison v. Stewart, 93 U. S. 160, 23 L. ed. 843; Toler v. East Tennessee Ry. 67 Fed. 171.

¹⁹Edrington v. Jefferson, 111 U. S. 774, 28 L. ed. 594, 4 Sup. Ct. Rep. 683.

³Pirie v. Tvedt, 115 U. S. 43, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; The Beaconsfield, 158 U. S. 307, 39 L. ed. 993, 15 Sup. Ct. Rep. 860; Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596.

⁴Louisville, etc. R. R. v. Ide, 114 U. S. 56, 29 L. ed. 63, 5 Sup. Ct. Rep. 735.

⁵Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596.

⁶Farni v. Tesson, 1 Black, 315, 17 L. ed. 67.

court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves.^[b] All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.^[a] ^[c]

87th equity rule promulgated March 1842.

[a] The rule in general.

In the equity rules of 1822 the only provision respecting parties, is contained in rule 27 and concerned with guardians *ad litem*. It provides that: "Orders for the admission of a guardian *ad litem*, to defend a suit, may be made either by the court or one of the judges thereof."⁹ "In practice in the courts of law," observes Judge Story, "an infant generally sues by his *prochein ami*; but in all cases defends by his guardian" and again "when it is said that he must sue and be sued by his guardian, it is not to be understood as of course, that it is by his general guardian, but by his guardian *ad litem*, admitted by the court for this purpose."¹⁰ It would seem that the 87th rule *supra*, is designed to require that an infant or other incompetent shall always defend by guardian *ad litem*; and that an infant or other incompetent sue either by *prochein ami* or regular guardian. The language used is susceptible of the construction that such person must sue by guardian rather than *prochein ami*, if he has any. But such cannot have been the intent since the suit might often be in hostility to the regular guardian, and hence that construction would be inimical to the ward's interests.

[b] Infants or other incompetents as defendants.

Since it is error to proceed to decree against a minor defendant or other incompetent¹² without appointment of guardian *ad litem*,¹³ it is not only proper but necessary to have such guardian appointed by the court.¹⁴ In practice the regular guardian may often be appointed also guardian *ad litem*.¹⁵ It is improper for a court to appoint a guardian *ad litem* for infant defendants who is suggested by plaintiff's counsel and without notice to the infants or their friends;¹⁶ at least where the court acts entirely upon the suggestion and without itself becoming satisfied of the appointee's fitness. The court will sometimes in case of suit to which infants are joint parties plaintiff by their next friend, order them to be

⁹See 7 Wheat. VI. et seq., 5 L. ed. 377.

¹⁰Story Eq. Pl. § 58, note.

¹²E. g. a lunatic: See Harrison v. Rowan, 4 Wash. C. C. 202, Fed. Cas. No. 6,143.

¹³O'Hara v. McConnell, 93 U. S. 152, 23 L. ed. 840.

¹⁴Bank of United States v. Ritchie, 8 Pet. 144, 8 L. ed. 890.

¹⁵See Simmons v. Baynard, 30 Fed. 532, where infants held bound by appearance of father as guardian *ad litem*; Story Eq. Pl. § 58, note.

¹⁶Bank of U. S. v. Ritchie, 8 Pet. 144, 8 L. ed. 890.

joined as defendants instead, and appoint guardian ad litem for them.¹⁷ The guardian ad litem cannot by admissions or stipulations surrender rights of the infant.¹⁸ It has been held error to decree against infants upon an unsworn answer by guardian admitting the allegations of the bill, and without any evidence being taken.¹⁹ But in a more recent case, a consent decree has been held binding upon infants.²⁰ Service upon a minor is not absolutely essential, and he may be bound if properly represented in court by a guardian.¹ The mere weakness or ignorance of a guardian ad litem will not invalidate a decree where his interests were protected by intelligent counsel.²

[c] — suing as plaintiff by next friend or guardian.

"When an infant claims a right or suffers an injury on account of which it is necessary to resort to a court of chancery to protect his rights, his nearest relation, not concerned in point of interest in the matter in question, is supposed to be the person who will take him under his protection and institute a suit to assert his rights . . . and it is for this reason that a person who institutes a suit on behalf of an infant is termed 'his next friend.'"⁵ It is improper to sue by a next friend who has a personal interest.⁶ A next friend cannot by admissions or stipulations surrender rights of the infant;⁷ though he may waive formalities of procedure if without prejudice to the infants rights.⁸ He cannot accept a release not conformable to a decree secured in the infant's favor.⁹ The next friend should bring the suit in the infant's name and not his own;¹⁰ but he need not exhibit with the bill, evidence of special authority to sue as such.¹¹

§ 1025. Objection for defect of parties—hearing where objection taken in the answer.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, with-

¹⁷See *Jarvis v. Crozier*, 98 Fed. Y. 531, 45 Am. St. Rep. 633, 40 N. E. 218, 28 L.R.A. 359.

¹⁸*Kingsbury v. Buckner*, 134 U. S. 680, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; *White v. Miller*, 158 U. S. 128, 39 L. ed. 921, 15 Sup. Ct. Rep. 788.

¹⁹*Bank of U. S. v. Ritchie*, 8 Pet. 144, 8 L. ed. 890.

²⁰*Thompson v. Maxwell*, L. G. Co. 168 U. S. 460, 42 L. ed. 539, 18 Sup. Ct. Rep. 121; compare *White v. Joyce*, 158 U. S. 149, 39 L. ed. 921, 15 Sup. Ct. Rep. 788.

¹*Manson v. Duncanson*, 166 U. S. 533, 41 L. ed. 1105, 17 Sup. Ct. Rep. 647; contra *Woolridge v. McKenna*, 8 Fed. 660; see *Thaw v. Ritchie*, 136 U. S. 548, 34 L. ed. 538, 10 Sup. Ct. Rep. 1044; *Sloane v. Martin*, 145 N. E. 638.

²*Thompson v. Maxwell*, L. G. Co. 168 U. S. 460, 42 L. ed. 539, 18 Sup. Ct. Rep. 121.

⁵*Daniell Ch. Pr.* 69, quoted in *Jarvis v. Crozier*, 98 Fed. 755.

⁶*Jarvis v. Crozier*, 98 Fed. 755.

⁷*Kingsbury v. Buckner*, 134 U. S. 680, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.

⁸*Ibid.*

⁹*Morris v. Harmer*, 7 Pet. 563, 8 L. ed. 781.

¹⁰*Morgan v. Potter*, 157 U. S. 198, 39 L. ed. 670, 15 Sup. Ct. Rep. 590.

¹¹*Kingsbury v. Buckner*, 134 U. S. 680, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.

in fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say:) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his case, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

52nd equity rule, promulgated March, 1842.

A defect or misjoinder of parties may be taken advantage of by demurrer where apparent on the face of the bill.¹⁴ It may also be raised by plea,¹⁵ which plaintiff may set down for argument or to which he may reply.¹⁶ Under the foregoing rule it may also be taken in the answer. In any of these cases plaintiff may elect to amend rather than to stand upon his bill.¹⁷ While defendant may object to a defect of parties in the answer it is not an objection which will under rule 39¹⁸ excuse full answer. The objection, however taken, should specify the names, description and necessity for the omitted parties.¹⁹ This rule provides so speedy a way of settling an issue as to defect of parties, that a court on application for leave to file several pleas may very properly refuse leave to file one raising the question of the character of the parties.²⁰

§ 1026. Objection for defect of parties at the hearing.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

53rd equity rule, promulgated March, 1842.

The usual rule is that objection for defect of parties must be raised by demurrer, plea or answer;⁴ and that it comes too late at the hearing.⁵ The right to object at that time in extreme cases, was, however, recognized

¹⁴Ante, § 979[c].

¹⁵Ante, § 979[h].

¹⁶Ante, § 981.

¹⁷Ante, §§ 957, 958.

¹⁸Ante, § 996[a].

¹⁹Segee v. Thomas, 3 Blatchf. 11, Fed. Cas. No. 12,633.

²⁰See *United States v. Gillespie*, 6 Fed. 803.

⁴Greenleaf v. Queen, 1 Pet. 138, 7 L. ed. 85.

⁵Segee v. Thomas, 3 Blatchf. 11,

Fed. Cas. No. 12,633.

prior to the above rule;⁶ and if the court find that it cannot make any decree without affecting the rights of parties not before it, it must necessarily dismiss if they cannot be brought in.⁷

⁶*Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; *Story v. Livingston*, 65, Fed. Cas. No. 17,100. 13 Pet. 359, 10 L. ed. 201. ⁷*Wallace v. Holmes*, 9 Blatchf.

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CHAPTER 29.

EQUITY PROCEDURE (CONTINUED)—TAKING OF TESTIMONY.

- § 1036. Mode of proof in equity.
- § 1037. Taking of testimony orally before examiner.
- § 1038. —parties or their counsel to be present—cross examination.
- § 1039. —how testimony to be reduced to writing.
- § 1040. —to be transcribed by stenographer or typewriter on request.
- § 1041. —signing of the testimony by the witness or examiner.
- § 1042. —statement by examiner—objections to questions—penalty for irrelevant matters.
- § 1043. —compulsory attendance of witnesses.
- § 1044. —notice of time and place of examination.
- § 1045. —transmission of testimony to clerk of court.
- § 1046. —court may prescribe order of taking and time for completing oral testimony.
- § 1047. —who to pay for stenography and typewriting.
- § 1048. —but court may direct a commission and written interrogatories.
- § 1049. Taking testimony by commission upon interrogatories.
- § 1050. —naming of the commissioners.
- § 1051. —form of the last interrogatory.
- § 1052. Taking testimony by deposition under statutory provisions.
- § 1053. Taking of testimony *de bene esse*.
- § 1054. Taking testimony in open court at hearing.
- § 1055. Testimony to be taken within three months.
- § 1056. Publication of the testimony.
- § 1057. Summoning and compensation of witnesses—refusal to appear or testify.

§ 1036. Mode of proof in equity.

The mode of proof in causes of equity . . . shall be according to rules now or hereafter prescribed by the supreme court, except as herein especially provided.

R. S. § 862, U. S. Comp. Stat. 1901, p. 661.

[a] The section in general.

The above provision also applies to admiralty procedure.¹ It was originally enacted August 23, 1842, just five months after the adoption of the equity rules of 1842, which contain various provisions respecting the mode of

¹Post, § 1281.

proof in equity, and are still in force. The clause "except as herein especially provided," refers to chapter 17 of title xiii. of the Revised Statutes, which deals with "Evidence." It has precise reference to the provisions for the taking of depositions contained in the chapter on evidence.²

The power of Congress to authorize the courts to regulate the equity and admiralty practice by rules, is well settled.³ The earliest statute respecting mode of proof in the Federal courts declared that it should be by "oral testimony and examination of witnesses in open court" just as at common law.⁴ But an act of 1802 left it in the discretion of the courts to take testimony by depositions, if that practice was allowed in equity by the law of the State where the court was sitting.⁵ These enactments were not carried into the revised statutes, and some question accordingly arose as to the right to examine witnesses in open court in equity cases.⁶

[b] How evidence is adduced in equity.

Borrowing their practice from the ecclesiastical courts, the equity tribunals formerly took the evidence in a cause secretly and kept it secret until the day for its "publication," when the proofs became accessible to counsel, and after which additional evidence could rarely be adduced.⁹ Counsel procuring the examination of a witness drew up certain interrogatories and furnished them to the examiner, who elicited the answers of the witness secretly and in the absence of the counsel. The opposite counsel could propound cross interrogatories to be similarly answered secretly. Neither knew the questions propounded by the other nor any of the answers obtained until the day of publication. The taking of proofs at the hearing was unknown,¹⁰ except perhaps the proving of exhibits.¹¹ In modern times this ancient practice has been greatly altered. The element of secrecy has been altogether eliminated¹² and the day of publication¹³ has lost much of its importance. The statutory provisions respecting the taking and use of depositions,¹⁵ and the submitting of interrogatories and cross interrogatories, apply to equity causes. Witnesses before examiners are subject to examination and cross examination by opposing counsel;¹⁶ and the court in its discretion may permit the testimony of one or more witnesses to be adduced orally in open court.¹⁷ The usual mode of proof in equity practice where witnesses are within the jurisdiction, is oral examination before the examiner.¹⁸ But such testimony may also be presented by

²See post, §§ 1761, et seq.

³White v. Toledo, etc. R. R. 79 Fed. 133, 24 C. C. A. 467; see ante, § 802 [a].

⁴Act Sept. 24, 1789, § 30.

⁵Act April 29, 1802, § 25, 2 Stat. 166; See Connecticut v. Pennsylvania, 5 Wheat. 424, 5 L. ed. 126; see also White v. Toledo, etc. R. R. 79 Fed. 134, 24 C. C. A. 467, reviewing the statutes.

⁶See post, § 1054.

⁹Wood v. Mann, 2 Sumn. 316, Fed. Cas. No. 17,953, per Story, J.

¹⁰See Wood v. Mann, 2 Sumn. 316, Fed. Cas. No. 17,953, per Story, J.

¹¹De Butts v. Bacon, 1 Cranch C. C. 569, Fed. Cas. No. 3,717.

¹²See rule 67, post § 1038.

¹³See post, § 1056.

¹⁵Post, § 1761.

¹⁶Post, § 1038.

¹⁷Post, § 1054.

¹⁸Post, § 1037.

deposition under statutory provisions,¹⁹ or by deposition procured upon a commission with written interrogatories in case neither party elects to have oral examination,²⁰ or if the court in its discretion and upon motion, so directs.¹ So also testimony may be adduced by oral examination in open court.² Where a witness is beyond the jurisdiction or otherwise unable to appear before the examiner in the place where proceedings are had, his testimony may be procured by deposition taken pursuant to the acts of Congress;³ or upon a commission under a *dedimus potestatem* pursuant to the equity rules;⁴ or, if in a foreign country, then by deposition or letters rogatory.⁵ By consent, a witness in another part of the United States may be examined before an examiner in the district where he is found;⁶ although it would seem that the court has no power to compel a substitution of this mode of obtaining testimony for the regular mode by deposition or commission. The taking of testimony before a master on a reference, is governed by equity rule 77.⁷

§ 1037. Taking of testimony orally before examiner.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined^[b] shall be examined before one of the examiners^[c] of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.^[a]

Part of 67th equity rule as amended May 3, 1892.

[a] In general.

The foregoing varies from the corresponding part of an amendment adopted at the December term, 1861, only in that the earlier provision required "the examiner to be furnished with a copy of the bill and answer, if any."¹² As originally adopted in 1842 the rule provided for oral examination in lieu of interrogatories only by mutual agreement.¹³ In the equity rules of 1822 it was provided that "All testimony taken under a commission shall be taken on interrogatories and cross interrogatories filed in the cause unless the parties shall dispense therewith."¹⁴ Notwithstanding an election by either party to take proofs on oral examination the court may on motion

¹⁹Post, § 1052.

²⁰Post, § 1049.

¹Post, § 1048.

²Post, § 1054.

³See post, § 1052. The statutes now permit deposition to be taken in the mode allowed by State laws.

⁴Post, 1049. So, rule 25 of the equity rules of 1822 provided that "Testimony may be taken according to the acts of Congress or under a commission." See 7 Wheat. VI, et seq. 5 L. ed. 376.

⁵*Bischoffsheim v. Baltzer*, 10 Fed. 1, 4. 20 Blatchf. 229; see post, § 1760 et seq.

⁶See *In re Allis*, 44 Fed. 216.

⁷See post, § 1072.

¹²See 139 U. S. 707, 20 L. ed. 916.

¹³See *Van Hook v. Pendleton*, 2 Blatchf. 85, Fed. Cas. No. 16,852; *Bischoffsheim v. Baltzer*, 10 Fed. 2, 20 Blatchf. 229.

¹⁴Rule 26, see 7 Wheat, VI et seq. 5 L. ed. 377.

order a commission.¹⁵ Upon motion for preliminary injunction a party desiring to take the testimony of an unwilling witness should obtain the appointment of an examiner by the court, providing for due notice to the opposite party.¹⁶ In appointing an examiner it is contrary to equity practice to limit the character of the testimony he may receive,¹⁷ or to deny a party the right to take testimony because it seems irrelevant.¹⁸ Scandalous and impertinent testimony is penalized by the imposition of costs;¹⁹ and it is the settled practice of courts of equity to include all evidence, relevant and otherwise, in the record, so that the trial and afterwards the appellate court may pass finally upon the cause.²⁰ If parties agree to the taking of testimony before any officer qualified to administer oaths without appointment as examiner, the deposition so taken should be filed in the cause and may not be suppressed by the party for whom it was taken.¹ So if the parties agree to the taking of the testimony by a typewriter in counsel's office and only in the constructive presence of the examiner, neither has a right to abandon that agreement and compel the further proceeding to be actually before the examiner, without adequate cause.² A Federal court has no jurisdiction to order the removal of documents produced before an examiner, on subpoena duces tecum to another district.³

[b] Oral examination before examiners outside the district.

There is some question whether this provision is to be interpreted as referring only to testimony adduced from witnesses at the place where the proceedings are had, or as including also the taking of the testimony of witnesses elsewhere. It is not in terms confined to "the evidence to be adduced" at the place where the proceedings are had; and Mr. Justice Bradley in a case at circuit thought the rule should be liberally interpreted as permitting the taking of testimony before an examiner outside the court's jurisdiction whenever a party desires it.⁷ Several subsequent cases have sanctioned the practice of appointing special examiners to take testimony orally beyond the district and of empowering a master to take testimony orally in other districts;⁸ though recognizing sometimes the need for discretion in the exercise of the power, to avoid unnecessary hardship and

¹⁵See post, § 1048.

¹⁶*Hammerschlag Mfg. Co. v. Judd*, 26 Fed. 292.

¹⁷*United States v. American B. T. Co.* 39 Fed. 230.

¹⁸*Fayerweather v. Ritch*, 89 Fed. 529; see *Parisian C. Co. v. Eschwege*, 92 Fed. 721; *Whitehead, etc. Co. v. O'Callahan*, 130 Fed. 243.

¹⁹See post, § 1042.

²⁰See *Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 521; *Fayerweather v. Ritch*, 89 Fed. 529; *Lloyd v. Pennie*, 50 Fed. 4; *Nelson v. United States*, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358.

¹*Mott Iron Works v. Standard M. Co.* 48 Fed. 345.

²*Ballard v. McCluskey*, 52 Fed. 677.

³*Pepper v. Rogers*, 137 Fed. 173.

⁷*Railroad v. Drew*, 3 Woods, 691, Fed. Cas. No. 17,434; *In re Stewart*, 29 Fed. 813; *Johnson Co. v. Steel Co.* 48 Fed. 191, approved in *White v. Toledo, etc. R. R.* 79 Fed. 135, 136, 24 C. C. A. 467, but declaring the courts should be cautious in exercising the power of appointing examiners elsewhere.

⁸*Magone v. Colorado, etc. Min. Co.* 135 Fed. 850; *In re Steward*, 29 Fed.

expense.⁹ The propriety of so doing has however been questioned by able judges, who have pointed out the unnecessary expense that the practice might entail.¹⁰ Undoubtedly it is proper and in accordance with the spirit of this rule, for the court on issuing a commission to take testimony elsewhere, to permit a party so desiring, to examine orally, though the other submitted interrogatories.¹¹ So parties may validly agree to take testimony elsewhere in the United States orally before an examiner.¹² But it does not seem to the writer that the rule was intended to refer to any other evidence than that to be adduced at the place where the proceedings are had. Any other construction gives the words "thereupon all the witnesses to be examined shall be examined before one of the examiners of the court" a sweeping force which brings them into direct conflict with the statutory provisions permitting the use of depositions of witnesses more than one hundred miles away and in other districts, and authorizes them to be taken before other than Federal court examiners.

[c] Examiners in equity.

Although examiners in chancery are nowhere provided for either by Federal statute or rule, their existence as an adjunct of the business of Federal courts of equity followed naturally from the adoption of customs and practices of the chancery courts of England, after which our procedure is modeled.¹⁵ They are referred to and their existence is assumed in the equity rules of 1822;¹⁶ and again in the present rules.¹⁷ The courts are not required to appoint a special examiner in each case, but may appoint one or more standing examiners. In the southern district of New York the practice of appointing standing examiners goes back to 1828 and the right to appoint a standing examiner is settled.¹⁸ It is not uncommon for parties by agreement to dispense with the actual presence of an examiner,¹⁹ or agree upon some person without special appointment by the court.²⁰

§ 1038. — parties or their counsel to be present—cross examination.

Such examination shall take place in the presence of the parties

813; Johnson, etc. Co. v. Steel Co. 48 Fed. 191; Bate, etc. Co. v. Gillette, 28 Fed. 676; White v. Toledo, etc. R. R. 79 Fed. 133, 24 C. C. A. 467; In re Spofford, 62 Fed. 443; Consol. F. Co. v. Columb. Co. 85 Fed. 54.

⁹See White v. Toledo, etc. R. R. 79 Fed. 133, 24 C. C. A. 467; Magone v. Colorado, etc. Min. Co. 135 Fed. 850. The court may require a commission and interrogatories in its discretion. See post § 1048.

¹⁰Lacombe and Blatchford, J.J. in the southern district of New York: Arnold v. Cheeseborough, 35 Fed. 16. But see In re Spofford, 62 Fed. 443.

¹¹See Bischoffsheim v. Baltzer, 10 Fed. 1, 20 Blatchf. 229; Bate, etc. Co. v. Gillette, 28 Fed. 676.

¹²See In re Allis, 44 Fed. 216.

¹⁵See ante, § 937.

¹⁶See Rule 28, 7 Wheat. VI. et seq. 5 L. ed. 377.

¹⁷Rule 78, post § 1057 and rule 67 ut supra.

¹⁸Van Hook v. Pendleton, 2 Blatchf. 85, Fed. Cas. No. 16,852.

¹⁹See Ballard v. McCluskey, 52 Fed. 677.

²⁰Mott Iron Works v. Standard M. Co. 48 Fed. 345,

or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and reëxamination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

Part of § 67th equity rule as amended May 3, 1892.

The above provision was the same in the amendment adopted at the December term, 1861.⁵ The amendment of 1892 merely re-enacted this particular portion of the rule.⁶ If a party refuses to produce a witness for cross-examination, his testimony in chief will be suppressed.⁷ Upon refusal to continue cross-examination in an agreed mode dispensing with the actual presence of an examiner, the court may declare the witnesses testimony closed where there was no "adequate reason for departing from the agreement."⁸

§ 1039. — how testimony to be reduced to writing.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

Part of 67th equity rule as amended May 3, 1892.

The earlier amendment adopted at the December term, 1861, provided that "the depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances."¹¹

§ 1040. — to be transcribed by stenographer or typewriter on request.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

Part of 67th equity rule as amended May 3, 1892.

This portion of the amendment of 1892 is entirely new. There is no official statutory court reporter in the Federal courts.

⁵See 20 L. ed. U. S. 917.

⁸Ballard v. McCluskey, 52 Fed. 677.

⁶See 139 U. S. 707,

¹¹See 20 L. ed. U. S. p. 917; 1

⁷Shapleigh v. Chester, etc. Co. 47 Black, 6.

Fed. 848.

§ 1041. — signing of the testimony by the witness or examiner.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

Part of 67th equity rule as amended May 3, 1892.

The earlier provision upon this subject was contained in an amendment of 1861 and provided that the deposition when completed "shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same."¹

§ 1042. — statement by examiner—objections to questions—penalty for irrelevant matters.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

Part of § 67th equity rule as amended May 3, 1892.

As respects this portion of the amendment of 1892, it merely carries forward the earlier amendment adopted at the December term, 1861, and is to this extent identical therewith.¹⁷ The court does not in advance limit the testimony to be taken, to any particular issue or issues.¹⁸ The examiner can only note exceptions and not pass upon their validity.¹⁹ It is for the court to protect against the injection of scandalous and impertinent matters into the testimony by the imposition of costs.²⁰ Even privileged matter such as letters between husband and wife should be produced before the examiner and made part of the record, so that the trial and appellate courts may pass thereon.¹ It is not the practice for the court to pass upon questions of the relevancy of evidence during an examination before the

¹⁴See 20 L. ed U. S. p. 917; 1 Black, 6.

¹⁷See 1 Black, 6.

¹⁸20 L. ed. U. S. 917; United States v. American B. T. Co. 39 Fed. 230. See Parisian C. Co. v. Eschwege, 92 Fed. 721.

¹⁹Blease v. Garlington, 92 U. S. 7, 23 L. ed. 521.

²⁰See Kelley v. Boettcher, 85 Fed. 57, 29 C. C. A. 14; Brown v. Worster, 113 Fed. 20; Griffith v. Shaw, 89 Fed. 313; Zunkel v. Litchfield, 21 Fed. 196. Some of the circuit courts have rules upon this subject.

¹Lloyd v Pennie, 50 Fed. 4.

examiner,² but to order the answer taken and reserve judgment thereon to the hearing.³ But where part of an answer is stricken out, the court in another district where evidence is being taken, will on application exclude testimony offered on that part.⁴ Failure to object when the evidence is taken will not forfeit the right to make objection at the hearing.⁵

§ 1043. — compulsory attendance of witnesses.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Part of 67th equity rule as amended May, 3, 1892.

This portion of the amendment of 1892 merely carries forward and is identical with the earlier amendment adopted at the December term, 1861.⁸ The penalty for refusal to appear or testify is prescribed by equity rule 78,⁹ and by R. S. § 868.¹⁰ Where by consent, testimony in another jurisdiction is taken upon oral examination before an examiner instead of deposition or commission, the court having jurisdiction in the district where the examination occurs, is the one having power to punish a contumacious witness.¹¹

§ 1044. — notice of time and place of examination.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

Part of 67th equity rule as amended May 3, 1892.

This portion of the amendment of 1892 merely carries forward and is identical with the earlier amendment adopted at the December term, 1861.¹⁴ The taking of evidence by referees without the giving of any notice has been held fatal to an award.¹⁵

§ 1045. — transmission of testimony to clerk of court.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of

²Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211, rule applied to ancillary court before which evidence is taken.

³Maxion, etc. Co. v. Colts, etc. Co. 103 Fed. 39.

⁴Independent, etc. Co. v. Boorman, 137 Fed. 995.

⁵Diamond, etc. Co. v. Kelly Bros. 120 Fed. 282.

⁸See 1 Black 6, 20 L. ed. U. S. 917.

⁹See post § 1057.

¹⁰See post, § 1767.

¹¹In re Allis, 44 Fed. 216.

¹⁴See 1 Black, 6, 20 L. ed. 917.

¹⁵New York v. Du Bois, 86 Fed.

the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the revised statutes.

Part of 67th equity rule as amended May 3, 1892.

The portion of the earlier amendment of 1862 superseded by the above, used the term "deposition" instead of "depositions," and referred to § 30 of the act of 1789, instead of to R. S. § 865 which is the early statute carried forward into the revision. An examiner need not file the proofs until his fees are paid.¹⁷

§ 1046. — court may prescribe order of taking and time for completing oral testimony.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

Part of amendment to 67th equity rule promulgated at December term, 1869, as amended May 3, 1892.

The amendment of 1892 consists merely in the substitution of "as before provided" for "as provided in the order passed at the December term, 1861,"¹⁸ amending the 67th General Rule."²⁰ The matters referred to by "as before provided" are the preceding nine sections of this text.¹ By rule 69 testimony is to be taken in three months after the cause is at issue.² The rules of 1822 gave six months from the time of replication, for the taking of evidence, and permitted either party at the expiration of that time to set the cause for hearing. Depositions taken afterwards unless by consent, special order, or taken out of the district, were not admissible.³ Prior to the above amendment it was the practice in equity for parties to proceed independently in the taking of their proofs, and not in the orderly manner of courts of law, where plaintiff's proof, defendant's defense and plaintiff's rebuttal follow in regular sequence. Under this amendment, and that of 1861, respecting oral examination of witnesses,⁴ a party may now have the evidence adduced in a mode very similar to that prevailing in trials at law.

¹⁷Frese v. Biedenfeld, 14 Blatchf. 402, Fed. Cas. No. 5,111.

¹⁸See 1 Black, VI.

²⁰See 9 Wall. VII, 139 U. S. 707.

¹Ante, §§ 1037-1045.

²Post § 1055.

³See Rule 25, 7 Wheat. VI, et seq. 5 L. ed. 376.

⁴Ante, §§ 1037, et seq.

Leave may be obtained to take evidence in surrebuttal upon notice setting up the precise fact which applicant desires to prove.⁵

§ 1047. — who to pay for stenography and typewriting.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Part of amendment of 67th equity rule, promulgated May 2, 1892.

§ 1048. — but court may direct a commission and written interrogatories.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Part of amendment of December term, 1861, of 67th equity rule.

The amendment of May 3, 1892, merely carried forward this provision without change, although modifying the amendment of 1861 in other respects.⁸ The purpose of the amendment adopted at the December term, 1861, was to require the taking of the testimony of witnesses within the jurisdiction, orally instead of by written interrogatories where either party so requested;⁹ whereas the earlier rule only permitted that practice when both consented and agreed thereto. The amendment concluded with this provision for written interrogatories, on motion, "for special reason satisfactory to the court or judge." While not altogether clear, the intent would seem to have been to protect against possible hardship or inconvenience in the working of the new practice, and to reach cases where oral examination would not be feasible for part of the witnesses, though within the jurisdiction.¹⁰ It seems not to apply to the taking of testimony on commission outside of the court's jurisdiction, since that is covered by another provision of the same rule.¹¹ "In the usual way" refers to what had been the ancient and customary mode of taking depositions on commission in courts of equity and not to the statutory mode¹² under R. S. § 866.¹³ Since the amendment of 1861 that way has become the exception and not the usual way.¹⁴

⁵Rubber T. W. Co. v. Columbia, etc. Co. 89 Fed. 593.

⁸See 1 Black, VI. 20 L. ed. U. S. 917, 139 U. S. 707.

⁹Ante, § 1037.

¹⁰See Bischoffsheim v. Baltzer, 10 Fed. 3, 20 Blatchf. 229.

¹¹See post, § 1049.

¹²Bischoffsheim v. Baltzer, 10 Fed. 3, 20 Blatchf. 229.

¹³See post, § 1765.

¹⁴Bischoffsheim v. Baltzer, 10

§ 1049. Taking testimony by commission upon interrogatories.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*.

Part of 67th equity rule promulgated March, 1842.

[a] In general.

This portion of the 67th rule has been unaffected by the numerous amendments since made. However, since the amendment permitting either party to demand oral examination of witnesses before examiners,¹⁸ the practice of taking the testimony of witnesses within the jurisdiction, on written interrogatories is infrequent. Commission is still a convenient mode of obtaining testimony outside the court's jurisdiction.¹⁹ The rules of 1822 required that the "interrogatories shall be filed in the clerk's office ten days previous to a rule day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right."²⁰

[b] Execution of commission.

The authority of commissioners is special and must be strictly pursued.³ It must be executed in the place directed and none other.⁴ Each interrogatory must be separately answered and an omission is fatal to the whole deposition;⁵ especially an omission to answer the general interrogatory.⁶ All must be substantially answered.⁷ The cross, as well as the direct interrogatories must be put;⁸ if there are any.⁹ However, if the interrogatories are hypothetical, or to be asked in a certain event which does not happen, or refer to records which speak for themselves, they need not be answered.¹⁰ It is no objection that direct and

¹⁸Ante, § 1037.

¹⁹See ante, § 1036 [b].

²⁰Rule 26, see 7 Wheat. VI, et seq. 5 L. ed. 377.

³Armstrong v. Brown, 1 Wash. C. C. 43, Fed. Cas. No. 542; Munns v. De Nemours, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; Willings v. Consequa, 1 Pet. C. C. 301, Fed. Cas. No. 17,767; Lonsdale v. Brown, 3 Wash. C. C. 404, Fed. Cas. No. 8,492.

⁴Boudereau v. Montgomery 4 Wash. C. C. 186, Fed. Cas. No. 1,694; Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740.

⁵Ketland v. Bissett, 1 Wash. C. C. 144, Fed. Cas. No. 7,742.

⁶Richardson v. Golden, 3 Wash. C. C. 109, Fed. Cas. No. 11,782; Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740.

⁷Dodge v. Israel, 4 Wash. C. C. 323, Fed. Cas. No. 3,952.

⁸Gilpins v. Consequa, 3 Wash. C. C. 184, Fed. Cas. No. 5,452.

⁹If not, the deposition is admissible on the direct interrogatories. Gass v. Stinson, 3 Sumn. 98, Fed. Cas. No. 5,262.

¹⁰Bell v. Davidson, 3 Wash. C. C. 328, Fed. Cas. No. 1,248.

cross-interrogatories are answered at different times;¹¹ or that a material part of the evidence is elicited in the answer to the general interrogatory.¹² It has been held that application for commission to take testimony abroad is not grantable as of course, but only in the court's discretion upon a showing of the materiality of the evidence to be adduced;¹³ although this seems at variance with the established principle that a party's latitude in the taking of testimony is not to be restricted by any determination of the court in advance as to what is relevant.¹⁴

§ 1050. — naming of the commissioners.

In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Part of 67th equity rule as amended December term, 1854, and May 3, 1892.

The proviso enabling a judge to delegate the power of naming commissioners, to the clerk was added by amendment at the December term, 1854; and on May 3, 1892, the paragraph was redrafted as given above, by embodying the proviso and the original statement in one sentence.¹⁷ The rules of 1822 provided that "Commissions to take depositions may be executed by any person qualified to take testimony according to the laws of the State, or by any person or persons, not exceeding three, appointed or named in the commission by order of the court, or by any judge thereof in vacation."¹⁸ In many districts the authority above given is exercised by a standing rule empowering the clerk to name commissioners.

§ 1051. — form of the last interrogatory.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

71st equity rule, promulgated March, 1842.

¹¹Gilpins v. Consequa, 3 Wash. C. C. 184, Fed. Cas. No. 5,452.

¹²Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740.

¹³United States v. Parrott, 1 McAll. 447, Fed. Cas. No. 15,999.

¹⁴See United States v. American B. T. Co. 39 Fed. 230; Fayerweather v. Ritch, 89 Fed. 529; Parisian C. Co. v. Eschwege, 92 Fed. 721.

¹⁷See 139 U. S. 707.

¹⁸Rule 26, see 7 Wheat. VI, et seq. 5 L. ed. 377.

In answer to this question, any further knowledge witness may have material to the cause is admissible. If there is no answer whatever to this interrogatory, the deposition is fatally defective.

§ 1052. Taking testimony by deposition under statutory provisions.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

68th equity rule, promulgated March, 1842.

The rules of 1822, provided that "Testimony may be taken according to the acts of Congress, or under a commission."¹ There are a number of statutory provisions respecting the taking of depositions, which are given elsewhere.² It has been said that this rule permitting deposition only after a cause is at issue, in effect modifies R. S. § 863,³ which permits deposition in any cause "depending in a district or circuit court" and permits a proceeding under R. S. § 863 only if the cause is at issue as well as "depending."⁴ This reasoning seems unsatisfactory, since courts are on principle, powerless to modify statutes by rule, and R. S. § 862 expressly declares the mode of proof in equity to be according to the rules "except as herein specially provided."⁵

§ 1053. Taking of testimony de bene esse.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as the judge of the court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony.

70th equity rule, promulgated March, 1842.

¹Rule 25, see 7 Wheat. VI. et seq.

³Post, § 1,761.

5 L. ed. 376.

⁴Stevens v. Missouri K. & T. Ry.

²See post, § 1,761, et seq. See Bis-

104 Fed. 934.

choffsheim v. Baltzer, 10 Fed. 3,

⁵See ante, § 1036.

²⁰Blatchf. 229.

The provision of the rules of 1822 was very similar to the above.⁷ Congress has also made provision for the taking of testimony *de bene esse*.⁸ A party may not have his own testimony taken under this rule.⁹

§ 1054. Taking testimony in open court at hearing.

Upon due notice given, as prescribed by previous order, the court may at its discretion permit the whole or any specific part of the evidence to be adduced orally in open court, on final hearing.

Amendment of 67th equity rule, promulgated May 15, 1893.¹²

The promulgation of this amendment set at rest whatever doubt may have existed after the adoption of the Revised Statutes,¹³ as to the propriety of oral examination of witnesses in open court in equity cases.¹⁴ The court is not, however, required to permit oral examination;¹⁵ and the general practice is not to take evidence orally in open court.¹⁶ To be available on appeal, testimony taken in open court must be reduced to writing and incorporated in the record, and this includes testimony that has been ruled out.¹⁷ An order to take testimony at the hearing must be obtained upon notice and not *ex parte*.¹⁸ Such order is held not in conflict with a subsequent order for taking testimony by deposition.¹⁹

§ 1055. Testimony to be taken within three months.

Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing.

Part of 69th equity rule, promulgated March, 1842.

The rules of 1822 allowed six months after answer and replication, for

⁷See Rule 24, 7 Wheat. 6, et seq., 5 L. ed. 376.

⁸See post § 1,761.

⁹*Eslava v. Mazanges*, 1 Woods, 624, Fed. Cas. No. 4,527.

¹²149 U. S. 793.

¹³See ante, § 1036 [a]. The revised statutes omitted early enactments on the subject.

¹⁴Prior to the revised statutes the right was settled: *Sickles v. Gloucester Co.* 3 Wall. Jr. 186, Fed. Cas. No. 12,840; *Van Hook v. Pendleton*, 2 Blatchf. 85, Fed. Cas. No. 16,852; see *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 523; *In re Clarke*, 9 Blatchf. 372, Fed. Cas. No. 2,801;

rule 78 (post, § 1057) also inferentially recognizes the practice.

¹⁵*Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 523.

¹⁶*Railroad Co. v. Drew*, 3 Woods, 692, Fed. Cas. No. 17,434.

¹⁷*Southern B. & L. Assn. v. Carey*, 117 Fed. 334; *In re De Gottardi*, 114 Fed. 342; *In re Lipset*, 119 Fed. 380; *Massenberg v. Dennison*, 107 Fed. 21, 46 C. C. A. 120; *McWilliams v. Conn. W. Co.* 119 Fed. 509; *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 523.

¹⁸*Mears v. Lockhart*, 94 Fed. 274, 36 C. C. A. 239.

¹⁹*Magone v. Colorado, etc. Min. Co.* 135 Fed. 846.

the taking of the depositions.³ Where either party has elected to have the testimony taken orally⁴ there is a further right to move the court to assign a time for taking plaintiff's proof, and a time for defendant's defense thereafter and finally for taking plaintiff's reply.⁵ If the court does not direct proofs to be taken in that mode, then each party proceeds independently to take his proofs and has the full period of three months in which to complete it.⁶ The limitation of three months applies both to defendant and plaintiff.⁷ It will be enforced unless the parties, otherwise agree, or the court grants an extension.⁸ A cause will not be deemed at issue within this rule until at issue as to all defendants, or else confessed as to those not at issue.⁹ But a defendant as to whom the cause is at issue has a right to proceed to take testimony and if plaintiff wishes to wait until he is at issue with all, it is better practice to get an order enlarging his time.¹⁰ The granting of further time for taking proofs is discretionary and its refusal is not reversible error unless a flagrant breach of discretion.¹¹ Belated proofs may be filed nunc pro tunc in the court's discretion,¹² or stricken out.¹³ An applicant for further time should state the names of proposed witnesses and the evidence desired to be taken, with the reasons for the delay in taking the proofs.¹⁴ Depositions taken after the time has expired cannot be read in evidence where timely objection is made.¹⁵ A plea at issue under replication will be overruled where evidence is not taken in its support within the allotted three months.¹⁶ So if no evidence is taken in season under an answer filed with a demurrer, decree may go for plaintiff, on the overruling of the demurrer.¹⁷ This rule does not apply to taking testimony on reference to a master.¹⁸ A party should move to suppress belated proofs or they may be received.¹⁹ An order enlarging the time should be sought upon notice to the opposite party.²⁰

§ 1056. Publication of the testimony.

Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court upon

³See Rule 25, 7 Wheat. VI. et seq. Fed. 98; Allington etc. Co. v. Globe 5 L. ed. 376. Co. 73 Fed. 394.

⁴Ante, § 1037.

⁵Ante, § 1046.

⁶Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621.

⁷Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621.

⁸Brown v. Worster, 113 Fed. 20.

⁹Gilbert v. Van Arman, 1 Flipp. 421, Fed. Cas. No. 5,414.

¹⁰Coleman v. Martin, 6 Blatchf. 291, Fed. Cas. No. 2,986.

¹¹Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621; see Wooster v. Howe S. M. Co. 10 Fed. 666; Coon v. Abbott, 37

Fed. 98; Allington etc. Co. v. Globe Co. 73 Fed. 394.

¹²Fischer v. Hayes, 6 Fed. 76, 19 Blatchf. 26.

¹³Wenham v. Switzer, 48 Fed. 612.

¹⁴Streat v. Steinam, 38 Fed. 548.

¹⁵Western E. Co. v. Capital T. Co. 86 Fed. 769.

¹⁶Sharon v. Hill, 22 Fed. 28, 10 Sawy. 394.

¹⁷Orendorf v. Budlong, 12 Fed. 24.

¹⁸Coosaw M. Co. v. Farmers' M. Co. 67 Fed. 31.

¹⁹Matthews v. Spangenberg, 19 Fed. 823, 20 Blatchf. 482.

²⁰Hunt v. Oliver, 3 Chi. L. N. 123, Fed. Cas. No. 6,894.

due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order books or indorsed upon the deposition or testimony.

Part of the 69th equity rule, promulgated March, 1842.

The passing of publication is now of very much less importance than formerly. When the proofs taken were unknown to counsel until publication,³ there were strict rules forbidding the taking of any further proof, upon the assumption that such proofs would reflect the temptation thereupon arising, to manufacture evidence to meet that already in.⁴ The rule suffered certain exceptions in the case of newly discovered evidence, evidence attacking the credibility of witnesses, and other belated evidence which might safely be assumed free from the suspicion of perjury and manufacture.⁵ Moreover exhibits might still be proved after publication and even at the hearing.⁶ Under this rule publication has been ordered of plaintiff's testimony taken on commission, in advance of the taking of any testimony by defendant.⁷

§ 1057. Summoning and compensation of witnesses—refusal to appear or testify.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or to give evidence, it shall be deemed a contempt of the court, which, being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of wit-

³See ante, § 1036[b]; *Bischoff-heim v. Baltzer*, 10 Fed., 5, 20 Blatchf. 229.

⁴See *Wood v. Mann*, 2 Sumn. 316, Fed. Cas. No. 17,953, where Judge Story learnedly discusses the law.

⁵See *Wood v. Mann*, 2 Sumn. 316, Fed. Cas. No. 17,953; *Gass v. Stinson*, 2 Sumn. 605, Fed. Cas. No. 5,261.

⁶See *De Butts v. Bacon*, 1 Cranch C. C. 569, Fed. Cas. No. 3,717.

⁷*Eillert v Craps*, 44 Fed. 792.

nesses viva voce when produced in open court, if the court shall, in its discretion, deem it advisable.

78th equity rule, promulgated March, 1842.

The above rule is identical with rule 28 of the equity rules of 1822, except that earlier rule uses "commissioners" throughout—not "commissioner;" and omits the final clause "if the court shall, in its discretion, deem it advisable." The examination of witnesses in open court is now governed by an amendment of the 67th rule.¹¹ The statutory provisions regarding compensation of witnesses,¹² and their summoning and attendance, appear elsewhere.¹³ Refusal to produce books or papers on a master's order is a contempt and punishable as such.¹⁴ A witness is not to be excused from answering because evidence seems immaterial, since a party is entitled to have all evidence in the record that the appellate court may pass upon.¹⁵ If it seems probable testimony may be relevant, a witness will be compelled to answer;¹⁶ and the objection made will be considered at the hearing.¹⁷ If a party after examination of a witness and adjournment for the day, refuses to produce him for cross-examination, his testimony will be suppressed.¹⁸ A witness may be punished for contempt under this rule where the subpoena is issued to compel attendance before a master or an examiner¹⁹ acting in the district under authority from the court of another district. So also he may be compelled by the court of the district to produce books or papers, before the special examiner appointed by a court elsewhere.²⁰

¹¹Ante, § 1054.

¹²Ante, § 725, et seq.

¹³Post, § 1742, et seq.

¹⁴Erie Ry. v. Heath, 8 Blatchf. 413, Fed. Cas. No. 4,513.

¹⁵Parisian C. Co. v. Eschwege, 92 Fed. 721.

¹⁶Robinson v. Philadelphia, etc. R. R. 28 Fed. 340.

¹⁷Maxim, etc. Co. v. Colts, etc. Co.

103 Fed. 39; Brown v. Worster, 113 Fed. 20.

¹⁸Shapleigh v. Chester, etc. Co. 47 Fed. 848.

¹⁹In re Steward, 29 Fed. 813; White v. Toledo, etc. R. R. 79 Fed. 133, 24 C. C. A. 467; In re Spofford, 62 Fed. 443.

²⁰Johnson, etc. Co. v. North B. Co. 48 Fed. 191.

CHAPTER 30.

EQUITY PROCEDURE (CONTINUED)—HEARING AND REFERENCE TO MASTERS.

- § 1067. Hearing in equity—references—jury.
- § 1068. Power to refer to a master and matters referred.
- § 1069. Appointment and compensation of masters.
- § 1070. Time when matter referred must be brought on before master.
- § 1071. Time and place for hearing—adjournments—speeding the hearing.
- § 1072. Master to regulate proceedings before him, examine witnesses, procure evidence, etc.
- § 1073. Mode of producing accounts—examination of accounting party.
- § 1074. Affidavits, depositions and documents already in evidence may be used.
- § 1075. Creditors and claimants may be examined—evidence reduced to writing.
- § 1076. Reference to master in decree for accounting of decedent's personality.
- § 1077. Master's report.
- § 1078. Report should refer to, and not recite affidavits, depositions, etc.
- § 1079. Filing of report, confirmation and exceptions thereto.
- § 1080. Costs imposed upon overruling and allowing of exceptions.

§ 1067. Hearing in equity—references—jury.

After a cause has passed the preliminary stages in which hearings are had upon the pleadings, as, upon demurrer, and plea,¹ or bill and answer,² or upon exceptions to the answer,³ or upon a defect of parties alleged in the answer;⁴ and after the time for taking testimony⁵ has expired, either party may then set the cause for hearing before the court. The general equity rules contain no provision as to setting a cause for hearing or as to the procedure at the hearing, except to permit testimony then to be taken orally in the discretion of the court.⁶ In many districts there are circuit court rules prescribing the procedure with more or less minuteness. But in the absence of local rule, the practice is, in general, for the solicitors

¹See Ante, § 981.

²Ante, § 1005.

³Ante, § 1002.

⁴Ante, § 1025.

⁵Ante, §§ 1046, 1055.

⁶Ante, § 1054.

for plaintiff and defendant in turn, to state the substance of their respective pleadings and proof and argue the points of law thereon. leaving the court to formulate its decision from an examination of the proofs in detail, and of points or briefs, if any, submitted by the solicitors in typewritten or printed form.^[a] It may be necessary before final decree can be made that reference to a master be ordered to state an account or for other purpose, and in that event the decree at the first hearing is merely interlocutory.⁷ So the court may desire the verdict of a jury upon some issue of fact raised and thereupon empanel a jury or send the issue to the law side of the court.^[b]

Author's section.

[a] Proceedings at hearing.

A party is bound at the argument by the allegation of a particular fact in his pleading.¹⁰ Ordinarily plaintiff has the right to open and close.¹¹ The granting of continuance is a matter of sound discretion, and may be denied if a party had ample notice and opportunity to prepare.¹²

[b] Verdict of jury in equity causes.

In equity the court has power to decide both law and fact. The submission of an issue of fact to a jury is entirely discretionary,¹³ and usually will not be ordered unless the evidence is so conflicting or evenly balanced that the court would not disturb a verdict either way.¹⁴ So the jury's verdict when rendered, is merely advisory and not binding upon the court.¹⁵ It may be disregarded entirely, and decree at variance therewith may be entered without formally setting it aside.¹⁶ It may be adopted in part;¹⁷ and if satisfactory is to be treated as if made by the court and, if general, as covering all the issues.¹⁸ Decree may be founded thereon.¹⁹ New trial may be directed after verdict though errors at the trial will not be ground

⁷See post, § 1090.

¹⁰*Prevost v. Gratz*, 3 Wash. C. C. 434, Fed. Cas. No. 11,407.

¹¹*Armstrong v. United States*, Gilp. 399, Fed. Cas. No. 548.

¹²*Greigg v. Reade*, Crabbe 64, Fed. Cas. No. 5,804.

¹³*Garsell v. Beall*, 92 U. S. 695, 23 L. ed. 686; *Wilson v. Riddle*, 123 U. S. 615, 31 L. ed. 280, 8 Sup. Ct. Rep. 255.

¹⁴*Harding v. Handy*, 11 Wheat 121, 6 L. ed. 429; *Earle v. McCartney*, 109 Fed. 13.

¹⁵*Harding v. Handy*, 11 Wheat 121, 6 L. ed. 429; *Pront v. Roby*, 15 Wall. 475, 21 L. ed. 58; *Little v. Alexander*, 21 Wall 503, 22 L. ed. 625; *Watt*

v. Starke, 101 U. S. 252, 25 L. ed. 826; *Quinby v. Conlan*, 104 U. S. 424, 26 L. ed. 800; *Perego v. Dodge*, 163 U. S. 165, 41 L. ed. 113, 16 Sup. Ct. Rep. 971.

¹⁶*Idaho, etc. Co. v. Bradbury*, 132 U. S. 516, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Kohn v. McNulta*, 147 U. S. 240, 37 L. ed. 150, 13 Sup. Ct. Rep. 298.

¹⁷*Kohn v. McNulta*, 147 U. S. 240, 37 L. ed. 150, 13 Sup. Ct. Rep. 298.

¹⁸*Hammer v. Garfield M. Co.* 130 U. S. 206, 32 L. ed. 964, 9 Sup. Ct. Rep. 548.

¹⁹*Garsell v. Beall*, 92 U. S. 695, 23 L. ed. 686.

unless wrongful verdict resulted.²⁰ On motion for new trial the applicant must provide notes of the proceedings and evidence so that they may be made part of the record on appeal.¹ Strictly the practice requires that the chancellor order a jury to be empanelled on the law side of the court and the verdict to be certified by the clerk to the equity side, but less formal mode is allowable.²

§ 1068. Power to refer to a master and matters referred.

Courts of equity have power to refer to a master for investigation and report, the taking of accounts, the making of computations or the investigation of the facts in contempt proceedings. So they may direct a master in chancery to inquire into the appointment of a receiver, or trustee, into the issue of an injunction, whether a suit is for an infants benefit, or a consent decree would be beneficial to an infant. Exceptions to an answer,³ and exceptions to any pleading for scandal or impertinence may be referred to a master for investigation and report. Reference to a master is often proper after the taking of a bill pro confesso. The power is a very broad one and extends in general to the investigation of any question or issue of fact which courts of equity may be called upon to make. Nor is it uncommon for parties to agree that issues of law as well as of fact be submitted to a master.

Author's section.

Federal courts of equity have inherent power to order reference to a master;⁶ but it is improper to refer a cause in advance of decree settling the issues raised by the pleadings.⁷ It is improper to refer a bill for accounting until after plaintiff has established his right thereto.⁸ It is discretionary with the court to refer the ascertainment of an amount due,⁹ or to refer a bill in intervention.¹⁰ If the court can ascertain the facts from the evidence, it will not order a reference;¹¹ unless both parties desire it.¹² Where the litigation has already been very long further reference should, if possible be avoided.¹³ Counsel may sometimes stipulate to dispense with

²⁰Watt v. Starke, 101 U. S. 251, 25 L. ed. 826.

¹Watt v. Starke, 101 U. S. 251, 25 L. ed. 826; Clyde v. Richmond, etc. R. R. 72 Fed. 121, 18 C. C. A. 467.

²Wilson v. Riddle, 123 U. S. 615, 31 L. ed. 280, 8 Sup. Ct. Rep. 255.

³Ante, § 1101.

⁶Thompson v. Smith, 2 Bond, 320, Fed. Cas. No. 13,976.

⁷Ward v. Paducah, etc. R. R. 4 Fed. 862; but see Briggs v. Neal, 120 Fed. 229, 56 C. C. A. 572.

⁸Columbian Co. v. Mercantile Co. 113 Fed. 23, 51 C. C. A. 33.

⁹Brown v. Grove, 80 Fed. 564, 25 C. C. A. 644.

¹⁰Central T. Co. v. Madden, 70 Fed. 451, 17 C. C. A. 236.

¹¹Field v. Holland, 6 Cranch, 8, 7 L. ed. 136; Lawrence v. Dana, 4 Cliff. 6, Fed. Cas. No. 8,136.

¹²Jewett v. Cunard, 3 W. & M. 277, Fed. Cas. No. 7,310.

¹³Campbell v. New York, 81 Fed. 182.

a reference;¹⁴ or agree upon reference as to both fact and law.¹⁵ But a reference of the entire decision of a case is improper except by the consent of both parties.¹⁶ A court may in its discretion itself state an account after examining the testimony taken by the master.¹⁷ Matters of computation and account are a common subject for reference.¹⁸ Boundaries may be ascertained by reference;¹⁹ or the propriety of a receiver's petition to reduce wages;²⁰ or the amount of a receiver's compensation.¹ After order for decree *pro confesso* the ascertainment of damages suffered by plaintiff or the computation of an account, is often a proper preliminary to a decree.² Claims of all sorts against a fund in court may be ordered presented before the master.³ Reference is proper where parties are unable to settle upon interrogatories and some are questioned as irrelevant.⁴ It is often proper where a receiver is sued upon a claim for damages;⁵ or to ascertain the proper compensation of a receiver's counsel.⁶ A plea of *res judicata* will be referred unless it clearly appears that the causes of action were not the same.⁷

§ 1069. Appointment and compensation of masters.

The circuit courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme court, the circuit judges, and the district judge for the district concurring in the appointment) and they may also appoint a master *pro hac vice* in any particular case.^[a] The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances

¹⁴Dumont v. Fry, 13 Fed. 423.

¹⁵See Kimberley v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; United States T. Co. v. Mercantile T. Co. 88 Fed. 140, 31 C. C. A. 427; Third Nat. Bank v. National Bank, 86 Fed. 852, 30 C. C. A. 436; Farrar v. Bernheim, 75 Fed. 136, 21 C. C. A. 264.

¹⁶Kimberley v. Arms, 129 U. S. 524, 32 L. ed. 764, 9 Sup. Ct. Rep. 355.

¹⁷Wheeler v. Billings, 72 Fed. 301, 18 C. C. A. 573.

¹⁸St. Colombe v. United States, 7 Pet. 625, 8 L. ed. 807; Hatch v. Indianapolis, etc. R. R. 9 Fed. 856; 11 Biss. 138; see Wann v. Coe, 31 Fed. 369; Harding v. Handy, 11 Wheat. 126, 6 L. ed. 427; Burns v. Rosenstein, 135 U. S. 455, 34 L. ed. 193, 10 Sup. Ct. Rep. 817.

¹⁹See Murphy v. So. Ry. 99 Fed. 469.

²⁰United States T. Co. v. Omaha, etc. Ry. 63 Fed. 737.

¹Gasquet v. Crescent C. Co. 49 Fed. 493.

²See Reedy v. Western E. Co. 83 Fed. 709, 28 C. C. A. 27; Thompson v. Wooster, 114 U. S. 114, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; Pendleton v. Evans, 4 Wash. C. C. 391, Fed. Cas. No. 10,921.

³See Fidelity, etc. Co. v. Shenandoah Co. 42 Fed. 372; Central T. Co. v. Texas Ry. 32 Fed. 448; post, §—.

⁴See Zunkel v. Litchfield, 21 Fed. 196.

⁵See Central T. Co. v. Marietta, etc. Ry. 75 Fed. 41.

⁶Walters v. Western R. R. 69 Fed. 706.

⁷Park, etc. Co. v. Bruen, 133 Fed. 807.

thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.^[b]

82nd equity rule, as amended April 16, 1894.

[a] In general.

The amendment of April 16, 1894,¹⁰ consisted in substituting the portion of the above rule embraced within the parenthesis for the proviso, "both the judges concurring in the appointment," found in the rule as originally adopted in 1842.¹¹ The rules of 1822 contained no provision respecting the appointment of masters. The appointment of both standing and special masters is discretionary.¹² Such appointments should be made by the court, as a master is an officer¹³ of the court, and no notice thereof need be given.¹⁴ By an act of 1879 Congress made clerks and other deputies ineligible for the position except for special reasons to be assigned by the order of appointment;¹⁵ and by act of 1887 relatives of the judge may not be appointed officers of the court.¹⁶ It is not essential to the validity of any standing appointment that the master give a bond or the appointment be recorded.¹⁷ It has been held that a party cannot raise the question of the disqualification of an appointee under the acts of Congress, by motion to set aside a sale made, because such an attack upon the appointment is collateral.¹⁸ Appointment of a clerk as special master is not reversible error where the order of appointment inadvertently omits to set forth the special reason therefor.¹⁹ Erroneous statements in a final report reproduced inadvertently from an earlier report at which time the statements were true is not ground for removal of the master for bad faith and malice.²⁰

[b] Compensation and attachment therefor.

A master must file his report whether his fees are paid or not, but attachment will issue if they are not paid;⁴ and the issuance of attachment

¹⁰See 152 U. S. 709.

¹¹See 17 Pet. 20 L. ed. p. 918.

¹²Van Hook v. Pendleton, 2

Blatchf. 85, Fed. Cas. No. 16,852;

¹³Bate F. Co. v. Gillette, 28 Fed.

673.

¹⁴Finance Com. v. Warren, 82 Fed.

525; 27 C. C. A. 472; Seaman v.

Northwestern M. L. I. Co. 86 Fed.

497, 30 C. C. A. 212.

¹⁵Ante, § 603.

¹⁶Ante, § 443.

¹⁷Seaman v. Northwestern, etc.

Co. 86 Fed. 493, 30 C. C. A. 212;

¹⁸Seaman v. Northwestern, etc.

Co. 86 Fed. 492, 30 C. C. A. 212;

Elgutter v. Northwestern, etc. Co. 86

Fed. 500, 30 C. C. A. 218.

¹⁹Briggs v. Neal, 120 Fed. 224, 56

C. C. A. 572.

²⁰Mason v. Pewabic M. Co. 100

Fed. 340.

⁴Frese v. Biedenfeld, 14 Blatchf.

402, Fed. Cas. No. 5,111.

is not stayed by proceedings for appeal.⁵ On adjournment of a hearing a master's fee should be paid by the party asking the adjournment and properly should be paid at the time.⁶ Each party should pay his own costs in the first instance and leave their final disposition to be determined in the decree.⁷ A master's compensation should be measured by the work done, time employed and the responsibility assumed, having also in view the magnitude of the interest involved.⁸ It should not be fixed finally until after the services are rendered; and an interlocutory order fixing them at a sum per annum may afterwards be modified.⁹ Where a special master's fees are allowed and embodied as costs in a decree which is thereafter reversed so that the costs are imposed upon the other party, the master is entitled to interest from date of the allowance of his fees.¹⁰

§ 1070. Time when matter referred must be brought on before master.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance and for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

74th equity rule, promulgated march, 1842.

The rules of 1822 merely required the master to assign a day for hearing whenever a matter was referred.¹¹

§ 1071. Time and place for hearing—adjournments—speeding the hearing.

Upon every such reference it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceedings in the same, and to

⁵Myers v. Dunbar, 12 Blatchf. 380, Fed. Cas. No. 9,990; compare Jesup v. Wabash, etc. R. R. 94 Fed. 20.

⁶Brickill v. New York, 55 Fed. 565.

⁷United States P Co. v. American P. C. Co. 81 Fed. 506; Brickill v. New York, 55 Fed. 565. But a party seeking an accounting will usually be required to pay the compensation: Urner v. Kayton, 17 Fed. 539, 21 Blatchf. 428.

⁸See Doughty v. West, 8 Blatchf. 107, Fed. Cas. No. 4,030; Erie Ry. v. Heath, 10 Blatchf. 214, Fed. Cas. No.

4,516; Middleton v. Bankers, etc. Co. 32 Fed. 524; Finance Comm. v. Warren, 82 Fed. 525, 27 C. C. A. 472; see Brown v. King, 62 Fed. 529, 10 C. C. A. 541, refusing further compensation to special master in railroad foreclosure.

⁹Pleasants v. Southern Ry. 93 Fed. 93, 35 C. C. A. 226.

¹⁰Jesup v. Wabash, etc. R. R. 94 Fed. 20.

¹¹See Rule 29, 7 Wheat. VI. et seq. 5 L. ed. 377.

give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

75th equity rule, promulgated March, 1842.

By rule 29 of the equity rules of 1822¹⁶ it was provided that "When a matter is referred to a master to examine and report thereon he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or solicitor of such party as may not reside within the district, and if either party shall fail to attend at the time and place, the master may adjourn the examination of the matter to some future day and give notice thereof to the parties, in which notice it shall be expressed that if the party fail again to appear, the master will proceed *ex parte*; and if after receiving such notice the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the court, that such proceedings may be had thereon as to the court shall seem equitable and right." The granting of adjournments¹⁷ and of leave to reopen the hearing for further proofs after it has been closed and the report prepared, is largely discretionary.¹⁸

§ 1072. Master to regulate proceedings before him, examine witnesses, procure evidence, etc.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by

¹⁶See 7 Wheat. VI. et seq. 5 L. ed. 377.

¹⁸Central T. Co. v. Richmond, etc. R. R. 69 Fed. 761; Central T. Co. v.

¹⁷Third Nat. Bank v. National Marietta, etc. R. R. 75 Fed. 41. Bank, 86 Fed. 852, 30 C. C. A. 436.

deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

77th equity rule, promulgated March, 1842.

The equity rules of 1822 contained no provision respecting references other than that elsewhere quoted,² but they were deemed to recognize the propriety of the examination of witnesses before master.³ When rule 77 was adopted parties were not competent witnesses in their own behalf and the authority "to examine the parties in the cause, upon oath" meant merely the usual right to a discovery of evidence against them and not a right in either party to make himself a witness in his own behalf.⁴ Undoubtedly the provision no longer has so narrow a meaning. This rule gives the master discretion as to the order of proof,⁵ the granting of adjournments,⁶ or the opening of the cause after report drafted, for further proofs,⁷ It has been held to permit him to require the production of correspondence leading up to contract on an accounting in an infringement suit.⁸ The evidence already taken in a cause is properly before the master;⁹ including evidence at a former accounting.¹⁰ A witness whose testimony has previously been taken cannot be again examined before the master upon the same matters, without special order of court, though he may be examined upon collateral or independent matters.¹¹ The master may use book entries of accounts without vitiating his report on an accounting, though the books themselves had previously been ruled out as not books of original entry.¹² It is proper for him to refuse newly discovered evidence on an issue already adjudged by interlocutory decree.¹³ Where evidence offered is objected to, the master should receive it subject to the objection, so that the court may thereafter review the matter.¹⁴ It is proper also to request the master to report specially, such evidence as furnishes ground of excep-

²Ante, § 1071, note.

³Story v. Livingston, 13 Pet. 368, 10 L. ed. 200.

⁴Foote v. Silsby, 3 Blatchf. 507, Fed. Cas. No. 4,920.

⁵Wooster v. Gumbirner, 20 Fed. 167.

⁶Third Nat. Bank v. National Bank, 86 Fed. 852, 30 C. C. A. 436.

⁷Central T. Co. v. Richmond, 69 Fed. 761; Central T. Co. v. Marietta R. R. 75 Fed. 41; Piper v. Brown, Holmes, 196, Fed. Cas. No. 11,181.

⁸Goss Co. v. Scott, 119 Fed. 941.

⁹Gass v. Stinson, 2 Sum. 605, Fed. Cas. No. 5,261; see rule 80, post, § 1074.

¹⁰Reed v. Lawrence, 29 Fed. 915.

¹¹Gass v. Stinson, 2 Sum. 605, Fed. Cas. No. 5, 261; Jenkins v. Eldridge, 3 Story, 299, Fed. Cas. No. 7,267.

¹²Robinson v. Alabama Mfg. Co. 89 Fed. 218.

¹³Deitch v. Staub, 115 Fed. 309, 53 C. C. A. 137.

¹⁴Kansas, etc. Co. v. Electric, etc. Ry. 108 Fed. 702.

tion.¹⁵ It is not a proper practice to move the court to instruct the master while making his investigations, but a party aggrieved has his remedy by exception to the report.¹⁶ But the fact that execution of the master's orders will involve considerable expense of time and money, may justify the hearing of an application to modify or vacate them.¹⁷ The authorities have frequently sanctioned the right of a master in his discretion to proceed beyond the district to take testimony,¹⁸ and even abroad.¹⁹

§ 1073. Mode of producing accounts—examination of accounting party.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party, viva voce, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

79th equity rules, promulgated March, 1842.

§ 1074. Affidavits, depositions and documents already in evidence may be used.

All affidavits, depositions and documents which have been previously made, read or used in the court, upon any proceeding in any cause or matter, may be used before the master.

80th equity rule, promulgated March, 1842.

This rule means that testimony in any cause² may be brought before the examiner without being retaken, by calling his attention to the parts relied upon, in making up the case; but does not authorize the using of it in argument after the case made, when the opposite party no longer has opportunity to answer or explain it.³

§ 1075. Creditors and claimants may be examined—evidence reduced to writing.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or viva voce, or both modes, as the nature of the case may

¹⁵Donnell v. Columbian Ins Co. 2 Sumn. 366, Fed. Cas. No. 3,987.

¹⁶Lull v. Clark, 20 Fed. 454; post,

§ 1079. But in case of extreme hardship it may be done: Welling v. La Bau, 32 Fed. 293, 23 Blatchf. 305.

¹⁷Bate, etc. Co. v. Gillette, 28 Fed.

673.

¹⁸See Consolidated F. Co. v. Columbian Co. 85 Fed. 54; White v.

Toledo, etc. R. R. 79 Fed. 133, 24 C. A. 467; Dowagiac Mfg. Co. v. Lochren, 143 Fed. 214.

¹⁹Bate, etc. Co. v. Gillette, 28 Fed. 673.

²See Cimiotti U. Co. v. Bowsky, 113 Fed. 699.

³Bell v. United States S. Co. 32 Fed. 550.

appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

81st equity rule, promulgated March, 1842.

§ 1076. Reference to master in decree for accounting of decedent's personalty.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

73rd equity rule, promulgated March 1842.

§ 1077. Master's report.

At the conclusion of the investigations made by the master pursuant to the order of reference it is his duty to report to the court concerning the premises. The report should be returned into the clerk's office and a dissatisfied party may then except thereto pursuant to rule 83.⁷

Author's section.

A master may be permitted to withdraw his report for correction, but should not then reverse his former findings except upon notice to the parties.⁸ The master after preparing a draft of his report should submit it to the solicitors and have a hearing upon their objections before filing it,⁹ though in some districts this practice is not followed where there has been full argument by counsel on both sides prior to the draft of the report.¹⁰ So it is not as essential where the objection is to the principal finding which probably would not have been changed as a result of the objection.¹¹ All the evidence should be included in the report, although in making his findings, the master may disregard immaterial evidence.¹²

§ 1078. Report should refer to, and not recite affidavits, depositions, etc.

In the reports made by the master to the court no part of any state of facts, charge, affidavit, deposition, examination, or answer

⁷Post, § 1079.

⁸National, etc. Co. v. Dayton, 9 Fed. 822.

⁹Troy v. Corning, 6 Blatchf. 328, Fed. Cas. No. 14,196; Gaines v. New Orleans, 1 Woods, 104, Fed. Cas. No. 5,177; Fischer v. Hayes, 16 Fed. 463;

Gay Co. v. Camp. 68 Fed. 68, 15 C. C. A. 226.

¹⁰Hatch v. Indianapolis, etc. Ry. 9 Fed. 856, 11 Biss. 138.

¹¹Celluloid Co. v. Cellonite Co. 40 Fed. 476.

¹²Huttig, etc. Co. v. Fuelle, 143 Fed. 363.

brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

76th equity rule, promulgated March, 1842.

A master's report need not state the facts he considers proved by the evidence.¹⁵ Under the order of reference requires it, all the testimony taken before a master need not be annexed to the report; and on appeal in the absence of such requirement it will be presumed that other evidence than that attached may have been submitted, when the report does not purport to contain all.¹⁶ Where a party excepts to evidence offered, he should require the evidence upon which the exception is grounded to be stated by the master.¹⁷

§ 1079. Filing of report, confirmation and exceptions thereto.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto;^[a] and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed they shall stand for hearing^[n] before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.^{[a]-[1]}

83rd equity rule, promulgated March, 1842.

[a] Report not conclusive on court.

A masters' report does not conclude the court.¹ It settles no rights, but merely presents the case to the court in such manner that intelligent action may be taken by it.² The report is simply advisory and may be accepted or disregarded.³ This is especially true where the order of reference excludes any determination of the issues by the master,⁴ or when it is not entered by agreement.⁵ Hence it is not error to enter a decree at

¹⁵McCormack v. James, 36 Fed. 14.

¹⁶Sheffield, etc. Ry. v. Gordon, 151 U. S. 293, 38 L. ed. 164, 14 Sup. Ct. Rep. 343.

¹⁷Greene v. Bishop, 1 Cliff. 186, Fed. Cas. No. 5,763.

¹Field v. Holland, 6 Cranch, 22, 3 L. ed. 136; United States T. Co. v. Omaha Ry. 63 Fed. 737.

²Railroad v. Swasey, 23 Wall. 410, 23 L. ed. 136.

³Kimberley v. Arms, 129 U. S. 523, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Boesch v. Gaff, 133 U. S. 705, 33 L. ed. 787, 10 Sup. Ct. Rep. 378.

⁴Blythe v. Thomas, 45 Fed. 784.

⁵Bosworth v. Hook, 77 Fed. 686,

23 C. C. A. 404.

variance with the master's conclusions;⁶ and the court may correct an error in the report.⁷ But where by consent of parties, the entire cause, both law and fact, is submitted to a master for decision, the court should decree in conformity with the master's conclusions, except for manifest error therein,⁸ or unless further evidence is received before the court, and one of the questions is the legal effect of documentary evidence;⁹ or unless his findings are clearly against the evidence,¹⁰ or essentially defective.¹¹

[b] Necessity for objection before master.

Questions raised before the master are deemed waived if not made matter of exception, unless on its face the report shows error. The general rule is that¹⁴ a party is entitled to no exception before the court which he has not made before the master, since the latter should have been given an opportunity to correct the error, if any.¹⁵ But error of law in the report may be challenged in the absence of exception before the master.¹⁶ The master should submit a draft of the report to the counsel, and have a hearing there to enable objections to be taken;¹⁷ although in some circuits this is dispensed with where the report is drawn after full argument by counsel upon both sides.¹⁸

[c] Necessity for specific exceptions.

An exception should distinctly and specifically point out the finding and conclusion of the master which it seeks to reverse.¹ A general assignment of error is insufficient.² If specific, exceptions may be sufficient, though

⁶*Oteri v. Scalzo*, 145 U. S. 589, 590, 36 L. ed. 824, 12 Sup. Ct. Rep. 895.

⁷*Sheffield, etc. Ry. v. Gordon*, 151 U. S. 291, 38 L. ed. 164, 14 Sup. Ct. Rep. 343.

⁸*Western U. T. Co. v. American B. T. Co.* 105 Fed. 684; *Kimberley v. Arms*, 129 U. S. 524, 32 L. ed. 764, 9 Sup. Ct. Rep. 355.

⁹*United States T. Co. v. Mercantile T. Co.* 88 Fed. 140, 31 C. C. A. 427.

¹⁰*Third Nat Bank v. National Bank*, 86 Fed. 852, 30 C. C. A. 436.

¹¹*Farrer v. Bernheim*, 75 Fed. 136, 21 C. C. A. 264.

¹⁴*Gordon v. Lewis*, 2 Sum. 143, Fed. Cas. No. 5,613.

¹⁵*Story v. Livingston*, 13 Pet. 366, 10 L. ed. 200; *McMicken v. Perin*, 18 How. 507, 15 L. ed. 504; *Troy Co. v. Corning*, 6 Blatchf. 333, Fed. Cas. No. 14,196; *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; *Fischer v. Hayes*, 16 Fed. 469; *McNamara v. Home, etc. Co.* 105 Fed.

202; *Gay Mfg. Co. v. Camp*, 68 Fed. 68, 15 C. C. A. 226, and cases cited.

¹⁶*Celluloid M. Co. v. Cellonite M. Co.* 40 Fed. 476; *Home, etc. Co. v. McNamara*, 111 Fed. 822, 49 C. C. A. 642.

¹⁷*Troy v. Corning*, 6 Blatchf. 328, Fed. Cas. No. 14,196; *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; *Fischer v. Hayes*, 16 Fed. 469.

¹⁸*Hatch v. Railroad*, 9 Fed. 856; 11 Biss. 138; *Jennings v. Dolan*, 29 Fed. 861.

¹*Neal v. Briggs*, 110 Fed. 477; *Appeal of Columbus, etc. R. R.* 109 Fed. 177, 48 C. C. A. 275; *Foster v. Goddard*, 1 Black, 509, 17 L. ed. 228; *Sheffield, etc. Ry. v. Gordon*, 151 U. S. 290, 38 L. ed. 164, 14 Sup. Ct. Rep. 343; *General Fire, etc. Co. v. Lamar*, 141 Fed. 353, (C. C. A.)

²*Dexter v. Arnold*, 2 Sum. 108, Fed. Cas. No. 3,858; *Greene v. Bishop*, 1 Cliff. 186, Fed. Cas. No. 5,763; *Stanton v. Alabama, etc. R. R.* 2 Woods, 506, Fed. Cas. No. 13,296.

not technically drawn.³ The verbal objections to the draft of the report may suffice for exceptions thereto.⁴ And where the evidence accompanies the report and shows the objections interposed thereto, those objections are sufficient without enumerating them further in the exceptions taken to the report.⁵ Where the evidence does not accompany the report, the party must require that the evidence on which an exception is grounded be stated by the master,⁶ and where there is no evidence at all before the court except exhibits the master's findings will be taken as true.⁷ An exception to allowance of claims in a master's report based upon an invalid statute, need not allege that invalidity.⁸ If no exceptions at all are taken, a party cannot on appeal then first challenge the master's report.⁹

[d] Time for exceptions.

The requirement for exception within one month applies to report upon a receiver's compensation;¹² but not to the master's ministerial acts, such as a sale, and it is not premature to confirm a sale within one month.¹³ "One month" means a calendar and not a lunar month.¹⁴ The exceptions may be filed any time within the month.¹⁵ Amended exceptions filed after the prescribed time will be overruled on motion.¹⁶

[e] Grounds of exception and persons entitled to except.

It is no ground of objection that the master was not sworn, when the order of reference did not so require.¹⁹ Nor is it ground of exception that on an accounting the master reports more due than the bill claimed,²⁰ nor that he awarded interest pursuant to an interlocutory decree and the order of reference.¹ A new defense is not proper in the form of exception to the master's report, after decree determining the merits.² Report upon a matter not referred to the master may be excepted to.³ An exception based on matters of fact not taken before the master will not be considered.⁴ An

³Central T. Co. v. Wabash R. R. 57 Fed. 441.

⁴Fischer v. Hayes, 16 Fed. 469.

⁵Marks v. Fox, 18 Fed. 713.

⁶Donnell v. Columbian Ins. Co. 2 Sumn. 366, Fed. Cas. No. 3,987; Greene v. Bishop, 1 Cliff. 186, Fed. Cas. No. 5,763.

⁷Atlas, etc. Bank v. French, etc. Co. 134 Fed. 746.

⁸Fidelity Co. v. Shenandoah Co. 42 Fed. 372.

⁹Burnes v. Rosenstein, 135 U. S. 455, 34 L. ed. 193, 10 Sup. Ct. Rep. 817; Medsker v. Bonebrake, 108 U. S. 71, 72, 27 L. ed. 654, 2 Sup. Ct. Rep. 351; Pleasant v. Beckwith, 100 U. S. 528, 25 L. ed. 702; Topliff v. Topliff, 145 U. S. 173, 36 L. ed. 665, 12 Sup. Ct. Rep. 832.

¹²Gasquet v. Crescent C. B. Co. 49 Fed. 493.

¹³Pewabic M. Co. v. Mason, 145 U. S. 363, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

¹⁴Gasquet v. Crescent C. B. Co. 49 Fed. 493.

¹⁵Fidelity, etc. Co. v. Shenandoah Co. 42 Fed. 372.

¹⁶Syz v. Redfield, 11 Fed. 799.

¹⁹Thompson v. Smith, 2 Bond, 320, Fed. Cas. No. 13,976.

²⁰Nashua, etc. R. R. v. Boston, etc. R. R. 49 Fed. 774.

¹Nashua, etc. R. R. v. Boston, etc. R. R. 49 Fed. 774.

²New Orleans v. Warner, 180 U. S. 199, 45 L. ed. 493, 21 Sup. Ct. Rep. 353.

³Taylor v. Robertson, 27 Fed. 537.

⁴Gay Co. v. Camp, 68 Fed. 67, 15 C. C. A. 226.

intervener who fails to make his case and the amount of his claim reasonably certain cannot except to the master's finding against him.⁵

[f] Waiver and withdrawal of exceptions.

A waiver of right to except to a report does not concede the correctness of a decree thereafter entered thereon.⁸ Withdrawal of exceptions in the order book and in a paper filed in the cause is sufficient.⁹

[g] Report presumed correct—disposition of exceptions.

Every reasonable presumption is indulged in favor of a master's report upon matters of fact, especially where the testimony is seriously conflicting;¹² and it will not be set aside or modified in the absence of some clear error or mistake.¹³ The presumption in favor of a master's findings are especially strong where the reference is by consent.¹⁴ Harmless or inconsequential error is no ground for setting a report aside.¹⁵ A report as to damages will not be set aside unless clearly inadequate or excessive.¹⁶ But where a report is withdrawn and the original findings are reversed without notice or hearing, presumptions in favor of its correctness are destroyed.¹⁷ Exceptions must be founded upon the facts stated in the report or in accompanying documents.¹⁸ They are to be regarded only so far as supported by the special statements of the master or by particular testimony in the cause upon which the exceptor relies.¹⁹ Where the exceptions make no allusion to the evidence and the statement of the master does not support them, but supports his findings, the report must be confirmed.²⁰ Upon appeal a master's report concurred in by the court below, will be adhered to unless for obvious error or mistake.¹ If there are sufficient facts in the

⁵Missouri, etc. Ry. v. Texas, etc. Ry. 33 Fed. 376.

⁸Waterman v. Banks, 144 U. S. 394, 36 L. ed. 479, 12 Sup. Ct. Rep. 646.

⁹Gasquet v. Crescent C. B. Co. 49 Fed. 493.

¹²Appeal of Columbus, etc. R. R. 109 Fed. 117, 48 C. C. A. 275; Missouri, etc. Ry. v. Texas Ry. 33 Fed. 803; Callaghan v. Myers, 128 U. S. 666, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Davis v. Schwarz, 155 U. S. 636, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; Camden v. Stuart, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 585; Chandler v. Pomeroy, 87 Fed. 262.

¹³Girard Ins. Co. v. Cooper, 162 U. S. 538, 40 L. ed. 1062, 16 Sup. Ct. Rep. 879; Jaffrey v. Brown, 29 Fed. 476; Taintor v. Franklin Bank, 107 Fed. 825; Lake, etc. Ry. v. Fremont, 92 Fed. 721, 34 C. C. A. 625; Stanton v. Alabama, etc. Ry. 31 Fed. 585; Kilgour v. National Bank, 97 Fed. 693.

¹⁴See Walker v. Kinnare, 76 Fed. 101, 22 C. C. A. 75; Walters v. Railroad, 69 Fed. 706.

¹⁵Mason v. Crosby, 3 Woodb. & M. 258, Fed. Cas. No. 9,236; Gottfried v. Crescent B. Co. 22 Fed. 433.

¹⁶Murphy v. Southern Ry. 99 Fed. 469.

¹⁷National, etc. Co. v. Dayton Co. 91 Fed. 822.

¹⁸Dexter v. Arnold, 2 Sumn. 108, Fed. Cas. No. 3,858.

¹⁹Harding v. Handy, 11 Wheat. 126, 6 L. ed. 429; Farrar v. Bernheim, 75 Fed. 136, 21 C. C. A. 264; Jaffrey v. Brown, 29 Fed. 476; Jones v. Lamar, 39 Fed. 585.

²⁰Cutting v. Florida R. R. 43 Fed. 743.

¹Crawford v. Neal, 144 U. S. 596, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Furrer v. Ferris, 145 U. S. 134, 36 L. ed. 649, 12 Sup. Ct. Rep. 821; Fisher v. Shropshire, 147 U. S. 146, 37 L. ed. 109, 13 Sup. Ct. Rep. 201.

report unexcepted to, to entitle either party to a decree, the exceptions may be disregarded.²

[h] Hearing and recommitment.

Prior to the regulation of the matter by the present rule, it was held that a report might be considered at the term when made.⁶ A second hearing on exceptions will not be allowed.⁷ But a court may in its discretion permit an amendment of general exceptions.⁸ The court will not verify each interest calculation.⁹ It has power to recommit the report for further investigation or correction.¹⁰ Where the report discloses facts necessitating further investigation, the court will so order.¹¹ Recommitment may be ordered if a question did not receive sufficient attention.¹² But small errors are not grounding for requiring restatement of an account.¹³ Nor are minor inaccuracies ground for recommitment,¹⁴ or the omission to state conceded facts.¹⁵ Where the report can be corrected without rereference this should be done.¹⁶

[i] Reopening proceedings after report filed.

After filing of the report the proceedings will not be reopened to permit dilatory creditors to appear, make objections and present testimony;¹⁷ nor to permit a party to challenge the truth of testimony where he had elected to rely upon its incompetency.¹⁸

§ 1080. Costs imposed upon overruling and allowing of exceptions.

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the cost to be fixed in each case by the court, by a standing rule of the circuit court.

84th equity rule, promulgated March, 1842.

Solicitors' fees are not costs within the meaning of this rule.¹

²Central T. Co. v. Wabash Ry. 57 Fed. 441.

⁶Coates v. Muese, 1 Brock. 529, Fed. Cas. No. 2,916.

⁷Felch v. Hooper, 4 Cliff. 489, Fed. Cas. No. 4,718.

⁸Jones v. Lamar, 39 Fed. 585; compare Syz v. Redfield, 11 Fed. 799.

⁹Chandler v. Pomeroy, 96 Fed. 156, 37 C. C. A. 430.

¹⁰National, etc. Co. v. Dayton Co. 91 Fed. 822.

¹¹Magic R. Co. v. Elm C. Co. 14 Blatchf. 109, Fed. Cas. No. 8,950.

¹²Missouri, etc. R. R. v. Texas, etc. Ry. 33 Fed. 359.

¹³Taylor v. Robertson, 27 Fed. 537.

¹⁴McElroy v. Swope, 47 Fed. 380.

¹⁵Jennings v. Dolan, 29 Fed. 861; Reading Ins. Co. v. Egelhoff, 115 Fed. 393.

¹⁶Witters v. Sowles, 43 Fed. 405.

¹⁷Sands v. Greeley, 83 Fed. 772.

¹⁸Cimecotti U. Co. v. Bowsky, 113 Fed. 699.

¹Previously it was regarded as improper: Whiting v. United States, 13 Pet. 16, 10 L. ed. 38.

CHAPTER 31.

EQUITY PROCEDURE (CONTINUED)—DECREES AND ORDERS, RE-HEARING, ENFORCEMENT BILL OF REVIEW.

- § 1090. Form of decree or order—matters to be omitted.
- § 1091. Decree requiring specific act should prescribe time thereof.
- § 1092. Correction of clerical mistakes or accidental omissions.
- § 1093. Deficiency decree in foreclosure suits.
- § 1094. Rehearing.
- § 1095. Proper process to enforce orders and decrees.
- § 1096. Proper final process in equity.
- § 1097. Writ of assistance to compel delivery of possession.
- § 1098. Enforcement of orders by or against persons not parties.
- § 1099. Bill of review.
- § 1100. Final record what to contain.

§ 1090. Form of decree or order—matters to be omitted.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substances, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz." [Here insert the decree or order.]

86th equity rule, promulgated March, 1842.

Decrees in equity differ widely from judgments at law. The latter are simple and uniform while the former are often complicated owing to the more comprehensive relief given. Although this rule abolished the practice¹ of reciting pleadings in a decree, it is often proper that the decree state conclusions of fact as well as of law, in order to render the judgment clearer.² Any decree is interlocutory which is not complete and final and which leaves matters undetermined before the court to be ascertained and disposed of before the granting of the full relief that is proper in the

¹Putnam v. Day, 22 Wall. 67, 22 L. ed. 764; see McClaskey v. Barr, 48 Fed. 131.

premises.³ When a hearing has been had in a cause upon the testimony taken after issue joined, the court very frequently makes a decree declaring the legal rights of the parties, which is merely interlocutory because accounts are still to be examined, or damages ascertained, or a sale made, or some other thing must first be done before the court can enter final decree disposing of the cause.⁴

§ 1091. Decree requiring specific act should prescribe time therefor.

If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice.

Part of 8th equity rule, promulgated March, 1842.

Rule 8 is given in full in a subsequent section.⁷ The failure to fix a time for performance will not prevent contempt proceedings for nonperformance;⁸ nor prevent a decree from being deemed final.⁹ A court may protect a lien of defendants which he failed to enforce by cross bill, by attaching terms to its decree against him for performance.¹⁰

§ 1092. Correction of clerical mistakes or accidental omissions.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment^[a] thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.^{[b] [c]}

85th equity rule, promulgated March, 1842.

[a] Enrollment of decree.

In English practice decrees in equity are enrolled upon parchment under the great seal in chancery. But in the United States all decrees are matters of record just as are judgments at law, and technical enrollment has never obtained. A decree is considered as enrolled when signed by the chancellor and filed by the clerk, and the term has elapsed at which it was rendered.¹⁴ The signing, filing and lapse of the terms are therefore in our practice the

³Souter v. La Crosse R. R. 1 U. S. 545, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Blythe v. Hinckley, 84 Fed. 239.

⁴See Perkins v. Fourinquet, 6 How. 206, 12 L. ed. 407.

⁷Post, § 1095.

⁸Souter v. La Crosse R. R. 1 Woolw. 80, Fed. Cas. No. 13,180.

⁹Desvergers v. Parsons, 60 Fed. 143, 8 C. C. A. 526.

¹⁰See McPherson v. Cox, 96 U. S. 420, 24 L. ed. 746.

¹⁴See Dexter v. Arnold, 5 Mas. 303, Fed. Cas. No. 3,856; Whiting v. United States Bank, 13 Pet. 6, 10 L. ed. 33; Robinson v. Rudkins, 28 Fed. 8.

equivalents for enrolling and are presumably intended by "actual enrollment thereof" as used in the above rule.

[b] Interlocutory decrees.

It is the settled rule in Federal practice that an interlocutory decree, is within the control of the court at all times until final decree, though the term of its entry has elapsed; and hence that it may be altered or reversed or disregarded in the final decree.¹⁷ In this respect the Federal rules differs from that prevailing in many States, where interlocutory decree settling the rights of the parties becomes unalterable with the lapse of the term.¹⁸ The Federal doctrine was established after the promulgation of the equity rules. In view of the fact that the authorities declare an interlocutory decree always open to amendment and correction,¹⁹ it is not clear that rule 85, *supra*, should not be construed as referring to other than final decrees, although the language used suggests also interlocutory orders and decrees. Often there is no particular need for motion to correct interlocutory decrees since it can be done on the coming in of the master's report,²⁰ or be remedied by final decree.

[c] Final decrees.

In the case of final decree the expiration of the term at which it is rendered greatly reduces the power which a court of equity will consent³ to exercise respecting its alteration, amendment, or vacation. During the term it will exercise plenary power and amend, add to, correct or vacate a decree⁴ whether for clerical mistake or substantial error therein. So if motion to that end is made during the term it may be continued over and acted upon at an ensuing term.⁵ But after the term, alleged error involving the merits of the case will not move the court to reverse its prior decree,⁶

¹⁷*Iowa v. Illinois*, 151 U. S. 238, 38 L. ed. 145, 14 Sup. Ct. Rep. 333; *Fourniquet v. Perkins*, 16 How. 85, 14 L. ed. 856; *Clark v. Blair*, 14 Fed. 812; 4 *McCrary*, 311; *Steam, etc. Co. v. Sheldon*, 21 Fed. 875; *American D. Co. v. Sullivan M. Co.* 21 Fed. 74; *Henry v. Travelers Ins. Co.* 34 Fed. 258; *Blythe v. Hinkley*, 84 Fed. 239; *Pullan v. Cincinnati R. R.* 5 Biss. 237, Fed. Cas. No. 11,462; *Reeves v. Keystone B. Co.* 2 B. & A. 256, Fed. Cas. No. 11,661.

¹⁸See 5 *Encyc. Pl. & Pr.* 1042.

¹⁹*Linder v. Lewis*, 4 Fed. 318; *De Florez v. Reynolds*, 8 Fed. 434, 17 *Blatchf.* 436; *Clark v. Blair*, 14 Fed. 812, 4 *McCrary* 311; *Wooster v. Handy*, 21 Fed. 51.

²⁰See *Henry v. Travelers Ins. Co.* 34 Fed. 258.

³It must be remembered that no question of jurisdictional power is in-

involved, although the subject is sometimes so treated. The rules governing the matter are judge-made rules, based upon considerations of propriety and expediency.

⁴*Doss v. Tyack*, 14 How. 312, 14 L. ed. 428; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Barrell v. Tilton*, 119 U. S. 643, 30 L. ed. 511, 7 Sup. Ct. Rep. 332; *Henderson v. Carbondale, etc. Co.* 140 U. S. 40, 35 L. ed. 332, 11 Sup. Ct. Rep. 691.

⁵*Goddard v. Ordway*, 101 U. S. 745, 25 L. ed. 1040; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Linder v. Lewis*, 1 Fed. 378; *Graham v. Swayne*, 109 Fed. 366, 48 C. C. A. 411.

⁶*Cameron v. McRoberts*, 3 Wheat. 591, 4 L. ed. 467; *McMicken v. Perin*, 18 How. 507, 15 L. ed. 504; *French v. Hay*, 22 Wall. 238, 22 L. ed. 854; *Central T. Co. v. Grant L. Works*,

and the remedy must be by bill of review or appeal.⁷ As respects clerical mistakes and accidental omissions the right of amendment during the term is recognized by the Rule 85 *supra*, and comes clearly within the principle of plenary control during the term, recognized by the authorities.⁸ At that time clerical mistake may be corrected even although appeal has been taken.⁹ The authorities go further, however, than rule 85 seems to contemplate, and have recognized also the right to correct clerical mistakes or the inadvertent entering of a decree at an ensuing term;¹⁰ though if there is a doubt whether a mistake is clerical or judicial, correction will be refused.¹¹ The safer way of correcting clerical mistakes after the term, is perhaps, bill of review.¹² Rule 88¹³ establishes a further limitation on the principle that a decree is unalterable after the term, and permits petition for rehearing at a subsequent term, in causes not appealable. There are also other exceptions to the general rule of the inviolability of decrees after the expiration of the term. In executing a final decree, orders may be made at a subsequent term modifying its terms, e. g. as to sale thereunder.¹⁴

§ 1093. Deficiency decree in foreclosure suits.

In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule¹⁷ of this court regulating the equity practice, where the decree is solely for the payment of money.

92nd equity rule, promulgated, April 18, 1864.¹⁸

The rule resulted from the decision that execution could not issue for

135 U. S. 224, 34 L. ed. 97, 10 Sup. Ct. Rep. 736; Robinson v. Rudkins, 28 Fed. 8; Campbell v. James, 31 Fed. 525; Petersburg Co. v. Dellatorre, 70 Fed. 643, 17 C. C. A. 310; Omaha v. Reddick, 63 Fed. 1, 11 C. C. A. 1.
⁷Huntington v. Little Rock R. R. 16 Fed. 906, 3 McCrary 581.
⁸Witters v. Sowles, 32 Fed. 130, 24 Blatchf. 550; Henderson v. Carbondale, etc. Co. 140 U. S. 25, 35 L. ed. 332, 11 Sup. Ct. Rep. 691.

⁹Hovey v. McDonald, 109 U. S. 158, 27 L. ed. 888, 3 Sup. Ct. Rep. 136.

¹⁰Robinson v. Rudkins, 28 Fed. 8; Hicklin v. Marco, 64 Fed. 609; Lincoln Nat. Bank v. Perry, 66 Fed. 887; United States v. Castro, 5

Sawyer. 625, Fed. Cas. No. 14,754; United States v. Williams, 67 Fed. 384, 14 C. C. A. 440; Fisher v. Simon, 67 Fed. 387, 14 C. C. A. 443. See in re Pentlarge, 17 Blatchf. 306, Fed. Cas. No. 10,962; and Coleman v. Neil, 11 Fed. 461, refusing relief where several terms had elapsed.

¹¹Hicklin v. Marco, 64 Fed. 609.

¹²See Robinson v. Rudkins, 28 Fed. 8.

¹³Post, § 1094. Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 350, 13 Sup. Ct. Rep. 426.

¹⁴Mootry v. Grayson, 104 Fed. 613, 44 C. C. A. 83.

¹⁷See post, § 1096.

¹⁸1 Wall. v.

a balance due on a mortgage after sale of the security.¹⁹ It authorizes personal judgment for a deficiency;²⁰ even in the absence of any prayer therefor, though it is better practice to insert such prayer.¹ The mortgagee is entitled to deficiency decrees as matter of right where the proceeds are less than the judgment.²

§ 1094. Rehearing.

Every petition for a rehearing^[a]-b] shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the fact therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person.^[d] No rehearing shall be granted after the term at which the final decree^[c] of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.^[e]

88th equity rule, promulgated March, 1842.

[a] Nature of remedy by rehearing in equity.

For error in a final decree, other than clerical error or accidental omission,⁵ the appropriate remedy during the term at which the decree is rendered in appealable cases, and also during the next term in nonappealable cases, is petition for rehearing. The remedy is also used for the correction of error in an interlocutory decree,⁶ although motion will, it seems, suffice and the use of petition for rehearing in such a case has been declared technically improper.⁷ After the term in appealable cases, the remedy for other than clerical error is by bill of review and never by petition for rehearing.⁸

[b] Grounds for rehearing—discretion.

Rehearing in Federal equity practice is not a matter of right but rests in the sound discretion of the court.¹¹ That discretion is to be exercised

¹⁹Noonan v. Lee, 2 Black, 499, 17 L. ed. 278; Orchard v. Hughes, 1 Wall. 77, 17 L. ed. 560.

²⁰Walker v. Dreville, 12 Wall. 442, 20 L. ed. 429.

¹Seattle, etc. Co v. Union Trust Co. 79 Fed. 179, 24 C. C. A. 512.

²Northwestern M. L. Asso. v. Keith, 77 Fed. 374, 23 C. C. A. 196.

⁵These are reviewable by motion under rule 85 ante, § 1092. Formerly however by petition: Jenkins v. Eldridge, 3 Story, 299, Fed. Cas. No. 7,267.

⁶See Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267; Baker v.

Whiting, 1 Story, 218, Fed. Cas. No. 786; Gillette v. Bate Co. 12 Fed. 108; Rogers v. Marshall, 12 Fed. 614.

⁷Pullam v. Pullam, 10 Fed. 53; Campbell Co. v. Marden, 70 Fed. 339.

For motion to open interlocutory decree, see Reeves v. Keystone Bridge Co. 11 Phila. 498, Fed. Cas. No. 11,661.

⁸Roemer v. Simon, 91 U. S. 150, 23 L. ed. 267; Scott v. Blaine, 1 Baldw. 287, Fed. Cas. No. 12,525; Scott v. Hore, 1 Hughes, 163, Fed. Cas. No. 12,535.

¹¹Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381; Roemer v. Bern-

in accordance with established principles.¹² The grounds for rehearing are analogous to those at law which constitute the basis for new trial.¹³ Death of the judge before actual delivery of his opinion is ground for rehearing.¹⁴ A showing that the decision is in conflict with an express statute is also ground.¹⁵ Newly discovered evidence if material and not before obtainable is ground for rehearing if sufficient to uphold bill of review after the term;¹⁶ or to warrant granting of new trial at law.¹⁷ Errors of law apparent in the decree or upon the record are grounds for rehearing.¹⁸ Excusable non-attendance of counsel at the hearing may be ground for granting rehearing.¹⁹

Rehearing sought by a defeated complainant upon the ground of want of jurisdiction, will be denied.²⁰ Errors or fault of counsel in arguing the cause¹ do not constitute ground for rehearing. Nor does newly discovered evidence that would not change the result,² or that is merely cumulative in character,³ or that might by diligence have been discovered.⁴ An application based upon the same facts and arguments will not be considered;⁵ nor one supported only by counsel's certificate that the case is meritorious.⁶

Surprise in the conduct of the case by opposing counsel is no ground for rehearing.⁷

[c] Time for filing petition.

As provided by the rule, the petition will not lie after the close of the

heim, 132 U. S. 103, 33 L. ed. 277, 10 Sup. Ct. Rep. 12; American, etc. Co. v. Sheldon, 1 Fed. 870, 18 Blatchf. 50; Daniel v. Mitchel, 1 Story, 198; Fed. Cas. No. 3,563; American, etc. Co. v. Sheldon, 18 Blatchf. 50, 1 Fed. 870.

¹²American Co. v. Sheldon, 1 Fed. 870, 18 Blatchf. 50.

¹³Railway R. Co. v. North, etc. R. R. 26 Fed. 411.

¹⁴Doggett v. Emerson, 1 Woodb. & M. 1, Fed. Cas. No. 3,961.

¹⁵Railway Co. v. North, etc. Co. 26 Fed. 411.

¹⁶Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786.

¹⁷Bentley v. Phelps, 3 W. & M. 403, Fed. Cas. No. 1,332; Hunter v. Marlboro, 2 Woodb. & M. 168, Fed. Cas. No. 6,908.

¹⁸American, etc. Co. v. Sheldon, 1 Fed. 870, 18 Blatchf. 50.

¹⁹Blair v. Silver P. M. 93 Fed. 332.

²⁰Southern D. Co. v. Silva, 89 Fed. 418.

¹Railway R. Co. v. North etc. Co. 26 Fed. 411; Witters v. Sowles, 31 Fed. 5, 24 Blatchf. 359; Page v. Holmes Co. 2 Fed. 333, 18 Blatchf. 118; Doggett v. Emerson, 1 Woodb.

& M. 1, Fed. Cas. No. 3,961; Hunter v. Marlboro, 2 Woodb. & M. 168, Fed. Cas. No. 6,908; Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786.

²McCloskey v. DuBois, 9 Fed. 38, 20 Blatchf. 7; Munson v. New York, 11 Fed. 72, 20 Blatchf. 358; Bentley v. Phelps, 3 Woodb. & M. 403, Fed. Cas. No. 1,332.

³Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786; Rogers v. Marshall, 13 Fed. 59, 3 McCrary, 87; Witters v. Sowles, 32 Fed. 765; Acme Co. v. Cary Co. 99 Fed. 500.

⁴Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786; Willmantic Co. v. Clarke Co. 24 Fed. 799; Prevost v. Gratz, Pet. C. C. 364, Fed. Cas. No. 11,406; Central T. Co. v. Worcester Co. 91 Fed. 212; Hicks v. Ferdinand, 20 Fed. 111; Sowles v. Bank, 133 Fed. 846.

⁵Tufts v. Tufts, 3 W. & M. 426, Fed. Cas. No. 14,232.

⁶Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267; Emerson v. Davies, 1 W. & M. 21, Fed. Cas. No. 4,437; Tufts v. Tufts, 3 W. & M. 426, Fed. Cas. No. 14,232.

⁷Everest v. Buffalo Co. 22 Fed. 252, 22 Blatchf. 524.

term of the entry of decree;¹⁰ the only exception being in cases not appealable.¹¹ An order granting a rehearing filed at a subsequent term is void and may be disregarded.¹² A petition filed too late may however sometimes be treated as a bill of review.¹³ The authorities hold that a petition filed and entertained at the term may be disposed of thereafter, and time for appeal only then begins to run,¹⁴ notwithstanding the rule only permits the "granting" of rehearing at the same term. When the court keeps one term open until the beginning of the next, the petition may be filed any time before the next term.¹⁵ The fact that part of a fund ordered to be distributed by final decree is still in court at the next term will not justify petition at that time.¹⁶ Where the parties six months after the decree, dismiss their appeal taken and apply for rehearing for newly discovered evidence, they are guilty of inexcusable laches.¹⁷ Petition for rehearing during the term may be entertained although appeal has been taken, the result being to destroy the effect of the appeal.¹⁸

[d] Form and contents—procedure.

The petition if based upon new evidence should state its nature, and also be supported by affidavits expressly made part of the petition, setting it forth.¹ The petition should show diligence in seeking it before, and its materiality.² The diligence should be shown by positive testimony and not by mere assertion.³ The application is not ex parte but should be on notice to the adverse party.⁴ It must be by petition and ordinary motion will not suffice.⁵ The petition must be signed by counsel.⁶ Verification should not be before a notary who is also one of the counsel.⁷ If sought

¹⁰Bank of Lewisburg v. Sheffey, 140 U. S. 445, 35 L. ed. 493, 11 Sup. Ct. Rep. 755; Barker v. Stowe, 4 B. & A. 485, Fed. Cas. No. 995; Brooks v. R. R. Co. 102 U. S. 107, 26 L. ed. 92; Poole v. Nixon, 9 Pet. Appnd. 770, Fed. Cas. No. 11,270; Easton v. Houston, etc. Ry. 44 Fed. 7.

¹¹Newman v. Moody, 19 Fed. 858; Wooster v. Handy, 21 Fed. 51; Clarke v. Threkeld, 2 Cranch, C. C. 408, Fed. Cas. No. 2,865.

¹²Sheffey v. Bank, 33 Fed. 318; Glenn v. Lucas, 43 Fed. 550.

¹³See Hoffman v. Knox, 50 Fed. 489, 1 C. C. A. 535.

¹⁴New Orleans v. Fisher, 91 Fed. 585, 34 C. C. A. 15; In re Worcester Co. 102 Fed. 810, 42 C. C. A. 637; First Nat. Bank v. Woodrum, 86 Fed. 1004; Goddard v. Ordway, 101 U. S. 745, 25 L. ed. 1040; Aspen. Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Giant P. Co. v. Cal. P. Co. 5 Fed. 197, 6 Sawy. 527. But see Glenn v. Noonan, 43 Fed. 403, 550.

¹⁵First N. Bk. v. Woodrum, 86 Fed. 1004.

¹⁶Halsted v. Forest H. Co. 109 Fed. 820.

¹⁷Norton v. Walsh, 49 Fed. 769.

¹⁸Voorhees v. Noye M. Co. 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295.

¹Allis v. Stowell, 85 Fed. 481, Barker v. Stowe, 4 B. & A. 485, Fed. Cas. No. 995; McLeod v. New Albany, 66 Fed. 378, 13 C. C. A. 525. It is also proper to state such evidence by supplemental bill or answer accompanying the petition. Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786.

²Gillette v. Bate R. Co. 12 Fed. 108;

³Page v. Holmes Co. 2 Fed. 330, 18 Blatchf. 118; Hicks v. Otto, 85 Fed. 728; Allis v. Stowell, 85 Fed. 481.

⁴Giant P. Co. v. Cal. V. Co. 5 Fed. 197.

⁵Harman v. Lewis, 24 Fed. 530.

⁶Allis v. Stowell, 85 Fed. 481.

⁷Ibid.

because of the excusable nonattendance of counsel it should be accompanied by a showing of a meritorious defense.⁸ The usual practice is to obtain and serve with a copy of the petition, an order upon the opposite party to show cause at the next rule day why it should not be granted. The matter should then be heard on the answer to the petition or affidavits in opposition and any briefs filed.⁹

[e] Effect of filing petition and of granting it.

The filing of the petition will suspend the operation of a decree¹² and destroy the effect of an appeal already taken¹³ and the finality of the decree for purposes of appeal.¹⁴ Upon granting petition for rehearing of an interlocutory decree, the court should set aside its former decree; although the mere reopening of a case after interlocutory decree, on petition for rehearing to let in newly discovered evidence, should perhaps not be accompanied by an order vacating the interlocutory decree.¹⁵

§ 1095. Proper process to enforce orders and decrees.

Unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Part of the 7th equity rule, promulgated March, 1842.

The rule also provides that subpoena is the proper mesne process.¹⁶ General statutory provisions as to the form and amendment of Federal process and the power of Federal courts to issue various writs are given in another chapter.²⁰

§ 1096. Proper final process in equity.

Final process to execute any decree may, if the decree be solely

⁸Blair v. Silver P. Mines, 93 Fed. 332.

⁹See Giant P. Co. v. Cal. V. Co. 5 Fed. 197, where a Supreme Court justice heard the case. But motion for leave to file the petition is sometimes used: Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 350, 13 Sup. Ct. Rep. 426. In many districts there are local rules governing the procedure.

¹²Brockett v. Brockett, 2 How. 239, 11 L. ed. 251; Aspen Co. v. Billings, 150 U. S. 36, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; Rogers v. Marshall, 12 Fed. 614.

¹³Voorhees v. Noye M. Co. 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295.

¹⁴Brockett v. Brockett, 2 How. 239, 11 L. ed. 251; R. R. Co. v. Bradleys, 7 Wall. 575, 19 L. ed. 274; Andrews v. Thum, 64 Fed. 149, 12 C. C. A. 77; Kinman v. Wester Mfg. Co. 170 U. S. 678, 42 L. ed. 1194, 18 Sup. Ct. Rep. 786.

¹⁵See Rogers v. Marshall, 15 Fed. 193, 4 McCrary, 307.

¹⁹Ante, § 968.

²⁰Ante, § 836-843.

for the payment of money, be by writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further services, to take notice;³ and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerks shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of non est inventus, to compel obedience to the decree.^{[a] [b]}

8th equity rule, promulgated, March, 1842.

[a] In general.

There are several statutory provisions respecting the execution of Federal judgments and decrees applicable both at law and in equity, given in a subsequent chapter.⁵ With some few exceptions a Federal court is not empowered to issue process outside its own district and this applies to process of execution⁶ and often final process to enforce its decrees.⁷ But equity usually acts in personam and not in rem, and though land or other property to be affected by its decree is beyond the jurisdiction, it will, by constraint upon the person of the defendant, compel performance of the act necessary to render its decree effective.⁸ It has been held that upon decree for payment of money supplementary proceedings under the State law may be had since available upon Federal judgment at law in assumpsit.⁹

[b] Bill to enforce decree in equity.

A supplementary bill in equity is often necessary to enable parties to procure the fruits of a decree in equity as well as of a judgment at law.

³See ante, § 1091.

⁵Post, §§ 1865 et seq.

⁶See post, § 1865.

⁷Watkins v. Holman, 16 Pet. 57, 10 L. ed. 873; Booth v. Clark, 17 How. 333, 15 L. ed. 164.

⁸Massie v. Watts, 6 Cranch. 158, 3 L. ed. 181; Watts v. Waddle, 6 Pet. 401, 8 L. ed. 437; Watkins v. Holman, 16 Pet. 57, 10 L. ed. 873;

Lewis v. Darling, 16 How. 13, 14 L. ed. 819; Northern, etc. R. R. v. Michigan, C. R. R. 15 How. 243, 14 L. ed. 674; Booth v. Clarke, 17 How. 332, 15 L. ed. 164; Corbett v. Nutt, 10 Wall. 475, 19 L. ed. 976; Phelps v. McDonald, 99 U. S. 308, 25 L. ed. 473.

⁹Sage v. St. Paul Ry. 47 Fed. 3.

Bill to carry a decree into execution will always lie where further decree becomes necessary;¹³ and is maintainable in the same or in another court.¹⁴ Bill of revivor may be necessitated by the death of parties.¹⁵ Supplemental bill may be necessitated by transfer of complainant's rights.¹⁶ So a decree in equity for the payment of money, although debt may be maintained thereon,¹⁷ may be the basis of creditor's bill and receivership proceedings,¹⁸ or statutory supplementary proceedings.¹⁹ Aid in the enforcement of a decree may however be refused for inequity therein.²⁰ Bills of this character are ancillary and maintainable regardless of the jurisdictional citizenship of the parties.¹

§ 1097. Writ of assistance to compel delivery of possession.

When any decree or order² is for the delivery of² possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

9th equity rule, promulgated March, 1842.

The writ of assistance is an appropriate process against parties bound by decree who refuse to surrender possession.⁴ The power to act under this writ extends only to parties to suit and those coming in under them after suit commenced.⁵ It is commonly used to put the purchaser at foreclosure sale into possession.⁶

§ 1098. Enforcement of orders by or against persons not parties.

Every person not being a party in any cause, who has obtained an order, or in whose favor any order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the court

¹³Thompson v. Maxwell, 95 U. S. M. 138 U. S. 561, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402, Compton v. Jesup, 399, 24 L. ed. 481.

¹⁴Shields v. Thomas, 18 How. 262, 68 Fed. 263, 15 C. C. A. 397.
¹⁵L. ed. 368.

¹⁶See Rutledge v. Waldo, 94 Fed. 265. Ante, § 960.

¹⁷See Root v. Woolworth, 150 U. S. 411, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136.

¹⁸Pennington v. Gibson, 16 How. 77, 14 L. ed. 847. Compare Corbin v. Graves, 27 Fed. 644.

¹⁹Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. 148; Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397.

²⁰Sage v. St. Paul Ry. 47 Fed. 3.

²¹Lawrence M. Co. v. Jaynesville

22 L. ed. 634. See ante, § 841. []

¹Ante, § 3 [d] et seq.

²Printed "or" in published rules.

³Gormley v. Clark, 134 U. S. 350,

33 L. ed. 909, 10 Sup. Ct. Rep. 554;

Terrell v. Allison, 21 Wall. 289, 22

L. ed. 634; Pratt v. Burr, 5 Biss.

36, Fed. Cas. No. 11,372; Lacassagne

v. Chapuis, 144 U. S. 125, 36 L. ed.

371, 12 Sup. Ct. Rep. 662.

⁴Comer v. Felton, 61 Fed. 735, 10

C. C. A. 28; Thompson v. Smith, 1

Dill. 458, Fed. Cas. No. 13,977.

⁵Terrell v. Allison, 21 Wall. 289,

22 L. ed. 634. See ante, § 841. []

may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

10th equity rule, promulgated March, 1842.

§ 1099. Bill of review.

When the term of the rendition of final decree has elapsed, bill of review in the court rendering the decree, is a proper remedy for correction of error apparent upon the record; or for procuring a vacation of the decree upon the ground of newly discovered evidence.^{[a]-[c]} If sought upon the former ground the bill must be filed within the time allowed for appeal.^{[d]-[f]} If sought upon the ground of newly discovered evidence, the granting of leave to file the bill is matter of discretion.^{[g] [h]} The bill should show performance of the decree or legal excuse for nonperformance.^[e]

Author's section.

[a] Nature of remedy by bill of review.

After the expiration of the term¹⁰ of entry of a final appealable¹¹ decree, remedy for error therein, other than clerical, must be sought by appeal to a higher tribunal or by bill of review before the same court. Bill of review is maintainable after the term of entry of final decree for error therein apparent upon its face,¹² or on account of newly discovered evidence material in character, that could not earlier have been discovered with due diligence.¹³ Where error of law is the ground assigned, this must be shown from the pleadings, proceedings and decree, 'without reference to the evidence.¹⁴ The only questions open are those upon the face of the record without the evidence.¹⁵ Nothing else can avail the party.¹⁶ The complainant cannot go into the evidence at large to establish error in the decree.¹⁷ Bill of review is maintainable only by parties

¹⁰If the decree is nonappealable Massie v. Graham, 3 McLean, 41, petition for rehearing may lie at the Fed. Cas. No. 9,263.

¹¹Whiting v. Bank, 13 Pet. 13, 10 L. ed. 33. See O'Connor v. O'Connor, 142 Fed. 449 — (C. C. A.) —.

¹²Clark v. Killian, 103 U. S. 769, 26 L. ed. 607; Osborne v. San Diego, etc. Co. 178 U. S. 32, 44 L. ed. 966, 20 Sup. Ct. Rep. 860.

¹³Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 569; Beard v. Burts, 95 U. S. 436, 24 L. ed. 485; Irwin v. Meyrose, 7 Fed. 533, 2 McCrary 244. The rule respecting bills of review goes back to Lord Bacon's ordinance.

¹⁴Shelton v. Van Kleeck, 106 U. S. 535, 27 L. ed. 269, 1 Sup. Ct. Rep. 491; Putnam v. Day, 22 Wall. 65, 22 L. ed. 764.

¹⁵Thompson v. Maxwell, 95 U. S. 397, 24 L. ed. 481.

¹⁶Willamette Co. v. Hatch, 125 U. S. 7, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Reed v. Stanly, 89 Fed. 430.

¹⁷Whiting v. Bank, 13 Pet. 14, 10 L. ed. 33; Kennedy v. Georgia Bank, 8 How. 609, 12 L. ed. 1209.

to the decree or their privies;¹⁸ and only by parties aggrieved.¹⁹ One accepting the benefits cannot maintain the bill.²⁰ Strangers to the decree must proceed by supplemental bill in the nature of bill of review;¹ or by original bill.² Bill filed by a stranger is not a bill of review.³ During the term of the rendition of the decree newly discovered evidence may be set up by a bill in the nature of a bill of review.⁴ If neither error of law nor new evidence be shown the bill must be dismissed;⁵ or leave to file it may be refused.⁶

[b] Grounds for maintaining in general.

Bill of review is not maintainable to a consent decree;⁹ nor to a compromise decree petitioning land.¹⁰ Nonjoinder of parties plaintiff is not ground for bill of review when defendant was not injuriously affected thereby.¹¹ Fraud in obtaining the decree is ground for bill of review.¹² The fact that a judgment at law in which a decree is based has since been reversed is ground for bill of review to set aside the decree.¹³ Error of law ceases to be ground for the bill after judgment on appeal.¹⁴ Decree entered pursuant to the Supreme Court's mandate is not ground for bill of review.¹⁵ When decree is entered for plaintiff though the bill states no ground for relief, bill of review is a proper remedy.¹⁶ But supposed error in the construing of the evidence is no ground for bill of review;¹⁷ nor error resulting from misconception of the evidence or the conclusions deducible therefrom.¹⁸ The fact that a law in accordance with which the decree was made has since been declared invalid in the State court, has been

¹⁸Lacassagne v. Chapuis, 144 U. S. 125, 36 L. ed. 368, 12 Sup. Ct. Rep. 659; Thompson v. Maxwell, 95 U. S. 397, 24 L. ed. 481.

¹⁹Whiting v. Bank, 13 Pet. 14, 10 L. ed. 33; Brown v. White, 16 Fed. 900, 4 Woods, 614.

²⁰Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 569.

¹Thompson v. Schenectady R. R. 119 Fed. 634.

²Kingsbury v. Buckner, 134 U. S. 675, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.

³Cutter v. Iowa W. Co. 96 Fed. 777.

⁴Whiting v. Bank, 13 Pet. 13, 10 L. ed. 33. And also by petition for rehearing, ante, § 1094.

⁵Purcell v. Miner, 4 Wall. 521, 18 L. ed. 435.

⁶Nickle v. Stewart, 111 U. S. 776, 28 L. ed. 599, 4 Sup. Ct. Rep. 700.

⁹Thompson v. Maxwell, 95 U. S. 397, 24 L. ed. 481.

¹⁰Ibid.

¹¹Thomas v. Harvey, 10 Wheat. 152, 6 L. ed. 287.

¹²Reed v. Stanly, 89 Fed. 430; Pittsburg, etc. R. R. v. Keokuk B. Co. 107 Fed. 781, 46 C. C. A. 639; Terry v. Commercial Bk. 92 U. S. 456, 23 L. ed. 620.

¹³Ballard v. Searls, 130 U. S. 54, 56, 32 L. ed. 846, 9 Sup. Ct. Rep. 418.

¹⁴Kingsbury v. Buckner, 134 U. S. 671, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; Franklin S. Bk. v. Taylor, 53 Fed. 854, 4 C. C. A. 55; Leslie v. Urbana, 56 Fed. 762, 6 C. C. A. 111.

¹⁵Kimberly v. Arms, 40 Fed. 554.

¹⁶Ohio R. R. v. Central T. Co. 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. Rep. 235.

¹⁷Armes v. Kimberly, 136 U. S. 629, 34 L. ed. 557, 10 Sup. Ct. Rep. 1064.

¹⁸Jourolomon v. Ewing, 85 Fed. 103, 29 C. C. A. 41.

held no ground for bill of review.¹⁹ And the absence of counsel from the hearing is not ground.²⁰

[c] — newly discovered evidence.

The evidence must be new or else such as the party could not by diligence have known.⁴ The failure to produce the testimony earlier must be accounted for.⁵ The new evidence must be controlling⁶ and not be merely cumulative;⁷ or mere impeachment of witnesses;⁸ or evidence that should have been known;⁹ or evidence merely increasing doubt as to the real truth.¹⁰ Where the alleged new matter relates to the proceedings on the sale under a foreclosure decree this cannot have any effect on the decree and hence bill of review thereto should be dismissed.¹¹ A change in a legal rule resulting from a new decision of the Supreme Court is not new matter justifying bill of review thereon.¹²

[d] Time for filing.

The rule is established that a bill of review must ordinarily be filed within the time for taking an appeal where the review sought is not founded on newly discovered evidence.¹⁵ Thus where error of law is the ground upon which bill of review is based, it must be filed within that time.¹⁶ But the fact that an appeal was pending during part of the time after decree, may excuse the filing of bill of review within the two years;¹⁷ although the bill should be filed promptly thereafter.¹⁸ Attempted appeal to the Supreme Court of the United States in a case properly

¹⁹Hoffman v. Knox, 50 Fed. 481, 1 C. C. A. 535.

²⁰Tilghman v. Werk, 39 Fed. 680.

⁴Rubber Co. v. Goodyear, 9 Wall. 806, 19 L. ed. 828; Beard v. Burts, 95 U. S. 436, 24 L. ed. 485; Society of Shakers v. Watson, 77 Fed. 512, 23 C. C. A. 263.

⁵Easley v. Kellom, 14 Wall. 281, 20 L. ed. 890. The question of diligence is a preliminary one to be disposed of on the application for leave to file the bill and no issue need be joined by pleadings; Kelley v. Diamond, etc. Co. 142 Fed. 858.

⁶Freeman v. Clay, 52 Fed. 1, 2 C. C. A. 587.

⁷Southard v. Russell, 16 How. 569, 14 L. ed. 1052 (Unless perhaps in writing).

⁸Southard v. Russell, 16 How. 569, 14 L. ed. 1052.

⁹Society of Shakers v. Watson, 77 Fed. 512, 23 C. C. A. 263; Dumont v. Des M. V. R. R. 131 U. S. 45, 25 L. ed. 520.

¹⁰Society of Shakers v. Watson, 77 Fed. 512, 23 C. C. A. 263.

¹¹Shelton v. Van Kleeck, 106 U. S. 535, 27 L. ed. 269, 1 Sup. Ct. Rep. 491.

¹²Tilghman v. Werk, 39 Fed. 680.

¹⁵Jorgenson v. Young, 136 Fed. 381, and cases cited.

¹⁶Thomas v. Harvey, 10 Wheat. 151, 6 L. ed. 287; Kenedy v. Bank, 8 How. 609, 12 L. ed. 1200; Ensminger v. Powers, 108 U. S. 302, 27 L. ed. 732, 2 Sup. Ct. Rep. 643; Chamberlain v. Peoria Ry. 118 Fed. 32, 55 C. C. A. 54; Pacific R. R. v. Missouri Ry. Co. 12 Fed. 641, 2 McCrary, 227; McDonald v. Whitney, 39 Fed. 467; Reed v. Stanly, 80 Fed. 433; Taylor v. Charter O. I. Co. 17 Fed. 567, 3 McCrary, 487; Copeland v. Brunning, 104 Fed. 169, (six months' time for appeal); also Reed v. Stanley, 97 Fed. 521, 38 C. C. A. 331.

¹⁷Esminger v. Powers, 108 U. S. 303, 27 L. ed. 732, 2 Sup. Ct. Rep. 643.

¹⁸Central & Co. v. Grant L. Wks. 135 U. S. 227, 34 L. ed. 97, 10 Sup. Ct. Rep. 736.

appealable to the circuit court of appeals has been held not to excuse the filing of bill of review within the six months prescribed for appeals to the latter court.¹⁹ Bill of review will not lie for errors of law, after judgment on appeal;²⁰ nor to review a decree entered in pursuance of the Supreme Court's mandate;¹ nor can the lower court grant a bill of review during the pendency of an appeal.² Nine years' delay is fatal to bill of review.³ Where decree is against absent parties served only by publication it only becomes final at the end of a year and the time for bill of review runs from that time.⁴

[e] Performance of decree as condition precedent.

The general rule is that a decree must first have been performed and costs paid before bill of review will lie.⁷ However, this rule is administrative and not jurisdictional and in a proper case may be disregarded.⁸ Poverty, want of assets, or other inability will excuse performance.⁹

[f] Form and proceedings upon bill of review.

A petition for rehearing filed too late, may perhaps be treated as bill of review.¹² Leave must be obtained to file bill of review for newly discovered evidence.¹³ But a bill for error of law may be filed without leave,¹⁴ unless the party is unable to aver performance of the decree, in which case application should be made upon notice.¹⁵ Original bill in the nature of bill of review may be filed without leave;¹⁶ but not supplemental bill.¹⁷ Where the cause has been appealed and there decided, the appellate court must also grant leave;¹⁸ though the leave there granted is usually formal and does not prevent the lower court afterwards exercising its own dis-

¹⁹Blythe Co. v. Hinckley, 111 Fed. 827, 49 C. C. A. 647.

²⁰Southard v. Russell, 16 How. 570, 14 L. ed. 1052; Kingsbury v. Buckner, 134 U. S. 671, 672, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; In re Gamewell etc. Co. 73 Fed. 911, 20 C. C. A. 111.

¹Kimberly v. Arms, 40 Fed. 554, 2 Emsminger v. Powers, 108 U. S. 302, 27 L. ed. 732, 2 Sup. Ct. Rep. 643; Kimberly v. Arms, 40 Fed. 548.

³Hendryx v. Perkins, 114 Fed. 801, 52 C. C. A. 435. See also Tilghman v. Werk, 39 Fed. 680; Duncan v. Atlantic R. R. 88 Fed. 840.

⁴Beach v. Mosgrove, 16 Fed. 305, 4 McCrary, 50.

⁷Ricker v. Powell, 100 U. S. 108, 25 L. ed. 527; Kimberley v. Arms, 40 Fed. 555; Hoffman v. Knox, 50 Fed. 492, 1 C. C. A. 585; Miller v. Clark, 47 Fed. 851.

⁸Davis v. Speiden, 104 U. S. 84, 85, 26 L. ed. 660; Wallamet Co. v. Hatch, 19 Fed. 349, 9 Sawy. 643.

⁹Davis v. Speiden, 104 U. S. 84, 85, 26 L. ed. 660.

¹²Knox v. Columbia Co. 42 Fed. 378 (reversed 50 Fed. 484, 1 C. C. A. 535.)

¹³Ricker v. Powell, 100 U. S. 107, 25 L. ed. 527. This is so although other grounds are also stated; Arms v. Kimberly, 136 U. S. 629, 34 L. ed. 557, 10 Sup. Ct. Rep. 1064.

¹⁴Davis v. Speiden, 104 U. S. 87, 26 L. ed. 660; Copeland v. Bruning, 104 Fed. 169.

¹⁵Wailmet Co. v. Hatch, 19 Fed. 349, 9 Sawy. 643.

¹⁶Ritchie v. Burke, 109 Fed. 16; Northern, etc. Co. v. Young, 12 Fed. 809, 11 Biss. 331.

¹⁷Thompson v. Schenectady Ry. 119 Fed. 634.

¹⁸Pittsburg, etc. R. R. v. Keokuk B. Co. 107 Fed. 781; 46 C. C. A. 639; Southard v. Russell, 16 How. 571, 14 L. ed. 1052; Society of Shakers v. Watson, 77 Fed. 512, 23 C. C. A. 263.

cretion in permitting the filing of the bill.¹⁹ If laches clearly appear the appellate court will refuse leave on the ground.²⁰ The evidence in the original cause need not be set forth in the bill except to show its relevancy to the new matter,¹ and is surplusage which may be stricken out on motion or made ground of special demurrer.² All parties to the original decree should be parties to the bill of review.² A bill in the nature of a bill of review may introduce new parties.⁴ The opposite party may demur to bill of review and such demurrer does not admit the truth of facts averred inconsistent with the decree.⁵ Where demurrer is sustained the bill will be dismissed.⁶ Demurrer will raise the point that a bill is too late if apparent on the face thereof, otherwise the contention should be raised by answer.⁷ Answer and replication are proper to a bill of review based upon new evidence.⁸ Performance of the decree should be averred or legal excuse therefor;⁹ although failure to make such averment has been held no ground of demurrer but only of motion to stay.¹⁰

[g] Discretion in allowing.

Where the bill is sought because of newly discovered evidence leave to file the same rests in the sound discretion of the court,¹⁴ and this rule holds where that ground is joined with the contention of error of law.¹⁵ This discretion is to be exercised sparingly.¹⁶ Even though the new evidence would change the decree, the court may refuse to reopen the decree if productive of mischief to innocent parties.¹⁷

[h] Effect of granting or denying.

A decree sustaining demurrer to a bill of review and dismissing it, leaves the original decree in full force and effect.¹⁸

¹⁹Board, etc. v. Deposit Bank, 120 Fed. 165; Seymour v. White Co. 92 Fed. 115, 34 C. C. A. 240. See Boston, etc. R. R. v. Bemis Co. 98 Fed. 121, 38 C. C. A. 661.

²⁰Boston R. R. v. Bemis Co. 98 Fed. 121, 38 C. C. A. 661.

¹Davis v. Speiden, 104 U. S. 87, 26 L. ed. 660; Copeland v. Bruning, 104 Fed. 169; Wallamet I. Co. v. Hatch, 19 Fed. 349, 9 Sawy. 643.

²Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

³Bank of United States v. White, 8 Pet. 268, 8 L. ed. 938. But see King v. Dundee, 28 Fed. 33, dispensing with formal parties.

⁴Whiting v. Bank, 13 Pet. 13, 10 L. ed. 33.

⁵Shelton v. Van Kleeck, 106 U. S. 534, 27 L. ed. 269, 1 Sup. Ct. Rep. 491.

⁶Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

⁷Copeland c. Bruning, 104 Fed. 169.

⁸Buffington v. Harvey, 95 U. S. 103, 24 L. ed. 381.

⁹Kimberly v. Arms, 40 Fed. 548. 136 U. S. 629, 34 L. ed. 557, 10 Sup. Ct. Rep. 1064.

¹⁰Miller v. Clark, 47 Fed. 850.

¹⁴Thomas v. Harvey, 10 Wheat. 151, 6 L. ed. 287; Rubber Co. v. Good-year, 9 Wall. 806, 19 L. ed. 828; Ricker v. Powell, 100 U. S. 107, 25 L. ed. 527; Camp & M. Co. v. Parker, 121 Fed. 196.

¹⁵Ricker v. Powell, 100 U. S. 108, 25 L. ed. 527; Kimberly v. Arms, 40 Fed. 558.

¹⁶Craig v. Smith, 100 U. S. 234, 25 L. ed. 577.

¹⁷Ricker v. Powell, 100 U. S. 107, 25 L. ed. 527.

¹⁸Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

§ 1100. Final record what to contain.

In equity . . . causes, only the process, pleadings, and decree and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record.

R. S. § 750 U. S. Comp. Stat. 1901, p. 591.

This provision was carried forward into the Revised Statutes from an act of 1853.³ It also specifies admiralty causes.⁴

³Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 163.

⁴Post, § 1289.

CHAPTER 32.

EQUITY PROCEDURE (CONTINUED)—INJUNCTIONS AND RECEIVERS.

- § 1110. Injunction and receivership provisions in other chapters.
§ 1111. Judges authorized to grant injunctions.
§ 1112. Special interlocutory injunctions only grantable on notice and hearing.
§ 1113. Injunction bond.
§ 1114. Temporary restraining order may issue.
§ 1115. Injunction in vacation to continue only to next term.
§ 1116. Injunction to stay proceedings at law how obtained.
§ 1117. Enforcement and violation of injunction—attachment.
§ 1118. Interlocutory State injunction against national banks forbidden.
§ 1119. Injunction by national bank to stay receivership proceedings.
§ 1120. Injunction against tax assessment or collection forbidden.
§ 1121. Injunction by district judge to stay proceedings on distress warrant.
§ 1122. —revisory proceedings before circuit justice or judge.
§ 1123. Persons ineligible to act as receiver.
§ 1124. Receiver suable without leave of appointing court, but subject to its control.
§ 1125. Federal receiver must manage property as required by valid State laws.
§ 1126. Railroad receivers not to reduce wages except on notice to employees and a hearing.

§ 1110. Injunction and receivership provisions in other chapters.

Elsewhere will be found provisions respecting the right of appeal to the circuit court of appeals from interlocutory injunction and receivership orders;¹ the effect of appeal as a supersedeas;² the power of Federal courts to issue injunction against State courts;³ the effect of removal upon injunction issued by a State court;⁴ the venue of injunction suits against the comptroller by a national bank;⁵ the issuance of injunction to restrain unlawful enclosure of public lands;⁶ injunction against patent⁷ or copyright⁸ in-

¹Ante, § 78.

²Post, § 2012.

³Ante, § 20.

⁴Post, § 1153.

⁵Ante, § 415.

⁶Ante, § 215.

⁷Post, § 1170.

⁸Post, § 1182.

fringement. Statutory provisions respecting receivers of public moneys, or of the land office, or of national banks, are not within the purview of this work. The bankruptcy laws contain provisions regarding receivers.⁹ Interlocutory receivership orders are appealable.¹⁰ Court clerks and their deputies should not be appointed as receivers.¹¹

Author's section.

§ 1111. Judges authorized to grant injunctions.

Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of the circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court.

R. S. § 719, U. S. Comp. Stat. 1901, p. 581.

[a] History of provision.

The first enactment upon this subject was in 1793.¹⁵ In 1807 district judges were first empowered to issue the writ out of term.¹⁶ The law as at present framed was enacted in 1872.¹⁷

[b] Granting of injunction by Supreme Court justice.

Application may be made to a circuit justice outside the circuit if neither the circuit judge of the circuit nor the district judge of the district can hear it for sickness or other cause.¹⁹ In one case arising in the Kentucky district a circuit justice of another circuit heard such an applica-

⁹See appendix II.

¹⁰Ante, § 78.

¹¹Ante, § 603.

¹⁵Act Mar. 2, 1793, c. 22, § 5, 1 Stat. 334.

¹⁶Act Feb. 13, 1807, c. 13, 2 Stat. 418.

¹⁷Act June 1, 1872, c. 255, 12 Stat. 197. See also Act Apr. 10, 1869, c. 22, 11 Stat. 44.

¹⁹Searles v. Jacksonville, etc. R. R. 2 Woods, 621, Fed. Cas. No. 12,-

tion in New Jersey upon affidavit showing that the district and circuit judges and circuit justice were all absent from the district and circuit.²⁰ Since the appointment of two and sometimes four circuit judges in the various circuits,¹ applications to a circuit justice under this provision have naturally become infrequent. A writ granted by a circuit justice in vacation does not expire at the commencement of the term but only upon an order of dissolution.³

[c] — by district judges.

This provision only restricts the powers of district judges to issue the writ, and does not make the writ when issued by a circuit court which is held by the district judge, any the less the writ of the circuit court.⁵ If the writ is issued by the district judge in vacation⁶ it will continue only until the next term of the circuit court, and must then be continued in force by an order of the circuit court, which order may be made by that court, though held by the district judge.⁷ A decision by the circuit court refusing to dissolve an order so made will be treated on appeal as the equivalent of an order continuing the injunction.⁸ If the circuit court is in session within a district, being held by the district judge sitting alone, the court as so constituted has full power to issue the writ; and application to the circuit judge sitting elsewhere is unnecessary.⁹ If the interlocutory injunction was granted by the district judge, application for its dissolution should also be before him;¹⁰ as the propriety of a hearing upon the modification or dissolution of an injunction before the judge first granting it, is recognized.¹¹

§ 1112. Special interlocutory injunctions only grantable on notice and hearing.

Special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte, if the adverse party does not appear at the time and place ordered.^{[a]-[b]}

Part of 55th equity rule, promulgated March 1842.

²⁰United States v. Louisville, etc. 645, 13 C. C. A. 73. See Equity Rule Co. 4 Dill. 601, Fed. Cas. No. 15, 55, post, § 1112, 1115, 1116. 633.

¹Ante, § 102.

²Gray v. Chicago, etc. R. R. 1 Woolw. 63, Fed. Cas. No. 5,713.

⁵Goodyear, etc. Co. v. Folsom, 3 Fed. 509; Industrial Co. v. Electrical Co. 58 Fed. 732, 7 C. C. A. 471; United States v. Weber, 114 Fed. 950.

⁶United States v. Weber, 114 Fed. 950; Gray v. Chicago, etc. R. R. 1 Woolw. 63, Fed. Cas. No. 5,713; Dreutzer v. Frankfort L. Co. 65 Fed.

⁷Goodyear, etc. Co. v. Folsom, 3 Fed. 509; Industrial Co. v. Electrical Co. 58 Fed. 732, 7 C. C. A. 471.

⁸See Parker v. Judges, 12 Wheat. 561, 6 L. ed. 729.

⁹Goodyear, etc. Co. v. Folsom, 3 Fed. 509.

¹⁰Ide v. Crosby, 104 Fed. 582.

¹¹Klein v. Fleetford, 35 Fed. 98; Westerly W. Wks. v. Westerly, 77 Fed. 783.

[a] In general.

This rule also provides for injunction against proceedings at law.¹² and for dissolution of injunctions awarded in vacation.¹³ Special injunctions are those obtainable only on notice, as distinguished from common injunctions grantable without notice. It has been said that all injunctions are special in the United States courts;¹⁴ although the 35th equity rule recognizes the distinction between common and special injunctions. The "due" notice required by this rule is relative and is to be interpreted in each case by its circumstances and the exercise of the court's discretion.¹⁵ Reasonable notice is essential.¹⁶ The provision of R. S. § 718,¹⁷ permitting a preliminary restraining order, does not repeal the provision of this rule requiring notice for the granting of interlocutory injunctions.¹⁸ Notice may be waived by appearance.¹⁹

[b] Issuance and effect of interlocutory injunction.

Interlocutory injunction is intended merely to preserve the status quo pending the ultimate decision of the suit.² It should not direct the restoration of property to its condition prior to a trespass complained of.³ Mandatory injunction is only properly granted at final hearing.⁴ There should be a showing of probable right and probable danger that the right would be defeated if not granted.⁵ If the court is doubtful respecting its ultimate decision and serious injury might result to complainant it is proper to grant the interlocutory injunction.⁶ The court need not be satisfied that complaint will finally prevail.⁷ If it is manifest that on final hearing injunction should issue, it is proper to grant the preliminary decree.⁸ The fact that irremediable injury may result from its refusal while the defendant would not be greatly incommoded by its issuance, will

¹²Post, § 1115.¹³Post, § 1116.

¹⁴Perry v. Parker, 1 W. & M. 280, Fed. Cas. No. 11,010; Lawrence v. Bowman, 1 McAll. 419, Fed. Cas. No. 8,134. The act of Mar. 2, 1793, c. 22, § 5, 1 Stat. 334, required notice in all cases: Perry v. Parker, supra; New York v. Connecticut, 4 Dall. 2, 1 L. ed. 715; but that provision was not carried forward into the revised statutes, and is therefore not in force; Yuengling v. Johnson, 1 Hughes, 607, 610, Fed. Cas. No. 18,195; Industrial Co. v. Electrical Co. 58 Fed. 737, 7 C. C. A. 471.

¹⁵Lawrence v. Bowman, 1 McAll. 419, Fed. Cas. No. 8,134.

¹⁶New York v. Connecticut, 4 Dall. 2, 1 L. ed. 715; Mowrey v. Indianapolis, etc. R. R. Co. 4 Biss. 78, Fed. Cas. No. 9,891.

¹⁷Post, § 1113.

¹⁸Industrial Co. v. Electrical Co. 58 Fed. 738, 7 C. C. A. 471.

¹⁹Marsh v. Bennett, 5 McLean, 117, Fed. Cas. No. 9,110.

²Denver, etc. v. Atchinson, R. R. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185.

³Southern P. R. R. v. Oakland, 58 Fed. 50.

⁴McCauley v. Kellogg, 2 Woods, 13, Fed. Cas. No. 8,688.

⁵Georgia v. Brailsford, 2 Dall 405, 1 L. ed. 433; Colorado E. R. R. v. Chicago, etc. Ry. 141 Fed. 898, (C. C. A.).

⁶Allison v. Corson, 88 Fed. 581, 32 C. C. A. 12; Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161. See Star Co. v. Colver P. H. 141 Fed. 129, holding a clear case must appear.

⁷Sanitary etc. Wks. v. Cal. Ry. Wks. 94 Fed. 693.

⁸Allington v. Booth, 78 Fed. 878, 24 C. C. A. 378.

incline the court to grant it.⁹ On the other hand if plaintiff's right is doubtful and defendant amply able to pay any damages these considerations incline the court against issuing the preliminary writ.¹⁰ If the bill is too indefinite it will not issue.¹¹ It was formerly the rule that the decision upon an interlocutory injunction was discretionary and not reviewable.¹² But an act of 1891 made such decrees appealable prior to final decree, although upon review the existence of considerable discretion will be recognized.¹³

§ 1113. Injunction bond.

The requirement of a bond as condition precedent to the granting of an injunction is discretionary in Federal practice.

Author's section.

It is in the discretion of the judge granting an interlocutory injunction to require or dispense with a bond, and his action in that behalf is not reviewable on error.¹⁶ There can be no question of the court's power to require a bond or to mitigate the terms imposed, at any time.¹⁷ The bond may be enforced summarily by the court in ancillary proceedings;¹⁸ or upon the dissolution of the injunction,¹⁹ or it may be sued upon in a State court.²⁰ If the bond given is insufficient the court on motion will require additional security.¹ In many cases the propriety of requiring a bond has been recognized;² especially where complanant is a nonresident alien.³ The fact that the United States is not required to give a bond has been made ground for refusing preliminary injunction in a doubtful case.⁴

§ 1114. Temporary restraining order may issue.

Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there

⁹See *Indianapolis G. Co. v. Indianapolis*, 82 Fed. 245; *Charles v. Marion*, 98 Fed. 166.

¹⁰See *Paine v. United States Co.* 90 Fed. 543; *Home Ins. Co. v. Nobles*, 63 Fed. 642; *Star Co. v. Colver*, P. H. 141 Fed. 129.

¹¹*Leo v. Union Pacific Ry.* 17 Fed. 273.

¹²See *Buffington v. Harvey*, 95 U. S. 100, 24 L. ed. 381; *United States v. Chicago*, 7 How. 191, 12 L. ed. 660.

¹³See ante, § 78 and notes.

¹⁶*Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060; *Meyers v. Block*, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525; *Briggs v. Neal*, 120 Fed. 228, 56 C. C. A. 572.

¹⁷*Russell v. Farley*, 105 U. S. 441, 26 L. ed. 1060; *Meyers v. Block*, 120 U. S. 214, 30 L. ed. 644, 7 Sup. Ct.

Rep. 529; *McCaull v. Braham*, 16 Fed. 42, 21 Blatchf. 278; *Coosaw M. Co. v. Carolina M. Co.* 75 Fed. 887. See *Tullock v. Neulvane*, 184 U. S. 510, 46 L. ed. 665, 22 Sup. Ct. Rep. 377.

¹⁸*Leslie v. Brown*, 90 Fed. 174, 32 C. C. A. 556; *Files v. Davis*, 118 Fed. 468.

¹⁹*West v. East, etc. Co.* 113 Fed. 744, 51 C. C. A. 416.

²⁰*Meyers v. Block*, 120 U. S. 214, 30 L. ed. 642, 7 Sup. Ct. Rep. 525.

¹*Goldmark v. Kreling*, 25 Fed. 349.

²See *Staffords v. King*, 90 Fed. 136, 32 C. C. A. 536.

³*Lowenfeld v. Curtis*, 72 Fed. 105.

⁴*United States v. Jellico Co.* 43 Fed. 898.

appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

R. S. § 718, U. S. Comp. Stat. 1901, p. 580.

This provision gives power to issue restraining order to preserve the statu quo,⁵ and without notice.⁶ But it does not give power to issue mandatory injunction.⁷ Restraining order should not issue unless there is a clear case of threatened injury reasonably to be apprehended, not otherwise capable of being averted nor compensated in damages.⁸ If a bill does not make out such a case restraining order should be refused.⁹ There should be moral certainty of irreparable injury.¹⁰ It may issue in advance of subpoena, where the bill is filed with the court although not formally deposited with the clerk until two days later.¹¹ In some districts it is the practice upon application for injunction to issue an order that defendant do nothing prejudicial to plaintiff's rights until the motion for injunction be heard.¹² Where restraining order is obtained the court should not let the plaintiff fix the hearing on the motion too far ahead, but rather anticipate the next rule day.¹³

§ 1115. Injunction in vacation to continue only to next term.

In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

Part of 55th equity rule, promulgated March, 1842.

If issued during vacation by a district judge it expires with the new term unless the circuit court order it to continue,¹⁴ and the concluding clause supra "or until it is dissolved by some other order of the court" does not apply.¹⁵ But if ordered by a circuit justice or, it would seem, by a circuit judge it continues under this rule until "dissolved by some other order of the court."¹⁶

⁵Spring Valley W. W. v. Bartlett, 16 Fed. 615, 8 Sawy. 555.

⁶Payne v. Kansas Ry. 46 Fed. 546.

⁷Chicago, etc. R. R. v. Burlington R. R. 34 Fed. 481.

⁸Industrial Co. v. Electrical Co. 58 Fed. 738, 7 C. C. A. 471; Central Trust Co. v. Wabash R. R. 25 Fed. 1.

⁹Worth M. Co. v. Bingham, 116 Fed. 785, 54 C. C. A. 119.

¹⁰Ryan v. Seaboard R. R. 89 Fed. 397.

¹¹Universal, etc. Co. v. Stoneburner, 113 Fed. 251, 51 C. C. A. 208.

¹²See Fanshawe v. Tracy, 4 Biss. 490, Fed. Cas. No. 4,643; United States v. Anon, 21 Fed. 767; Fremont v. Merced M. Co. 1 McAll. 268. Fed. Cas. No. 5,095.

¹³Walworth v. Cook County, 5 Biss. 133, Fed. Cas. No. 17,136.

¹⁴Ante, § 1111.

¹⁵Gray v. Chicago, etc. R. R. 1 Woodw. 63, Fed. Cas. No. 5,713.

¹⁶Ibid.

§ 1116. Injunction to stay proceedings at law how obtained.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction.

Part of 55th equity rule, promulgated March 1842.

Injunction to stay proceedings at law will be granted only at the instance of a party thereto or one interested therein.¹ Where granted without answer it will not be dissolved until answer filed;² and motion to dissolve will be considered only on questions raised in the answer.³

§ 1117. Enforcement and violation of injunction—attachment.

The 7th and 8th equity rules⁷ make attachment of the person of defendant the proper process for enforcing obedience to orders and decrees and punishing their violation. These rules apply fully to injunctive orders and decrees. In case of violation of such an order or decree, it is proper to bring the same to the court's attention by affidavit or affidavits setting forth the act or neglect relied upon, with the particularity and circumstance required by good pleading, accompanied by motion for attachment or order to show cause. Thereupon the court should issue order to show cause at a designated time and place, why attachment should not issue; or it may issue attachment in the first instance. If the contempt be proven fine or imprisonment may be resorted to by way of punishment,⁸ or imprisonment may be ordered to compel obedience to the order or decree.⁹

Author's section.

Disobedience of, or resistance to injunctive orders and decrees constitutes contempt.¹⁰ The proceedings in cases of contempt are discussed generally in another chapter.¹¹ Power to issue attachment in the first instance, upon evidence of violation of an injunctive order, undoubtedly exists, although order to show cause will usually first issue.¹² If the order has not been served this may be ground for refusing to issue the attach-

¹New York v. Connecticut, 4 Dall. 5, 1 L. ed. 715.

²Read v. Consequa, 4 Wash. C. C. 174, Fed. Cas. No. 11,606.

³Farmer v. Calvert L. Co. 1 Flipp. 228, Fed. Cas. No. 4,651.

⁷Ante, §§ 1095, 1096.

⁸Ante, § 807, as to punishment for contempt.

⁹Ante, §§ 1095, 1096.

¹⁰Ante, § 807 [e] [f].

¹¹Ante, § 807 [h].

¹²See Fanshawe v. Tracy, 4 Biss. 490, Fed. Cas. No. 4,643; United States v. Anon, 21 Fed. 767, 768; Eureka Co. v. Superior Ct. 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; Comly v. Buchanan, 18 Fed. 58.

ment.¹³ The affidavit need not be by a party, at least where alleging acts of violence.¹⁴ It is no objection that the motion for attachment fails to name the parties to be attached if otherwise obtainable from the record.¹⁵ Sometimes information is used to call attention to the violation of a court's injunctive order.¹⁶ Nominal fine and costs are deemed sufficient punishment if the disobedience was unintentional.¹⁷ The fine may be ordered paid to complainant as compensation in certain cases.¹⁸ Costs should be paid by complainant if unsuccessful in showing the contempt.¹⁹

§ 1118. Interlocutory State injunction against national banks forbidden.

No . . . injunction . . . shall be issued against such association [a national bank] or its property before final judgment in any suit, action or proceeding, in any State, county or municipal court.

Part of R. S. § 5243, U. S. Comp. Stat. 1901, p. 3517.

This provision was originally part of § 52 of the national bank law of 1864 and also forbids attachment and execution.² Later provisions respecting jurisdiction of suits by or against national banks did not repeal it.³ It does not forbid interlocutory injunction in the Federal court though the cause was commenced in a state tribunal and removed.⁴ Since the Federal jurisdiction of suits respecting national banks has been curtailed,⁵ without impairing the force of this prohibition,⁶ only citizens of some other State can now get preliminary injunction against a national bank, as they alone are able to proceed in the Federal court,⁷ unless a Federal question is involved.

§ 1119. Injunction by national bank to stay receivership proceedings.

Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an

¹³Bate R. Co. v. Gillette, 24 Fed. 696.

¹⁴Castner v. Pocahontas C. Co. 117 Fed. 184.

¹⁵Amer. C. Co. v. Jacksonville Ry. 52 Fed. 937.

¹⁶See United States v. Debs, 64 Fed. 724.

¹⁷Morss v. Dom. S. M. Co. 38 Fed. 482; Comly v. Buchanan, 81 Fed. 58.

¹⁸Cary M. Co. v. Acme Co. 108 Fed. 873, 48 C. C. A. 118.

¹⁹Hennessey v. Budde, 82 Fed. 541.

²Ante, § 24.

³Freeman M. Co. v. Nat. Bank, 160 Mass. 398, 35 N. E. 865; Raynor v. Pac. Nat. Bank, 93 N. Y. 371; Van Reed v. Peoples Nat. Bank, 173 N. Y. 314, 105 Am. St. Rep. 666, 66 N. E. 16.

⁴Hower v. Weiss M. & E. Co. 55 Fed. 356, 5 C. C. A. 129.

⁵Ante, § 24.

⁶Freeman M. Co. v. Nat. Bank, 160 Mass. 398, 35 N. E. 865.

⁷Ibid.

agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the comptroller of the currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

R. S. § 5237, U. S. Comp. Stat. 1901, p. 3508.

This provision was originally enacted in 1864.¹⁰

§ 1120. Injunction against tax assessment or collection forbidden.

No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

R. S. § 3224, U. S. Comp. Stat. 1901, p. 2088.

This provision was originally enacted in 1867,¹³ and is valid.¹⁴ It applies as well to assessment as to collection of a tax, and to an indirect mode of restraining the collectors or assessors acts.¹⁵ Congress intended that the remedy which it provided by proceedings for recovery of a tax after payment should be exclusive.¹⁶ Payment must be made and redress must be sought subsequently.¹⁷ The provision applies to Federal taxes, but has never been held to forbid the Federal courts restraining the collection of State taxes on proper grounds.¹⁸ While the Supreme Court has never recognized the prohibition as being other than comprehensive in character,¹⁹ the view has sometimes been expressed that injunction might issue where the act of the assessor or collector was entirely outside the powers con-

¹⁰Act June 3, 1864, c. 106 § 50, 13 Stat. 114.

¹³Act Mar. 2, 1867, c. 169 § 10, 14 Stat. 475.

¹⁴Pullan v. Kinsinger, 2 Abb. U. S. 94, Fed. Cas. No. 11,463. See Delaware R. R. v. Prettyman, 17 Int. R. 99, Fed. Cas. No. 3,767.

¹⁵Miles v. Johnson, 59 Fed. 38; Delaware R. R. v. Prettyman, 17 Int. R. 99, Fed. Cas. No. 3,767.

¹⁶Snyder v. Marks, 109 U. S. 193, 27 L. ed. 901, 3 Sup. Ct. Rep. 157; Delaware R. R. v. Prettyman, 17 Int. R. 99, Fed. Cas. No. 3,767.

¹⁷United States v. Black, 11 Blatchf. 543, Fed. Cas. No. 14,600.

¹⁸See State R. R. Tax Cases, 92 U. S. 613, 615, 23 L. ed. 674; Shelton v. Platt, 139 U. S. 597, 35 L. ed. 277, 11 Sup. Ct. Rep. 648; Baltimore, etc. R. R. v. Allen, 17 Fed. 171; Schulenberg, etc. Co. v. Hayward, 20 Fed. 422.

¹⁹See State R. R. Tax Cases, 92 U. S. 615, 23 L. ed. 674; Snyder v. Marks, 109 U. S. 189, 27 L. ed. 901, 3 Sup. Ct. Rep. 157; Pittsburg, etc. R. R. v. Bd. of Public Wks. 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; Pullan v. Kinsinger, 2 Abb. U. S. 94, Fed. Cas. No. 11,463; Howland v. Soule, 1 Deady, 413, Fed. Cas. No. 6,800.

ferred upon him.²⁰ As the provision is contained in the title of the Revised Statutes respecting internal revenue, it may be that it is not applicable to other forms of taxation.¹ The income tax law of 1894 was tested by means of a stockholder's suit against a trust company, enjoining it from paying the tax as invalid.²

§ 1121. Injunction by district judge to stay proceedings on distress warrant.

Any person who considers himself aggrieved by any warrant of distress issued under the foregoing provisions [against an officer failing to account for public moneys] may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond, with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court.

R. S. § 3636, U. S. Comp. Stat. 1901, p. 2421.

This provision is found in the title of the Revised Statutes dealing with "The Public Moneys" and was originally enacted in 1820.⁵

²⁰Kissinger v. Bean, 7 Biss. 60, Platt, 139 U. S. 597, 35 L. ed. 277, Fed. Cas. No. 7,850; Frayser v. Russell, 3 Hughes, 227, Fed. Cas. No. 5,067. ¹Pollock v. Farmers L. & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Rep. 673.

¹See Pacific S. W. Co. v. United States, 187 U. S. 452, 47 L. ed. 255, 23 Sup. Ct. Rep. 157; Shelton v. ⁵Act May 15, 1820, c. 107 §§ 4, 5, 3 Stat. 595.

§ 1122. — revisory proceedings before circuit justice or judge.

When the district judge refuses to grant an injunction to stay proceedings on a distress-warrant, as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the circuit within which such district lies, a copy of the proceeding had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction, or permit an appeal, as the case may be, if, in his opinion, the equity of the case requires it. The same proceedings, subject to the same conditions, shall be had upon such injunction in the circuit court as are prescribed in the district court.

R. S. § 3637, U. S. Comp. Stat. 1901, p. 2421.

This provision is taken from acts of 1820 and 1869.⁶ By act of 1891 all the appellate powers of the circuit court were taken away and vested in the circuit court of appeals and in the Supreme Court.⁷

§ 1123. Persons ineligible to act as receiver.

It shall not be lawful to appoint any of the officers named in this section [i. e. a marshal, deputy marshal, attorney or assistant attorney of any district, jury commissioner, clerk of marshal, bailiff, crier, juror, janitor of any public building, civil or military employee of the government, clerk or employee of any United States justice or judge] receiver or receivers in any case or cases now pending or that may be hereafter brought in the courts of the United States.

Part of § 20, act May 28, 1896, c. 252, 29 Stat. 184, U. S. Comp. Stat. 1901, p. 501.

The section also forbids such officers acting as United States commissioners.⁸ Another section forbids the appointment of court clerks or their deputies as receivers except under special circumstances.¹⁰

§ 1124. Receiver suable without leave of appointing court, but subject to its control.

Every receiver or manager of any property appointed by any

⁶Act May 15, 1820, c. 107, §§ 4, 6,
3 Stat. 595; Act Apr. 10, 1869, c. 22,
§ 2, 16 Stat. 44.

⁷See ante, § 77.

⁸See ante, § 673.

¹⁰Ante, § 603.

court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property,^{[a]-[b]} without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.^[c]

§ 3 of act Mar. 3, 1887, c. 373, 24 Stat. 554, as corrected Aug. 13, 1888, c. 866, § 2, 25 Stat. 436, U. S. Comp. Stat. 1901, p. 582.

[a] In general.

Prior to this provision the Federal Supreme Court recognized and enforced the general rule that a receiver cannot be sued touching the property in charge without consent of the appointing court;¹⁴ and that suit without such leave constituted contempt.¹⁵ In one of the circuits, however, the practice of providing in the appointing order that the receiver might be sued without consent was followed;¹⁶ and perhaps led to the enactment of the above section. It is now settled in conformity therewith, that a receiver may be sued in another court, State or Federal, touching his receivership acts, without leave.¹⁷ So, if a receiver sues in a State court, defendant may plead a set-off there without leave of the appointing court.¹⁸ The provision has been construed as placing a receiver in the same position as respects suit, as the concern or owner he represents;¹⁹ as intended to protect the right of jury trial in actions of a legal character;²⁰ and, again, as merely dispensing with the need for permission to sue, and leaving the judgment obtained merely advisory and subject to reduction as in case of trial of issues of fact out of chancery.¹ It takes away all discretion in the

¹⁴Davis v. Gray, 16 Wall. 218, 21 L. ed. 447; Barton v. Barbour, 104 U. S. 128, 26 L. ed. 673. See Peale v. Phipps, 14 How. 374, 14 L. ed. 459, holding that receiver not suable in Federal court.

¹⁵Express Co. v. R. R. Co. 99 U. S. 198, 25 L. ed. 319.

¹⁶See Dow v. Memphis R. R. 20 Fed. 260, per Caldwell, J.; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 673, per Miller, J., dissenting.

¹⁷McNulta v. Lockridge, 141 U. S. 330, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Texas & P. R. R. v. Cox, 145 U. S. 601, 602, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Texas & P. Ry. v. Johnson, 151 U. S. 101, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; Grant v. Buck-

ner, 172 U. S. 238, 43 L. ed. 430, 19 Sup. Ct. Rep. 163; Central T. Co. v. East, etc. Ry. 59 Fed. 523; Central T. Co. v. St. Louis R. R. 40 Fed. 426; Jones v. The St. Nicholas, 49 Fed. 671.

¹⁸Grant v. Buckner, 172 U. S. 238, 43 L. ed. 430, 19 Sup. Ct. Rep. 163.

¹⁹Eddy v. Lafayette, 49 Fed. 807, 1 C. C. A. 441.

²⁰McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; Affirmed 141 U. S. 330, 35 L. ed. 796, 12 Sup. Ct. Rep. 11.

¹Missouri P. Ry. v. Texas & P. Ry. 41 Fed. 311, contra; Central T. Co. v. East, T. Ry. 59 Fed. 523; Texas & P. Ry. v. Johnson, 151 U. S. 81, 38 L. ed. 89, 14 Sup. Ct. Rep. 250.

appointing court to refuse leave.² It applies to a temporary court receivership of a Federal corporation.³

[b] Section applies only to receiver's acts in carrying on the business.

As this provision is in the nature of an exception to the general rule, other suits than those specified are objectionable if instituted in other courts. Upon principles of comity elsewhere considered, suits to recover any of the property which is in custodia legis through the receivership cannot be brought elsewhere than in the receivership tribunal,⁶ and this provision does not alter that principle.⁷ Unlawful detainer will not lie in another court against a receiver without leave of the appointing court.⁸ Nor a suit to establish an interest adverse to the receivers,⁹ or get control of the assets;¹⁰ or to foreclose another mortgage.¹¹ Garnishment proceedings against a receiver have been held not a suit for "any act or transaction" of the receiver, so that leave to sue must be obtained.¹² A receiver cannot be sued without leave for a tort antedating the receivership since that is not an act of his in carrying on the business,¹³ though one receiver may be sued without leave under this statute, for an act of a prior receiver under the same receivership.¹⁴ A stockholder suing to enforce a right of a corporation in a receiver's hands which makes the receiver defendant, should obtain leave to sue notwithstanding this section.¹⁵

[c] Suit subject to equity control of appointing court.

Suit against a receiver in another court is subject to the equity jurisdiction of the appointing court.¹⁸ The courts have considered the meaning of this proviso in many cases. It is not to be so construed as to render valueless the right created by the other portions of the section.¹⁹ The equity jurisdiction of the appointing court is a jurisdiction over the property, and the ends of justice obviously require the due administration of that property between conflicting claimants. Hence the appointing court must have power to accord to a judgment obtained elsewhere its proper

²Central T. Co. v. St. Louis R. R. 40 Fed. 426.

³Wheeler v. Smith, 81 Fed. 319.

⁶Ante, § 17.

⁷See Ex parte Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785. Leave should be obtained: Minot v. Mastin, 95 Fed. 734, 37 C. C. A. 234.

⁸Comer v. Felton, 61 Fed. 731, holding judgment null and void.

⁹J. I. Case Plow Works v. Finks, 81 Fed. 529, 26 C. C. A. 46.

¹⁰Stateler v. Bank, 77 Fed. 43.

¹¹Amer. L. & T. Co. v. Central V. R. R. 84 Fed. 917; Central T. Co. v. East Ry. 59 Fed. 523.

¹²Central T. Co. v. Chattanooga Ry. 68 Fed. 685, contra; Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987.

¹³Farmers L. & T. Co. v. Chicago, etc. R. R. 118 Fed. 204; Jones v. Schlappack, 81 Fed. 274.

¹⁴McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11.

¹⁵Swope v. Villard, 61 Fed. 417.

¹⁸Tennessee v. Union, etc. Bank. 152 U. S. 462, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

¹⁹Texas & B. R. R. v. Johnson, 151 U. S. 103, 38 L. ed. 89, 14 Sup. Ct. Rep. 250.

equitable rank among the claims before it.²⁰ The payment of judgments and enforcement of decrees obtained elsewhere must be within the control of the appointing court so far as affecting the property in custody and its due administration. But it is not perceived that this equity jurisdiction to effect the ends of justice would ever give appellate or supervisory power to the appointing court over the proceedings leading up to a judgment elsewhere obtained.¹ It does not "make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction"² further at least than by providing for the payment or enforcement of the judgment or decree elsewhere obtained, in its equitable administration of the property. It does not enable the appointing court to treat such a judgment as other than conclusive in the premises.³

◆

§ 1125. Federal receiver must manage property as required by valid State laws.

Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2 of act Mar. 3, 1887, c. 373, § 2, 24 Stat. 554, as corrected act Aug. 13, 1888, c. 866, § 2, 25 Stat. 436, U. S. Comp. Stat. 1901, p. 582.

§ 1126. Railroad receivers not to reduce wages except on notice to employees and a hearing.

No reduction of wages shall be made by such receivers [i. e., railroad receivers appointed by Federal courts] without the authority of the court therefor upon notice to such employees [i.

²⁰Dillingham v. Hawk, 60 Fed. 494, 9 C. C. A. 101, 23 L.R.A. 517.

¹A circuit court has no appellate power over state courts or other circuit courts, ante, § 19.

²Texas & P. Ry. v. Johnson, 151 U. S. 103, 38 L. ed. 89, 14 Sup. Ct. Rep. 250.

³Central T. Co. v. East. T. R. R. 59 Fed. 523; Texas & P. Ry. v. Johnson, 151 U. S. 103, 38 L. ed. 89, 14 Sup. Ct. Rep. 250; St. Louis Ry. v. Holbrook, 73 Fed. 112, 19 C. C. A. 385, contra: Mo. Pac. Ry. v. Texas & P. R. R. 41 Fed. 311.

e. employees of railroads in receivers hands], said notice to be not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway operated by such receiver or receivers.

Part of § 9, act June 1, 1898, c. 370, 30 Stat. 427, U. S. Comp. Stat. 1901, p. 3210.

